



**IAEA**

International Atomic Energy Agency

**The 1997 Vienna Convention on Civil Liability for Nuclear Damage and the  
1997 Convention on Supplementary Compensation for Nuclear Damage**

**Explanatory Texts**

A comprehensive study of the Agency's nuclear liability regime by the  
IAEA International Expert Group on Nuclear Liability (INLEX)  
to aid the understanding and authoritative interpretation of that regime

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# **I. Introduction**

## **1. The origin of the international civil liability regime**

The problems of civil liability for damage caused by incidents in nuclear installations, and in the course of transport of nuclear material, have called for special statutory provisions in most countries where atomic energy started to be used for civil purposes in the 1950s.

In most legal systems, specific rules had already been adopted in order to govern third party liability for damage caused by dangerous activities in general. These rules usually alter in favour of third parties the general regime of civil liability, which normally requires the fault of the person whose action caused the damage. For example, the burden of proof is often shifted so that the person claiming reparation does not have to prove, in addition to causation, the fault of the defendant, as is normally the case under the general rules of civil liability; it is instead for the defendant to prove that he has exercised adequate diligence in carrying out the dangerous activity involved.

In theory, these rules could have applied to nuclear liability also. On the other hand, under the ordinary law of civil liability, several persons might have been held liable for damage caused by a nuclear incident and victims might have had difficulty in establishing which of them was, in fact, liable. In addition, the person liable would have had unlimited liability without being able to obtain complete insurance cover. In view of the fact that nuclear activities were generally deemed to be more hazardous than conventional dangerous activities, several legislators felt that liability for nuclear damage should be subject to a specific legal regime, in order to ensure prompt and adequate compensation for nuclear damage without, at the same time, exposing the infant nuclear industry to excessive burdens.

The development of national legislation was accompanied, and sometimes preceded, by an effort to achieve some degree of uniformity through the adoption of international agreements; the special nature of nuclear hazards, and the possibility that a nuclear incident might cause damage of an extreme magnitude and involve the nationals of more than one country, made it desirable that identical or similar rules be adopted by the highest possible number of countries. It was felt, in particular, that the adoption of an international regime for nuclear liability would facilitate the bringing of actions and the enforcement of judgements without too much hindrance by national legal systems.

The need for international regulation was first felt among States engaged in common regional efforts in the field of nuclear energy, such as the Member States of the then Organisation for European Economic Co-operation (OEEC), which was later reconstituted as the Organisation for Economic Co-operation and Development (OECD), and the European Atomic Energy Community (Euratom). In addition to factors such as contiguity and cooperation, these countries also faced difficulties in their relations with the suppliers of nuclear fuel and equipment, who were reluctant to furnish material, the use of which might result in not clearly defined, variable and possibly unlimited liability towards the victims and the operators themselves. Moreover, exporting governments feared the consequences that might derive for their nationals and for themselves from damage caused abroad by nuclear installations using material and equipment exported by their nationals under their sponsorship and on the basis of inter-State cooperation agreements. There was a widespread feeling that the operator of a nuclear installation should bear exclusive liability for damage caused by nuclear incidents, and that all other persons (such as builders or suppliers) associated with the construction or operation of that installation should be exempted from liability.

In a relatively short period of time, third party liability for nuclear activities thus came to be covered by a number of international conventions. Generally speaking, these conventions reflect, on the one hand, an early recognition of the need for a stronger, more equitable system of loss distribution, in order to better protect the victims of nuclear incidents, and, on the other, a desire to encourage the development of the nuclear industry.

At the regional level, mention must be made, in particular, of the 1960 Paris Convention on Third Party Liability in the Field of Nuclear Energy, which was adopted under the auspices of the (then) OEEC (now OECD) and entered into force on 1 April 1968.<sup>1</sup> This Convention was followed by the 1963 Brussels Convention Supplementary to the Paris Convention, which entered into force on 4 December 1974;<sup>2</sup> the purpose of the Brussels Convention is to provide for additional compensation for nuclear damage out of national and international public funds.

The need for a uniform nuclear liability regime was also felt at the world level, and, on 21 May 1963, the Vienna Convention on Civil Liability for Nuclear Damage was adopted under the auspices of the International Atomic Energy Agency (IAEA). The 1963 Vienna Convention entered into force on 12 November 1977. Even before the adoption of the 1963 Vienna Convention, a specific treaty had been adopted in order to deal with nuclear-powered ships, namely the 1962 Brussels Convention on the Liability of Operators of Nuclear Ships, but this Convention never entered into force.<sup>3</sup> Finally, mention must be made of the 1971 Brussels Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material, which was adopted under the auspices of the Inter-Governmental Maritime Consultative Organization (IMCO), now known as the International Maritime Organization (IMO), and entered into force on 15 July 1975.<sup>4</sup>

## 2. The purpose of the 1963 Vienna Convention on Civil Liability for Nuclear Damage and its scope of application

The 1963 Vienna Convention on Civil Liability for Nuclear Damage has the same basic purpose as the 1960 Paris Convention on Third Party Liability in the Field of Nuclear Energy, namely the harmonization of national legislation relating to third party liability for nuclear damage. The Convention does not cover the issue of State responsibility or liability for nuclear damage; indeed, Article XVIII makes it clear that the Convention is not to be “construed as affecting the rights, if any,

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<sup>1</sup> The text at present in force of the 1960 Paris Convention is the result of amendments adopted by an Additional Protocol of 28 January 1964 and a Protocol of 16 November 1982. A third Protocol to amend the Convention was adopted on 12 February 2004, but is not yet in force.

<sup>2</sup> The text at present in force of the 1963 Brussels Convention is the result of amendments adopted by an Additional Protocol of 28 January 1964 and a Protocol of 16 November 1982. A third Protocol to amend the Convention was adopted on 12 February 2004, but is not yet in force.

<sup>3</sup> Some features of the Convention (particularly the inclusion of warships) met with strong opposition on the part of both the USSR and the USA, which were the only countries operating nuclear ships at the time. But quite apart from military nuclear-powered ships, there appear to be very few civilian nuclear-powered ships in operation at present.

<sup>4</sup> The Convention was adopted on 17 December 1971 by a Conference convened by the IMCO, in association with the IAEA and the OECD (NEA). The purpose of the 1971 Convention is to resolve difficulties and conflicts which might otherwise arise from the simultaneous application to nuclear damage of certain maritime conventions dealing with shipowners' liability and the specific nuclear liability conventions which place liability exclusively on the operator of the nuclear installation from which, or to which, the material is transported. The 1971 Convention provides that a person otherwise liable for damage caused by a nuclear incident shall be exonerated from liability if the operator of the nuclear installation is also liable for such damage by virtue of the 1960 Paris Convention, the 1963 Vienna Convention, or national law which is similar in the scope of protection given to the persons who suffer damage.

of a Contracting Party under the general rules of public international law in respect of nuclear damage”.

The Convention contains a number of uniform rules to be applied by all Contracting Parties.<sup>5</sup> Of course, the Convention is, per se, only binding on the Contracting Parties; it cannot prevent the law of a non-Contracting State from providing otherwise. On the other hand, the Contracting Parties are not obliged by the Vienna Convention to recognize and enforce judgements entered by the courts of such a State.

In so far as its provisions are self-executing, each Contracting Party can choose between the incorporation of the Convention in the domestic legal system, thus allowing for its direct application, and the adoption of national legislation specifically implementing the Convention.<sup>6</sup> But the Convention does not bring about complete harmonization; rather, as is stated in its Preamble, it establishes “some minimum standards to provide financial protection against damage resulting from certain peaceful uses of nuclear energy”. Some degree of discretion is thus left to domestic law.

The scope of application of the 1963 Vienna Convention largely corresponds, in its turn, to that of the 1960 Paris Convention. However, unlike its regional predecessor, the Vienna Convention does not expressly state that its scope is limited to nuclear incidents occurring in the territory of Contracting Parties, or to nuclear damage suffered in such territory, unless the national legislation of the operator liable so provides. The implications of the absence of an express provision to this effect will be examined in Section II.2(c) of this Commentary.

The Vienna Convention relates to liability for “nuclear damage” caused by a “nuclear incident” occurring in a “nuclear installation” or in the course of transport of “nuclear material” to or from such an installation. A “nuclear incident” is defined in Article I.1(l) as an “occurrence or series of occurrences having the same origin which causes nuclear damage”.<sup>7</sup> “Nuclear damage” is defined in Article I.1(k)(i) as including loss of life, personal injury and loss of, or damage to, property,<sup>8</sup> which

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<sup>5</sup> It may be interesting to point out, in this respect, that the Convention is silent on the question of permissible reservations. Under Article 19 of the 1969 Vienna Convention on the Law of Treaties, a reservation would be permissible if compatible with “the object and purpose” of the Convention. But it could certainly be argued that a reservation purporting to exclude the application of one of the uniform rules embodying basic principles of nuclear liability would not be compatible in this sense.

<sup>6</sup> This is not the place to discuss the relationship between international and domestic law either from a general point of view or in respect of the specific question of the application of treaties in a Contracting Party’s legal system. However, since the same terms are sometimes used with a different meaning, it may be necessary to clarify that in this Commentary the term “incorporation” will be used to denote the legal operation by which an international treaty can be considered as part of a State’s domestic law; the term “self-executing” will be used to denote the possibility for the provisions of a treaty, once incorporated in a Contracting Party’s legal system, to be directly applied by domestic courts or, more generally, domestic law-applying officials, without the need for implementing legislation. For more details on this issue, see Section III.4 of this Commentary.

<sup>7</sup> Therefore, for example, an uncontrolled release of radiation extending over a certain period of time is considered to be a nuclear incident if its origin lies in one single phenomenon even though there has been an interruption in the emission of radiation.

<sup>8</sup> As will be pointed out in Section II.3(a) of this Commentary, under Article I.1(k)(ii), “any other loss or damage so arising or resulting” is covered only if and to the extent determined by “the law of the competent court”. With regard to loss of, or damage to, property, however, Article IV.5 states that the operator is not liable under the Convention for nuclear damage (a) to the nuclear installation itself or to any property on the site of that installation which is used or to be used in connection with it; or (b) to the means of transport upon which the nuclear material involved was at the time of the incident. In respect of this latter category of damage, Article IV.6 allows the legislation of the Installation State to cover it, provided that in no case the operator’s liability in respect of other nuclear damage shall be reduced to less than US

arises out of or results from the radioactive properties (or a combination of radioactive properties with toxic, explosive or other hazardous properties) of “nuclear fuel” or “radioactive products or waste” in a nuclear installation,<sup>9</sup> or of “nuclear material”<sup>10</sup> coming from, originating in, or sent to, such an installation.

It results from these definitions that compensation may be claimed under the Convention not only where both the occurrence and the damage are due to radioactivity, but also where an occurrence of conventional origin causes radiation damage or injury. Moreover, compensation may also be claimed where an occurrence due to radioactivity causes conventional damage. Under Article IV.4 (first sentence), “whenever both nuclear damage and damage other than nuclear damage have been caused by a nuclear incident or jointly by a nuclear incident and one or more other occurrences, such other damage shall, to the extent that it is not reasonably separable from the nuclear damage, be deemed, for the purposes of this Convention, to be nuclear damage caused by that nuclear incident”.<sup>11</sup>

The Convention relates exclusively to land-based nuclear installations, and expressly excludes from its definition of “nuclear installation”, in Article I.1(j), any reactor “with which a means of sea or air transport is equipped for use as a source of power, whether for propulsion thereof or for any other purpose”.<sup>12</sup> On the other hand, nuclear installations are defined as including, in addition to “nuclear reactors”, factories using nuclear fuel for the production of nuclear material, factories for the processing of nuclear material, including those for the reprocessing of irradiated nuclear fuel, as well as facilities where nuclear material is stored.<sup>13</sup> The definition does not specifically include radioactive waste disposal facilities.<sup>14</sup>

The special liability regime does not apply to radiation damage caused by radioactive sources in use in facilities such as hospitals and in industry. This results from the definition of “radioactive products or waste” (Article I.1(g)), which expressly excludes “radioisotopes which have reached the final stage of fabrication so as to be usable for any scientific, medical, agricultural, commercial or

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\$5 million for any one nuclear incident. As will be pointed out in Section II.3(d) of this Commentary, the 1997 Protocol amends Article IV in order to cover damage to the means of transport.

<sup>9</sup> Under Article I.1(k)(iii), damage caused by other ionizing radiation emitted by any other source of radiation inside a nuclear installation is only covered if “the law of the Installation State” so provides.

<sup>10</sup> Under Article I.1(h), “nuclear material” is defined as including both “nuclear fuel” and “radioactive products or waste”.

<sup>11</sup> On the other hand, where damage has been caused jointly by a nuclear incident and by an emission of ionizing radiation not covered by the Convention (i.e. because the source is outside a nuclear installation and is not constituted by “nuclear material” covered by the Convention; or because the source is inside a nuclear installation but is not constituted by either “nuclear fuel” or “radioactive products or waste”, as defined, and the law of the Installation State does not provide for the compensation of such damage under Article I.1(k)(iii)), Article IV.4 (second sentence) provides that the Convention does not limit or otherwise affect the liability in such a case of any person who may be held liable in connection with that emission of ionizing radiation, either as regards any person suffering nuclear damage or by way of recourse or contribution.

<sup>12</sup> As was mentioned in Section I.1 of this Commentary, an abortive attempt had been made in 1962 to establish uniform liability rules for nuclear ships. But it was also pointed out in that context that there seem to be very few civilian nuclear-powered ships in operation at present.

<sup>13</sup> However, facilities where nuclear material is stored as an incidental part of its carriage (for example, on a railway station platform) are excluded from the definition. Article I.1(j) also specifies that “the Installation State may determine that several nuclear installations of one operator which are located at the same site shall be considered as a single nuclear installation”.

<sup>14</sup> On the question of whether or not the definition includes radioactive waste disposal facilities, see Section II.2(b) of this Commentary.



industrial purpose”. Moreover, under Article I.2, the “Installation State”<sup>15</sup> may, if the small extent of the risks involved so warrants, exclude small quantities of nuclear material from the application of the Convention, provided that maximum limits for the exclusion of such quantities have been established by the Board of Governors of the IAEA.<sup>16</sup>

Neither does the Convention apply to damage caused by nuclear fusion installations, in view of the fact that nuclear fusion had not attained in 1963 the stage of industrial application and its hazardous implications were not sufficiently known. The scope of the Convention from this point of view is delimited by the definition of “nuclear installation”, already referred to, combined with the definitions of “nuclear reactor”, “nuclear fuel”, and “radioactive products or waste”.<sup>17</sup>

Article IX.1 deals with the relationship between the liability system envisaged in the Vienna Convention and national or public health insurance, social insurance, social security, workmen’s compensation or occupational disease compensation systems. Where a person suffering damage caused by a nuclear incident is entitled to compensation in respect of such damage under such systems, it is left to the law of the State (or to the regulations of the international organization) which has established such systems to determine if the beneficiaries are also entitled to compensation under the Convention. This law (or these regulations) will also decide whether the bodies responsible for the compensation have a right of recourse against the operator liable. In any case, the operator cannot be obliged to pay more than the liability amount established in accordance with the Convention.

### 3. The general principles of nuclear liability under the 1963 Vienna Convention on Civil Liability for Nuclear Damage

The special regime of nuclear liability is based on the following basic principles: (a) “absolute” liability, i.e. liability without fault; (b) exclusive liability of the operator of the nuclear installation; (c) limitation of liability in amount and/or limitation of liability cover by insurance or other financial security; (d) limitation of liability in time.

#### **(a) “Absolute” liability**

Under this principle, which greatly facilitates the bringing of claims on behalf of the victims of a nuclear incident, the operator of the nuclear installation is liable for compensation regardless of any fault on his part; the claimant is only required to prove the relationship of cause and effect between the nuclear incident and the damage for which compensation is sought, and the operator cannot escape liability by proving diligence on his part (Articles II and IV).

Article IV.1 expressly qualifies the operator’s liability as “absolute”, in order to make it clear that it is not subject to the classic exonerations such as force majeure, acts of God or intervening acts of third persons, irrespective of whether or not they were reasonably foreseeable and avoidable. However, Article IV.3 does allow for some causes of exoneration from liability. In fact, the operator is

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<sup>15</sup> Under Article I.1(d), “Installation State”, in relation to a nuclear installation, means “the Contracting Party within whose territory that installation is situated or, if it is not situated within the territory of any State, the Contracting Party by which or under the authority of which the nuclear installation is operated”.

<sup>16</sup> Article I.2 also specifies that any exclusion by an Installation State must be within such established limits, which are to be reviewed periodically by the Board of Governors.

<sup>17</sup> “Nuclear reactor” is defined by Article I.1(i) as “any structure containing nuclear fuel in such an arrangement that a self-sustaining chain process of nuclear fission can occur therein without an additional source of neutrons”. “Nuclear fuel” is defined in Article I.1(f) as “any material which is capable of producing energy by a self-sustaining chain process of nuclear fission”. “Radioactive products or waste” are defined in Article I.1(g) as “any radioactive material produced in, or any material made radioactive by exposure to the radiation incidental to, the production or utilization of nuclear fuel”.

not liable if the incident causing damage is directly due to “an act of armed conflict, hostilities, civil war or insurrection”; neither is he liable, unless the law of the Installation State provides to the contrary, if the incident is due to “a grave natural disaster of an exceptional character”.<sup>18</sup> It is, therefore, sometimes argued that the term “strict liability” would be more appropriate in order to describe the nature of the operator’s liability.<sup>19</sup>

Moreover, Article IV.2 provides that, if the operator proves that the damage resulted wholly or partly from the gross negligence of the person suffering such damage, or from an act or omission of such person done with intent to cause damage, the competent court may relieve him wholly or partly from his obligation to pay compensation for the damage suffered by that person.

#### **(b) Exclusive liability of the operator of a nuclear installation**

The principle of exclusive liability has two main aspects. First of all, liability is legally “channelled” to the “operator”<sup>20</sup> of the nuclear installation to the exclusion of any other party potentially liable under general tort law in substitution of, or in conjunction with, that operator. Secondly, the operator incurs no liability outside the system established by the Vienna Convention.<sup>21</sup>

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<sup>18</sup> Article IV.7 provides that the Convention does not affect the liability of any individual for nuclear damage caused by that individual’s act or omission done with intent to cause damage where the operator is not liable by virtue of paragraph 3.

<sup>19</sup> The 1960 Paris Convention avoids qualifying the operator’s liability as “absolute” and simply states that the operator’s liability arises upon proof that damage was caused by a nuclear incident (Articles 3 and 4); on the other hand, the Exposé des Motifs which is attached to the Paris Convention does speak of “absolute liability” (paragraph 14). It may be interesting to point out, in this respect, that the French text of Article IV.1 says that “l’exploitant est objectivement responsable” and the Spanish text equally qualifies the operator’s liability as “objetiva”; similarly, the French text of the Exposé des Motifs which is attached to the Paris Convention speaks of “responsabilité objective”. It is usually recognized that, within the perspective of objective liability, the use of the terms “strict” or “absolute” merely signifies a difference of degree in the range of exculpatory factors which may exclude liability. Having regard to the English text of the Vienna Convention, some commentators state that the term “strict liability” would have been more appropriate, since it simply refers to liability without fault; they point out that term “absolute liability” is usually employed in order to denote a situation where, in addition to strict liability, no causes of exoneration can be invoked. However, other commentators have retorted that, considering the relatively narrow exceptions envisaged in Article IV.3, the operator’s liability under the Vienna Convention may well be considered as “absolute”. In any case, the question is merely one of definition and has no practical significance.

<sup>20</sup> Under Article I.1(c), “operator” means, in relation to a nuclear installation, “the person designated or recognized by the Installation State as the operator of that installation”. Where there is a system of licensing or authorization, the operator will be the licensee or person duly authorized. In all other cases, the operator will be the person required by the competent public authority, in accordance with the provisions of the Convention, to have the necessary financial protection to meet civil liability risks. Therefore, during commissioning, when a reactor is normally operated by the supplier before being handed over to the person for whom the reactor was supplied, the person liable will be appropriately designated by the competent public authority of the Installation State.

Under Article I.1(a), “person” means “any individual, partnership, any private or public body whether corporate or not, any international organization enjoying legal personality under the law of the Installation State, and any State or any of its constituent sub-divisions”. It is important to note that, for the purposes of legal “channelling”, it makes no difference that the operator will in some cases be a State (or a State entity) or an international organization; in fact, Article XIV provides that, except in respect of measures of execution, jurisdictional immunities under rules of national or international law may not be invoked in actions brought under the Convention before the courts competent pursuant to Article XI.

<sup>21</sup> Article 6(c)(ii) of the 1960 Paris Convention expressly provides that “the operator shall incur no liability outside this Convention for damage caused by a nuclear incident”. Although no corresponding provision is included in the 1963 Vienna Convention, this aspect of the principle of exclusive liability may well be

But there is no doubt that the first aspect of the principle, which is unique to the field of nuclear law, is the one that has more far-reaching implications.

Under the ordinary rules of civil liability, should an incident occur due to a defect in services, material or equipment supplied, the persons suffering damage may well have a right of action against any person who has supplied or manufactured such services, material or equipment in connection with the planning, construction or operation of a nuclear installation. For example, such a right may derive from rules relating to so-called “product liability”. On the contrary, Article II.5 of the Vienna Convention, provides that no person other than the operator can be held liable for nuclear damage.<sup>22</sup>

Under Article II.1, the operator is exclusively liable both where the nuclear incident occurs in his nuclear installation and where the incident occurs in the course of transport of nuclear material to or from that installation. In the latter case, the operator’s liability excludes the liability of the carrier, who would otherwise be liable at common law.<sup>23</sup> More specifically, liability is imposed on the sending operator<sup>24</sup> until the operator of another nuclear installation has assumed liability pursuant to the

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regarded as implicit therein. However, a limited exception is envisaged in Article IV.7(b), whereby “nothing in this Convention shall affect ... the liability outside this Convention of the operator for nuclear damage for which, by virtue of sub-paragraph (b) of paragraph 5 of this Article, he is not liable under this Convention”; as a consequence, it will be for the ordinary rules of tort law to determine the operator’s liability for “nuclear damage to the means of transport upon which the nuclear material involved was at the time of the nuclear incident”. As will be pointed out in Section II.3(d) of this Commentary, this exception is no longer envisaged in the 1997 Protocol to amend the 1963 Vienna Convention, since, under the Protocol, the operator is made liable for that damage also.

<sup>22</sup> Under Article II.5, exclusive liability is required “except as otherwise provided in this Convention”. Exceptions are in fact envisaged in Article IV.7(a), which leaves it to the ordinary rules of tort law to determine the liability of an individual for nuclear damage for which the operator is not liable under the Convention and which was intentionally caused by that individual. More particularly, this is the case with regard to damage to the nuclear installation itself, to on-site property, or to the means of transport upon which the nuclear material involved was at the time of the nuclear incident (i.e. damage for which the operator is not liable by virtue of Article IV.5); moreover, this is also the case with regard to damage for which the operator is not liable by virtue of the causes of exoneration envisaged in Article IV.3. On the other hand, Article II.6 specifies that “no person shall be liable for any loss or damage which is not nuclear damage pursuant to sub-paragraph (k) of paragraph 1 of Article I but which could have been included as such pursuant to sub-paragraph (k)(ii) of that paragraph” (i.e. damage due to radioactivity other than loss of life, personal injury and loss of, or damage to, property).

<sup>23</sup> There is, however, one exception to the basic principle. Under Article II.2, the Installation State may provide by legislation that a carrier of nuclear material, or a person handling radioactive waste, be designated or recognized as operator in the place of the operator concerned. But the substitution must be requested by the carrier, or person handling the waste, and have the consent of the operator concerned.

Moreover, under Article II.5, the principle of exclusive liability “shall not affect the application of any international convention in the field of transport in force or open for signature, ratification or accession at the date on which this Convention is opened for signature”. International agreements in the field of transport are understood to mean international agreements dealing with third party liability for damage involving a means of transport and international agreements dealing with bills of lading. Therefore, a person suffering damage caused by a nuclear incident occurring in the course of transport may have two rights of action — one against the operator under the Vienna Convention and one against the carrier liable under existing international agreements in the field of transport. This situation has been the cause of practical difficulties in the field of insurance costs of the carriage by sea of nuclear material. In order to avoid such difficulties, the Brussels Convention relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material was adopted in 1971 (see Section I.1 of this Commentary).

<sup>24</sup> The sending operator will in fact be responsible for the packing and containment of the nuclear material and for ensuring that these comply with the applicable health and safety regulations.

express terms of a written contract or, in the absence of such express terms, when the operator of another installation has taken charge of the material.<sup>25</sup>

In order to facilitate the transport of nuclear material, especially in the event of transit through a number of countries, Article III provides that in respect of each carriage the operator liable must provide the carrier with a certificate issued by or on behalf of the insurer, or other person providing the financial security required by the Convention.<sup>26</sup>

Like the principle of strict liability, the principle of exclusive liability of the operator facilitates the bringing of claims on the part of the victims of a nuclear incident, since it relieves them of the burden of proving the liability of parties other than the operator. But the principle also obviously favours the manufacturer, supplier or carrier of the material or equipment, since it obviates the necessity for them to take out insurance, as well as any other person who may have contributed to the nuclear incident.

A corollary of the notion of legal channelling is, therefore, that possible recourse actions by the operator (or the insurer or other financial guarantor to whom the operator's right of recourse might have been transferred) against such persons are barred or reduced within very narrow limits; if this were not so, each supplier would have to insure himself against the same risk already covered by the operator's insurance and this would involve a costly duplication of insurance with no benefit to the victims.

Under Article X, a right of recourse is only granted to the operator in two cases. First, if a right of recourse is expressly provided for by a contract in writing; secondly, where the incident resulted from an act or omission done with intent to cause damage, against the person responsible. In this latter case, the right of recourse is limited to a right against the individual physical person who acts or omits to act with intent to cause damage; there is no right of recourse against the employer of that person. Even if the employer is the operator himself, imputation to him of acts or omissions of individuals done with intent to cause damage would run counter to the purpose of the Convention; in fact, under the Convention, operators of nuclear installations can never be held liable beyond the amount laid down in accordance with Article V, even if the damage was caused by them with intent to cause damage.

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<sup>25</sup> The Convention cannot impose liability upon persons not subject to the jurisdiction of the Contracting Parties. Consequently, if the nuclear material has been sent to a destination in a non-Contracting State, the sending operator is liable until the material has been unloaded from the means of transport by which it arrived in the territory of that State. Conversely, where the nuclear material has, with the written consent of the operator, been sent from a person within the territory of a non-Contracting State, liability is imposed upon the operator for whom the material is destined from the moment that it has been loaded on the means of transport by which it is to be carried from the territory of that non-Contracting State.

<sup>26</sup> Article III specifies that "the certificate shall state the name and address of that operator and the amount, type and duration of the security, and these statements may not be disputed by the person by whom or on whose behalf the certificate was issued". Moreover, "the certificate shall also indicate the nuclear material in respect of which the security applies and shall include a statement by the competent public authority of the Installation State that the person named is an operator within the meaning of this Convention." Unlike the corresponding provision in the 1960 Paris Convention (Article 4(c)), Article III does not expressly allow a Contracting Party to exclude its application to transport which takes place wholly within its territory.

**(c) Limitation of liability in amount and/or limitation of liability cover**

The operator's liability can, first of all, be limited in amount; Article V.1 allows the Installation State to limit such liability to no less than US \$5 million for any one nuclear incident.<sup>27</sup> Article V.2 specifies that the amount resulting from the application of this rule is exclusive of any interest and costs awarded by a court in actions for compensation of nuclear damage; therefore, such interest and costs are payable by the operator in addition to any sum for which he is liable under Article V.1.

Article II.3 provides for the case where nuclear damage engages the liability of more than one operator; in such a case, the liability of the different operators involved is "joint and several", i.e. all of them — or, alternatively, each of them — may be sued for the whole amount of the damage; as a result, the total amount of compensation available in such a case is the sum of the liabilities of the operators involved.<sup>28</sup> The ordinary rules of law will regulate the recovery of sums paid as compensation to third parties as between the different operators jointly and severally liable. Moreover, under Article II.4, where several nuclear installations of one and the same nuclear operator are involved in one nuclear incident, such an operator is liable in respect of each installation involved up to the amount applicable with respect to him pursuant to Article V.

The limitation of the amount of his liability is clearly designed as an advantage for the operator, in order not to discourage nuclear-related activities. It is important to point out, however, that, unlike the 1960 Paris Convention,<sup>29</sup> the Vienna Convention does not establish a maximum liability amount and the Installation State is, therefore, free to impose a higher amount of liability and even unlimited liability. In practice, few States have opted for unlimited liability, which could easily lead to the ruin of the operator without affording any substantial contribution to the compensation of the damage caused. Indeed, even where the operator's liability is unlimited in amount, insurance cover cannot be unlimited.

Another basic principle of nuclear liability is in fact that the operator must be required to have and maintain financial security in order to meet his liability towards victims. In the Vienna Convention, this principle is embodied in Article VII.1. Financial security may be in the form of conventional financial guarantees or ordinary liquid assets; but in most cases, it will be in the form of insurance cover. Under Article VII.1, the amount, type and terms of the operator's obligation to maintain financial security have to be specified by the Installation State,<sup>30</sup> but, obviously, the coverage available on the insurance market is one of the factors to be taken into account in this respect.

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<sup>27</sup> It must be noted, however, that the United States dollar referred to in the Convention is defined in Article V.3 as "a unit of account equivalent to the value of the United States dollar in terms of gold on 29 April 1963, that is to say US \$35 per one troy ounce of fine gold". Therefore, the minimum liability amount established by the Convention is in fact significantly higher than might appear at first sight. Article V.4 further provides that the sum may be converted into national currency in round figures.

<sup>28</sup> However, as is specified in Article II.3(b), this rule does not apply to a nuclear incident involving nuclear material in the course of carriage in one and the same means of transport, or, in the case of storage incidental to carriage, in one and the same nuclear installation; in such cases, the total liability cannot exceed the highest amount established with respect to any one of the operators whose liability is engaged.

<sup>29</sup> Article 7 of the Paris Convention at present establishes the maximum liability in respect of any single nuclear incident at 15,000,000 SDRs. However, a Contracting Party may, taking into account the possibilities of the operator of obtaining insurance or other financial security, establish by legislation a greater or lower amount; such lower amount cannot, however, be less than 5,000,000 SDRs. The 2004 amending Protocol will raise the liability amount to 700 million euros and make it a minimum amount.

<sup>30</sup> Although the operator is required, in principle, to have financial security available for each nuclear incident, the Vienna Convention does not prevent the possibility of obtaining insurance cover per

In cases where the yield of insurance is inadequate to satisfy the claims for compensation, Article VII.1 specifies that the Installation State must ensure the payment of such claims out of public funds up to the limit, if any, of the operator's liability amount. Therefore, in cases where, for example, the financial guarantor is bankrupt, or where insurance is per installation for a fixed period and, after a first incident, it is impossible to reinstate the financial security up to the specified limit, the Installation State must intervene. Moreover, where the operator's liability is unlimited, or is otherwise limited to an amount higher than the amount of the financial security he is required to maintain, the Installation State must also intervene.

This provision indicates a limited but important acknowledgement of the obligation of States to compensate for damage caused by nuclear activities where the operator is unable to do so. The same holds true for the case where the operator is itself a State (or a constituent sub-division thereof); in this case, under Article VII.2, there is no obligation to maintain insurance or other financial security, but, in the event of a nuclear incident, the State (or its constituent sub-division) has to ensure the payment of claims for compensation up to the limit, if any, of its liability as operator.

In any case, Article VII.3 makes it clear that the funds provided by insurance, by other financial security or by the Installation State are to be exclusively available for compensation under the Convention. Consequently, although these sums need not be segregated, they cannot be used to meet any other claim.

Moreover, Article XV provides that appropriate measures are to be taken by the Contracting Parties in order to ensure that compensation for nuclear damage, interest and costs awarded by a court in connection therewith, insurance and reinsurance premiums and funds provided by insurance, reinsurance or other financial security, or funds provided by the Installation State, pursuant to the Convention, shall be freely transferable into: (a) the currency of the Contracting Party within whose territory the damage is suffered; (b) the currency of the Contracting Party within whose territory the claimant is habitually resident; and (c), as regards insurance or reinsurance premiums and payments, the currencies specified in the insurance or reinsurance contract.

**(d) Limitation of liability in time**

Finally, the operator's liability is also limited in time. In view of the fact that physical injury from radioactive contamination may not manifest itself for some time after the nuclear incident, the adoption of too short a period of limitation would clearly be inequitable. On the other hand, this very fact, combined with the difficulty of proving that long-term radiation damage is due to a given source, has resulted in the adoption of a term shorter than those usually provided for under the general rules of tort law.

In all legal systems there is a time limit for the submission of claims, but, whereas in many States the normal time limit in general tort law is thirty years, under the Vienna Convention (Article VI.1, first sentence) rights of compensation are extinguished if an action is not brought within ten

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installation for a fixed period of time, rather than in respect of a single incident. In this case, however, if the amount available is reduced or exhausted as a result of a first incident, appropriate measures have to be taken to ensure that financial security up to the amount required is available for subsequent incidents.

In order to ensure as far as possible that there will never be a period in which less than the full amount required is available, Article VII.4 provides that the financial security can only be suspended or cancelled after a period of at least two months' notice has been given to the competent public authority; moreover, where the financial security relates to the carriage of nuclear material, it cannot be suspended or cancelled before a transport has been completed.

years from the date of the nuclear incident.<sup>31</sup> Moreover, provided that this ten-year period is not exceeded, Article VI.3 allows the law of the competent court to establish a shorter period of not less than three years from the date on which the victim had knowledge, or should have had knowledge, of the damage and of the operator liable therefor. This shorter period may be qualified as a period of “extinction”, i.e. an absolute period after which no compensation exists, or a period of “prescription”, which can be suspended or interrupted under the ordinary rules applicable to prescription.

The ten-year limitation is explained, once again, by the need not to put a prohibitive burden on persons engaged in nuclear activities; it was felt that operators and their guarantors should not be obliged to maintain over long periods commitments that might prove to be merely theoretical. But in addition to that it was also felt that a longer period would be of little advantage to the victims themselves, since it could result in the slowing down of compensation of ascertainable damage in view of the possibility that belated additional claims might alter the situation.

In two cases, however, proceedings may be brought after the elapse of the ten-year period. First of all, under Article VI.1 (second and third sentences), if under the law of the Installation State the operator’s liability is covered by financial security or State funds for a longer period, the law of the competent court may provide that proceedings may be brought during such longer period. Such an extension may not, however, affect the rights of compensation under the Convention of any person who, within the ten-year period, has brought an action against the operator for loss of life or personal injury.

Secondly, under Article VI.4, a person who suffers an aggravation of the damage for which he has already brought an action within the applicable period may amend his claim after the expiry of that period provided that no final judgement has yet been entered. The law of the competent court may, however, exclude this possibility.

#### 4. Jurisdiction, recognition of judgements and applicable law under the 1963 Vienna Convention on Civil Liability for Nuclear Damage

One of the important features of the special nuclear liability regime is the establishment of a single competent forum to deal with all actions for compensation. Under Article XI.1, **jurisdiction** over actions for compensation under the Convention<sup>32</sup> lies exclusively, in principle, with the courts of the Contracting Party within whose territory the nuclear incident occurred. However, the Convention may be applicable even if an incident occurs outside the territory of a Contracting Party, in particular if it occurs during the transport of nuclear material originating from, or sent to, a nuclear installation situated in the territory of a Contracting Party; in this case, Article XI.2 specifies that jurisdiction lies exclusively with the courts of the Installation State. The courts of the Installation State also have jurisdiction in cases where the place of the nuclear incident “cannot be determined with certainty”.

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<sup>31</sup> Under Article VI.2, where nuclear damage is caused by a nuclear incident involving nuclear material which at the time of the nuclear incident was stolen, lost, jettisoned or abandoned, the ten-year period of extinction is to be computed from the date of that incident, but it shall in no case exceed a period of twenty years from the date of the theft, loss, jettison or abandonment.

<sup>32</sup> In principle, actions for compensation under the Vienna Convention, whether arising out of nuclear incidents at a nuclear installation or in the course of transport of nuclear material, can only be brought against the operator liable under Article II. However, Article II.7 preserves the right to bring actions against the insurer, or other person furnishing the financial security pursuant to Article VII, either as an alternative to the operator or in addition to him, where the law of the competent court grants such a right of direct action.

The situation may occur where, as a result of the rules laid down in Article XI.1 and 2, jurisdiction would lie with the courts of more than one Contracting Party. In such a situation, Article XI.3 provides that: (a) if the nuclear incident occurred partly outside the territory of any Contracting Party and partly within the territory of a single Contracting Party, jurisdiction lies with the courts of this latter Party; (b) in any other case, jurisdiction lies with the courts of the Contracting Party which is determined by agreement between the Contracting Parties whose courts would have jurisdiction.<sup>33</sup>

Once the Contracting Party whose courts have jurisdiction has been determined, the Convention leaves it to the national procedural law of that Party to determine which court is competent to adjudicate claims of compensation arising out of the nuclear incident as well as which court is competent to hear appeals. A final judgement entered by the competent court benefits from specific provisions relating to the **recognition of judgements**. Leaving aside minor exceptions,<sup>34</sup> Article XII provides that the judgement is to be recognized within the territory of all Contracting Parties and is enforceable as if it were the judgement of a national court. Reconsideration of the merits of the case is never allowed.

As for the **applicable substantive law**, the competent court will, of course, apply the self-executing provisions of the Vienna Convention, if these have been made directly applicable within its domestic legal order, or the national legislation specifically enacted in order to implement the Convention. But, as was pointed out in Section I.2 of this Commentary, the Convention does not provide for uniform rules covering all aspects of civil liability for nuclear damage and leaves some discretion to national law. The question of which law is to be applied by the competent court therefore arises.

The Convention itself specifies that some matters are left to be determined by the Installation State<sup>35</sup> or by “legislation” enacted by that State,<sup>36</sup> whereas others are left to be governed by the “law of

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<sup>33</sup> If the interested States are unable to reach agreement, the resulting uncertainty is not resolved by the Convention, which contains no provisions on the settlement of disputes. Where, on the other hand, an agreement is reached, victims cannot bring actions until after the court having jurisdiction has been determined by such an agreement. In order to deal with this situation, Article VI.5 provides that, if a request has been made within the period of extinction applicable pursuant to the same Article to any one of the Contracting Parties empowered so to determine, but the time remaining after such determination is less than six months, the period within which an action may be brought shall be six months, reckoned from the date of such determination.

<sup>34</sup> Denial of recognition is only allowed: (a) where the judgement was obtained by fraud; (b) where the party against whom the judgement was pronounced was not given a fair opportunity to present his case; or (c) where the judgement is contrary to the public policy (“ordre public”) of the Contracting Party within whose territory recognition is sought, or is not in accord with fundamental standards of justice.

<sup>35</sup> The Installation State has to designate, first of all, the operator of a nuclear installation (Article I.1(c)); moreover, it has to determine the limit, if any, of the operator’s liability (Article V.1), as well as the limit of liability cover (Article VII.1). Other matters are left to its discretion: for example, it may determine that several nuclear installations of one operator that are located at the same site shall be considered as a single nuclear installation (Article I.1(j)); that any small quantities of nuclear material are excluded from the application of the Convention if maximum limits for the exclusion of such quantities have been established by the Board of Governors of the IAEA (Article I.2).

<sup>36</sup> The “legislation” of the Installation State may provide, in particular, that a carrier of nuclear material, or a person handling radioactive waste, may, at his request and with the consent of the operator concerned, be designated or recognized as operator (Article II.2); and that the operator’s liability extends to damage to the means of transport of nuclear material (Article IV.5).



the Installation State”.<sup>37</sup> As was pointed out above, the Installation State is not always the State whose courts have jurisdiction under the Convention. When the Convention refers to “legislation” enacted by the Installation State, it clearly refers to legislation specifically adopted by that State in order to regulate aspects which the Convention leaves to its discretion. On the other hand, the expression “law of the Installation State”, which is not defined in the Convention, may have a broader meaning and include the general tort law or other branches of the law of the Installation State, in so far as these apply to nuclear liability.

In most cases, however, the Convention leaves matters in respect of which uniform rules are not provided to be governed by the “law of the competent court”.<sup>38</sup> Moreover, Article VIII contains a general statement to the effect that, subject to the provisions of the Convention, the “law of the competent court” governs the nature, form and extent of the compensation.<sup>39</sup> But Article I.1(e) defines “law of the competent court” as the “law of the court having jurisdiction under this Convention, including any rules of such law relating to conflict of laws”; consequently, the applicable substantive law may be, depending on the criteria adopted in the private international law of the forum, the *lex fori*, in other words, the substantive law of the State whose courts have jurisdiction, or the law of a foreign State.

Whatever law is the applicable law, Article XIII requires that not only the Convention, but also “the national law applicable thereunder” be applied “without any discrimination based upon nationality, domicile or residence”. This ensures that, provided that damage is suffered within the “geographical scope” of the Convention,<sup>40</sup> nationals of States other than the Contracting Party whose courts have jurisdiction are not discriminated against; indeed, the principle of **non discrimination and equal treatment** of victims is often considered to be one of the basic principles of the nuclear liability regime.

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<sup>37</sup> For example, the questions whether nuclear damage includes damage arising out of, or resulting from, ionizing radiation emitted from sources inside a nuclear installation other than nuclear fuel or radioactive products or waste (Article I.1(k)(iii)); whether the operator is liable for nuclear damage caused by a nuclear incident due to a grave natural disaster (Article IV.3(b)); whether the operator’s liability is covered for a period longer than ten years from the date of the nuclear incident (Article VI.1).

<sup>38</sup> In particular, it is for the “law of the competent court” to provide if, and to what extent, damage other than loss of life, personal injury, and loss of, or damage to, property is covered by the operator’s liability (Article I.1(k)(ii)); if direct action lies against the person furnishing financial security in order to cover the operator’s liability (Article II.7); if the operator may be relieved from his obligation to pay compensation in respect of the damage suffered by a person who caused such damage through gross negligence or by an act or omission done with intent to cause damage (Article IV.2); if, in derogation of the ten-year period of extinction, rights of compensation are only extinguished after a longer period, corresponding at most to the period for which the operator’s liability is covered by financial security under the law of the Installation State (Article VI.1); if there is a period of extinction or prescription of not less than three years from the date on which the person suffering nuclear damage had knowledge, or should have had knowledge, of the damage and of the operator liable therefor (Article VI.3). Moreover, the “law of the competent court” may exclude the possibility of amending claims (Article VI.4).

<sup>39</sup> Claims for compensation following a nuclear incident may differ greatly in nature, amounts and time. It will be for the “law of the competent court” to decide the nature, form and extent of the compensation, for example to direct the granting of annuities and their amounts, as well as the effect on the victim’s claim of contributory negligence on his part. As for equitable distribution of the amount of compensation available, measures may be necessary in cases where the amount of compensation is or may be exceeded, for example, by providing a limit per person suffering damage or limits for damage to persons and damage to property. It is for each State to decide whether such measures should be taken in advance or at the time when actions are brought.

<sup>40</sup> On this issue, see Sections I.2 and II.2(c) of this Commentary.

## 5. The need for a more effective regime and the 1988 Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention

In the early 1960s it could be said that liability for nuclear damage was the field in which international regulation had achieved the most substantial results. Moreover, there was a widespread feeling that the international legal regime embodied in the 1960 Paris Convention and in the 1963 Vienna Convention represented a reasonable compromise between the need to provide adequate and effective compensation for the victims of a nuclear incident and the need to favour the development of the civil nuclear industry, which was then in its early stages. With the passage of time, however, the protection of victims of nuclear incidents came to be seen by world public opinion as the primary objective of international legal regulation and the need for a more effective liability regime began to be felt.

The 1986 Chernobyl accident confirmed that a nuclear incident may cause damage of an extreme magnitude, that damage may be caused in regions far beyond the territory of the incident State and that, in addition to damage to individuals and property, damage to the environment may result in several States. The Soviet Union, which was at the time the incident State, was not party to any of the existing conventions on civil liability and, although it regretted the consequences of the accident, it denied that it had any international legal obligations in that respect. The Chernobyl accident, therefore, raised two issues, both crucially important for the effectiveness of an international legal regime of nuclear liability: the first was, of course, the wide international acceptance of the regime; but the second was, inevitably, the adequacy of the regime to cope with the transboundary consequences of a major nuclear accident. The two issues were, and are, integrally related, but to some extent they have been dealt with separately at the international level.

The IAEA soon became the centre of international efforts to cope with the problems raised by the Chernobyl accident. With a view to ensuring a wider international acceptance of the civil liability regime, discussions centred, first of all, on the need to avoid the unnecessary duplication created by the existence of two different conventional regimes based on very similar principles: the regional Paris regime, on the one hand, and the Vienna regime, on the other. This question was discussed for some time within the Secretariat of the IAEA in close cooperation with the Secretariat of the OECD Nuclear Energy Agency (NEA), which is in charge of the Paris Convention. Various possibilities were envisaged, but both organizations eventually came to the conclusion that the best solution would be the adoption of a new conventional instrument aiming at linking the two conventions. Expert groups of both organizations endorsed this solution, and, on 21 September 1988, a Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention was adopted by a diplomatic conference jointly convened in Vienna by the IAEA and the OECD. The Joint Protocol entered into force on 27 April 1992.

The 1988 Joint Protocol provides for a mutual extension of the operator's liability under the Paris and Vienna systems (Article II): thus, if a nuclear incident occurs for which an operator is liable under both the Vienna Convention and the Joint Protocol, he shall be liable in accordance with the Vienna Convention for nuclear damage suffered not only in the territory of Parties thereto, but also in the territory of Parties to both the Paris Convention and the Joint Protocol; conversely, if an incident occurs for which an operator is liable under both the Paris Convention and the Joint Protocol, there shall be reciprocity. Moreover, the Joint Protocol is meant to eliminate conflicts which might otherwise arise, especially in transport cases, from the simultaneous application of the two Conventions (Article III).

## 6. The drafting history of the 1997 Protocol to Amend the Vienna Convention on Civil Liability for Nuclear Damage and the Convention on Supplementary Compensation for Nuclear Damage

As for the adequacy of the civil liability regime, the need to revise both the Paris and the Vienna Conventions soon became obvious. Discussions in the legal literature centred especially on the amount of the operator's liability and, in the case of the Vienna Convention, on the desirability of ensuring additional compensation for damage exceeding that amount out of national and international public funds; on the need to extend the operator's liability in time, in order to match the peculiarities of radiation effects, which may become manifest after many years; on the causes of exoneration from liability; on the concept of nuclear damage and the desirability of ensuring compensation of damage to the environment; on the territorial scope of the regime and the desirability of covering damage suffered in non-Contracting States. Moreover, the issue of international State liability in case of nuclear incidents and of its relationship to the international civil liability regime was often raised.

Within the IAEA, two major views emerged among the Member States. One view was that the civil liability regime was sufficient and efforts should be directed towards the revision of the existing conventions. The other view, however, was that, since both Conventions only dealt with the liability of individuals or juridical persons under civil law, there was a need to consider the broader question of international liability in inter-State relations and hence to elaborate, in a new multilateral instrument, the principle of international liability for nuclear damage in order to allow for international claims against States. Most Member States supported the Director General's recommendation that an open-ended working group of governmental experts be convened in order to discuss issues related to international liability for nuclear damage.<sup>41</sup>

Pursuant to a resolution of the General Conference,<sup>42</sup> the Board of Governors decided, on 23 February 1989, to establish an open-ended working group in order to study "all aspects" of liability for nuclear damage.<sup>43</sup> The Working Group on Liability for Nuclear Damage held two sessions in 1989 and considered issues relating to both civil liability and State liability for nuclear damage.<sup>44</sup> In view of the close relationship between the two questions, the Working Group came to the conclusion that its work should be discontinued and its mandate discharged by the Standing Committee on Civil Liability for Nuclear Damage, which had been established by the Board of Governors on 18 September 1963 with the principal task of keeping under review, and advising on, all problems relating to the 1963

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<sup>41</sup> In June 1987, the Board of Governors, having had a discussion on the basis of document GOV/2306 (*The Question of International Liability for Damage arising from a Nuclear Accident*), requested the Director General to invite comments from Member States on that document, with a view to facilitating the Board's further consideration of the question (see document GOV/OR 676, paragraph 37). Comments submitted by Member States were reproduced in an Annex to a Director General's Note dated 11 May 1988 (see document GOV/INF/550).

<sup>42</sup> Document GC (XXXII)/RES/491.

<sup>43</sup> See document GOV/2379, of 20 January 1989; document GOV/OR 706, paragraphs 84–111; document GOV/OR 707, paragraphs 1–54. The Group was put under the Chairmanship of the Resident Representative of the Netherlands to IAEA, Ambassador L.H.J.B. van Gorkom.

<sup>44</sup> The first session took place from 29 May to 1 June (document NL/1); the second session took place from 30 October to 3 November (document NL/2/4).

Vienna Convention.<sup>45</sup> It was, however, suggested to re-establish the Standing Committee with a revised name, mandate and composition.

Consequently, on 21 February 1990, the Board of Governors dissolved the Working Group and established a Standing Committee on Liability for Nuclear Damage, open to all Member States;<sup>46</sup> other States and interested organizations could be invited to participate as observers. The mandate of the Standing Committee was 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 that 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”(see paragraph 6.3.A of document GOV/2427).<sup>47</sup>

By the same decision, the Board requested the IAEA’s Director General, *inter alia*, to bring the need for a revision of the existing civil liability regime to the attention of States and, in particular, to ascertain from the Contracting Parties to the Vienna Convention whether they desired the convening at an opportune time of a conference to consider the revision of the Convention in accordance with Article XXVI thereof. On 6 June 1990, the Director General, in his capacity as depositary for the Vienna Convention, issued a circular letter to the effect that, by the same date, five affirmative replies to his enquiry had been received: these constituted the required number of one third of the Contracting Parties for a revision conference to be convened in accordance with Article XXVI. The notification also indicated that, in accordance with its mandate, the Standing Committee would act as a preparatory committee for the revision conference and that it would recommend the appropriate date for the convening of such a conference when the necessary preparatory work was done.<sup>48</sup>

From 1990 to 1997, the Standing Committee held seventeen sessions and periodically reported to the Board on the progress of its work.<sup>49</sup> The number of sessions, to which must be added four

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<sup>45</sup> See document GOV/931 of 7 August 1963; document GOV/OR 329, paragraphs 34–72. The Standing Committee was originally composed of 15 Member States, and had in fact held six series of meetings between its establishment and 1987.

<sup>46</sup> See document GOV/2427; document GOV/OR 722, paragraphs 1–95.

<sup>47</sup> Article XXVI.1 of the 1963 Vienna Convention provides that: “A conference shall be convened by the Director General of the International Atomic Energy Agency at any time after the expiry of a period of five years from the date of the entry into force of this Convention in order to consider the revision thereof, if one-third of the Contracting Parties express a desire to that effect”.

<sup>48</sup> See document N5.52.10.Circ. (Circular Note Verbale of 6 June 1990 from the Director General).

<sup>49</sup> See the Reports of the Standing Committee: first session (23–27 April 1990), document SCNL/1/INF.4; second session (15–19 October 1990), document SCNL/2/INF.2; third session (8–12 April 1991), document SCNL/3/INF.2/Rev.1; fourth session (2–6 December 1991), document SCNL/4/INF.6; fifth session (30 March–3 April 1992), document SCNL/5/INF.4; sixth session (12–16 October 1992), document SCNL/6/INF.4; seventh session (24–28 May 1993), document SCNL/7/INF.6; eighth session (11–15 October 1993), document SCNL/8/INF.4; ninth session (7–11 February 1994), document SCNL/9/INF.5; tenth session (31 October–4 November 1994), document SCNL/10/INF.4; eleventh session (20–24 March 1995), document SCNL/11/INF.5; twelfth session (26–30 June 1995), document SCNL/12/INF.6; thirteenth session (30 October–3 November 1995), document SCNL/13/INF.3; fourteenth session (29 January–2 February 1996), document SCNL/14/INF.5; fifteenth session (6–10 May 1996), document SCNL/15/INF.5; sixteenth session (14–18 October 1996), document SCNL/16/INF.3; seventeenth session, Part I, (3–7 February 1997), document SCNL/17/INF.4; seventeenth session, Part II (10–11 April 1997), document SCNL/17.II/INF.7.

meetings of an Intersessional Working Group<sup>50</sup> and several other informal meetings, reflects the complexity of the Standing Committee's task both from the technical and the political point of view. The issue of State liability, in particular, met with serious difficulties<sup>51</sup> and work soon concentrated, on the one hand, on the revision of the Vienna Convention and, on the other, on the establishment of a system of supplementary funding.

From 10 to 11 April 1997, the Committee held the second part of its seventeenth session, during which it finally reached the conclusion that its task had been fulfilled; it consequently decided to transmit to the Board of Governors the drafts of a Protocol to Amend the Vienna Convention and of a Convention on Supplementary Funding, and recommended the convening of a diplomatic conference with a view to adopting the two instruments.<sup>52</sup>

The Diplomatic Conference took place in Vienna from 8 to 12 September 1997<sup>53</sup> and, on 12 September 1997, adopted both a Protocol to Amend the Vienna Convention and a Convention on Supplementary Compensation for Nuclear Damage.<sup>54</sup> Both instruments were opened for signature by all States on 29 September 1997. The Convention on Supplementary Compensation has not yet entered into force and will remain open for signature until it enters into force. However, the Protocol to Amend the Vienna Convention entered into force on 4 October 2003, i.e. three months after the deposit of the fifth instrument of ratification, acceptance or approval, in accordance with Article 21 thereof.

Before examining both instruments in detail, it is important to point out that the States Parties to the 1960 Paris Convention took an active part in the negotiations leading to their adoption; in fact, it was "understood" from the very beginning that "most of the proposals" relating to the revision of the Vienna Convention "may apply mutatis mutandis to the Paris Convention".<sup>55</sup> As a result of the adoption, in September 1997, of the Protocol to Amend the Vienna Convention and of the Convention on Supplementary Compensation, there was a widespread feeling that the 1960 Paris Convention also needed to be revised. In fact, a few months later, the Contracting Parties to the Paris Convention

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<sup>50</sup> See the Reports of the Intersessional Working Group: first meeting (11–15 February 1991), document SCNL/IWG.1; second meeting (21–25 October 1991), document SCNL/IWG.2; third meeting (1–5 March 1993), document SCNL/IWG.3/INF.3/Rev.1; fourth meeting (9–13 May 1994), document SCNL/IWG/4/INF.4.

<sup>51</sup> On this issue, see Section II.2(a) of this Commentary.

<sup>52</sup> See document SCNL/17.II/INF.7, paragraph 14. The Committee, however, recognized that the issues relating to the entry into force of the future Convention on Supplementary Compensation and to jurisdiction in the exclusive economic zone needed to be further discussed at the political level, both prior to and at the diplomatic conference. The Committee also recommended that an informal open-ended meeting of Member States be held prior to the diplomatic conference in order to consider draft Rules of Procedure for the conference, to address all other issues related to that conference and to compile editorial comments on the two draft instruments.

<sup>53</sup> See the summary records of the plenary meetings (document NL/DC/SR.1–5).

<sup>54</sup> See the Final Act of the Diplomatic Conference Convened to Adopt a Protocol to Amend the Vienna Convention on Civil Liability for Nuclear Damage and to Adopt a Convention on Supplementary Funding (Vienna, 8–12 September 1997) (see document GOV/INF/822–GC(41)/INF/13, 19 September 1997). The text of the Protocol was adopted by a vote by show of hands of 64 in favour and 1 against, with 2 abstentions (of the 65 States present and voting, 21 were Parties to the Vienna Convention). The text of the Convention on Supplementary Compensation was adopted by a vote by show of hands of 66 in favour and 1 against, with 2 abstentions. (See the summary records of the plenary meetings of the Conference (document NL/DC/SR. 1–5) and, in particular, document NL/DC/SR.5, paragraphs 17 and 20 respectively).

<sup>55</sup> See document SCNL/1/INF.4, p. 4.

decided to revise their own Convention; moreover, approximately two years after the start of those negotiations, the Contracting Parties to the 1963 Brussels Convention Supplementary to the Paris Convention decided to revise that Convention as well. These negotiations took place in an ad hoc group of Contracting Parties within the NEA and, once successfully completed, they led to a Revision Conference, which took place in Paris on 12 February 2004 under the auspices of the OECD and of the Government of Belgium. The Conference adopted a Protocol to Amend the Paris Convention, together with a Protocol to Amend the 1963 Brussels Convention Supplementary to the Paris Convention.<sup>56</sup>

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<sup>56</sup> See the Final Act of the Conference on the Revision of the Paris Convention and of the Brussels Supplementary Convention (Paris, 12 February 2004). The Final Act contains the text of both instruments as well an *Explanatory Report by the Representatives of the Contracting Parties on the Revision of the Paris Convention and the Brussels Supplementary Convention*.

## II. The 1997 Protocol to Amend the Vienna Convention on Civil Liability for Nuclear Damage

### 1. The 1997 Vienna Convention on Civil Liability for Nuclear Damage and its relation to the 1963 Vienna Convention on Civil Liability for Nuclear Damage

The first instrument adopted at the 1997 Conference was a Protocol to Amend the Vienna Convention on Civil Liability for Nuclear Damage. The purpose of the 1997 Protocol, as is clearly stated in the Preamble, is to “amend” the 1963 Convention in order to provide for “broader scope, increased amount of liability of the operator of a nuclear installation and enhanced means for securing adequate and equitable compensation”. The 1997 Protocol consists of twenty-four articles, most of which either amend existing provisions in the 1963 Vienna Convention or insert new provisions therein. Article 18 of the Protocol states that, as between the Parties thereto, the 1963 Convention and the Protocol are to be “read and interpreted together as one single text that may be referred to as “the 1997 Vienna Convention on Civil Liability for Nuclear Damage”<sup>57</sup>.

Article XXVI.1 of the 1963 Vienna Convention expressly provides for the possibility of convening a conference in order to consider its “revision”. However, the 1963 Convention does not lay down a specific procedure for the adoption and entry into force of instruments effecting such a “revision”; consequently, the 1997 “amendments”<sup>58</sup> were adopted in the form of a new treaty, which,

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<sup>57</sup> A consolidated text of the Vienna Convention as amended by the 1997 Protocol has in fact been established by the Secretariat of IAEA (see the Annex to document INFCIRC/566).

A different solution has been adopted in respect of the amendment of the 1960 Paris Convention. Despite the fact that the Paris Convention has already undergone two amendments by virtue of Protocols adopted in 1964 and 1982 respectively, it is still known as the 1960 Paris Convention, albeit “as amended” by the two Protocols. The third amending Protocol, which was adopted in 2004 and is not yet in force, will not change the name of the Convention.

<sup>58</sup> The fact that the 1997 Protocol uses the term “amendment”, as opposed to the term “revision” employed in the 1963 Vienna Convention, is of no practical consequence. A distinction is sometimes made in the legal literature between the “amendment” of particular treaty provisions and the “revision” of a treaty as a whole. This distinction is reflected in some treaties which, like the United Nations Charter, lay down two distinct procedures for the adoption of “amendments” (Article 108) and for the “review” of the treaty as a whole (Article 109). However, there is clearly no distinction of quality between “amendment” and “revision”: significantly, Chapter XVIII of the UN Charter, where both Articles 108 and 109 can be found, bears the general title of “Amendments”. The real distinction is rather between those treaties which, like the UN Charter (or, indeed, the 1960 Paris Convention), lay down specific procedures for the adoption and entry into force of “amendments” (and/or “revisions”) and those which, like the 1963 Vienna Convention, do not.

Part IV of the 1969 Vienna Convention on the Law of Treaties makes no distinction between the “amendment” and the “revision” of treaties. On the other hand, it introduces a new distinction between the “amendment” and the “modification” of treaties which has a completely different basis. The term “amendment” is therein employed to indicate the situation where a bilateral treaty is “amended” (Article 39) or where there is a proposal to “amend” a multilateral treaty **as between all the Parties** (Article 40), irrespective of whether the intention is to amend particular treaty provisions or revise the treaty as a whole; the term “modification” is employed to denote the very different situation where the intention is to modify a multilateral treaty **as between certain of the Parties alone** (Article 41). Therefore, if the terminology employed in the Law of Treaties convention is followed, the 1997 Protocol is clearly a treaty intended to “amend” the 1963 Vienna Convention and not a treaty concluded by a limited number of Parties in order to

by its very nature, is only binding on the Parties thereto. A few remarks seem, therefore, in order on the legal relationship between the 1963 Vienna Convention and the amending Protocol, i.e. the “1997 Vienna Convention”.

It is important to point out, in the first place, that the Protocol was opened for signature by **all** States on 29 September 1997; moreover, whereas the Protocol is subject to ratification, acceptance or approval by the signatory States, **any** other State may accede thereto after its entry into force (Article 20). In other words, a State which is not already a Party to the 1963 Vienna Convention is not required to ratify it, or accede to it, in order to become a Party to the amending Protocol. Secondly, the entry into force of the amending Protocol was not made dependent upon ratification or accession on the part of all the Contracting Parties to the 1963 Convention; on the contrary, a rather low number of ratifications, or accessions was deemed sufficient (Article 21), irrespective of whether or not the ratifying, or acceding, States were Parties to the 1963 Vienna Convention.

The 1963 Vienna Convention and the 1997 Protocol (i.e. the 1997 Vienna Convention) have, therefore, been conceived as two distinct treaties independent of each other. The 1963 Vienna Convention continues in force and will coexist with the “1997 Vienna Convention” until the 1963 Convention is terminated. More specifically, the 1963 Convention continues to apply as between the Parties thereto which have not (yet) ratified, or acceded to, the Protocol;<sup>59</sup> moreover, it is still possible for a State to ratify the 1963 Convention, or accede thereto, notwithstanding the entry into force of the amending Protocol.<sup>60</sup> On the other hand, the “1997 Vienna Convention” applies in relations between all Parties to the amending Protocol irrespective of whether or not they are also Parties to the 1963 Vienna Convention.

As for treaty relations between States Parties to different versions of the Vienna Convention, the question of whether it would be possible, and indeed desirable, to uphold, or establish, such relations was briefly discussed within the Standing Committee. The original Draft Final Clauses to be included in the amending Protocol excluded treaty relations between States Parties to the amending Protocol only and States Parties to the unamended 1963 Convention only; as for States Parties to both the 1963 Convention and the amending Protocol, two alternatives had been envisaged, one of which would have required the denunciation of the 1963 Convention upon ratification of the amending Protocol, or accession thereto.<sup>61</sup> However, on the basis of a Note on the relationship between the unrevised and the revised Vienna Convention prepared by the Chairman of the Drafting Committee in

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“modify” the 1963 Convention as between themselves alone; in fact, irrespective of the number of ratifications or accessions it may have received at any given time, the Protocol is open to all States, including all Parties to the 1963 Convention.

<sup>59</sup> In addition, since, under Article 22, any Contracting Party may denounce the 1997 Protocol by written notification to the depositary, a State Party to both the 1963 Vienna Convention and the 1997 Protocol will still be bound by the earlier Convention if it decides to denounce the Protocol. Unless, of course, that State decides to take advantage of Article XXV of the 1963 Vienna Convention, which allows each Contracting Party to denounce the Convention by giving twelve months’ notice to that effect to the Director General of IAEA.

<sup>60</sup> The question of whether or not it will still be possible for a State to ratify, or to accede to, the 1963 Vienna Convention after all the Contracting Parties thereto have ratified, or acceded to, the 1997 Protocol was briefly discussed during the Fourth Meeting of INLEX (7-11 February 2005). The Group concluded that, “as a practical matter for the foreseeable future, there would most likely continue to be Parties to the 1963 Vienna Convention and the revised Vienna Convention”; consequently, the Group considered that, “in this context, ... it was not necessary to address this issue at this time” (p. 8 of the Chairman’s Report).

<sup>61</sup> *Draft Final Clauses for Protocol to Amend 1963 Vienna Convention* (document SCNL/8/WP.3) attached to the *Report of the Eighth Session of the Standing Committee* (document SCNL/8/INF.4 pp. 36–38). The Draft Final Clauses were prepared by the IAEA Secretariat at the request of the Drafting Committee.



May 1994,<sup>62</sup> it was eventually decided<sup>63</sup> that a solution upholding, or establishing, treaty relations between States Parties to different versions of the Vienna Convention would be preferable.

Thus, Article 19 of the 1997 Protocol makes it clear that a State Party to the 1963 Convention which decides to ratify the Protocol, or accede thereto, will still be bound by the unamended Convention in its relations with the Parties thereto which have not (yet) ratified, or acceded to, the Protocol (paragraph 2); moreover, a State which is not a Party to the 1963 Convention but decides to ratify the 1997 Protocol, or accede thereto, will be bound by the provisions of the unamended 1963 Convention in its relations with the States which are only Parties thereto, unless it expressly declares a different intention upon ratification or accession (paragraph 1).

Generally speaking, the solutions eventually adopted in the 1997 Protocol are based on the assumption that, in a transition period, they could promote a wider application of the civil liability regime.<sup>64</sup> The fact that States in treaty relations with each other may apply different liability regimes was not deemed to create insurmountable technical difficulties.<sup>65</sup> On the other hand, in view of the considerably higher compensation amounts envisaged in the 1997 Protocol, it was conceded that the lack of balance between these amounts and those envisaged in the 1963 Vienna Convention might be a matter of concern for some States.

A State not party to the 1963 Convention wishing to ratify, or accede to, the 1997 Protocol may avoid such lack of balance by expressly declaring that it does not wish to be bound by the 1963 Convention. A State party to the 1963 Convention may not make a similar declaration when ratifying, or acceding to, the 1997 Protocol; on the other hand, that State may denounce the 1963 Convention in accordance with Article XXV thereof.<sup>66</sup> Article 22.3 of the Protocol expressly states that, as between

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<sup>62</sup> Document IWG/4/INF.2, attached to the *Report of the Fourth Meeting of the Intersessional Working Group* (document SCNL/IWG/4/INF.4 pp. 48–57). In that Note express mention was made, in order to justify the proposed solution, of Article 40 of the 1969 Vienna Convention on the Law of Treaties, relating to the “Amendment of multilateral treaties”. In particular, paragraphs 4 and 5 thereof read as follows: “4. The amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement; [...]. 5. Any State which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State: (a) be considered as a party to the treaty as amended; (b) be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement”. Although framed in a somewhat different way, the provisions which were eventually inserted in the amending Protocol do appear to be in line with the provisions made in Article 40 of the 1969 Vienna Convention on the Law of Treaties. But, of course, these apply “unless the treaty otherwise provides”. The choice was, therefore, a political one, as the Note itself makes clear.

<sup>63</sup> See the *Report of the Thirteenth Session of the Standing Committee* (document SCNL/13/INF.3 p. 10).

<sup>64</sup> As an additional reason for the proposed solution the Note of the Chairman of the Drafting Committee, which was referred to above, stated that the functioning of the 1988 Joint Protocol linking the Paris and the Vienna Convention (therein defined as including any amendments thereto in force for a Contracting Party) could have been jeopardized in some cases (notably, in the case of an incident during transport) if Parties thereto considered each other as non-Contracting Parties to the relevant basic convention. Moreover, similar considerations were also said to apply with respect to the draft supplementary funding conventions which were then being discussed within the Standing Committee.

<sup>65</sup> In Section II.9 of this Commentary, the implications of the solution adopted in the 1997 Protocol on the issue of jurisdiction under the Vienna Convention will be examined.

<sup>66</sup> As was pointed out earlier, Article XXV allows each Contracting Party to denounce the 1963 Convention by giving at least twelve months notice to that effect to the Director General of the IAEA; however, under the same Article, the Convention remains in force for successive periods of five years (after the initial ten-year period), a denunciation notified during one such period only takes effect at the end of that period.

the Parties to the Protocol, denunciation by any of them of the 1963 Convention shall not be construed as denunciation of the Convention as amended by the Protocol.

## 2. The new provisions on the scope of the nuclear liability regime

As was pointed out in Section I.2 of this Commentary, the purpose of the Vienna Convention is the harmonization of national legislation relating to third party liability for damage caused by a nuclear incident occurring at certain installations, or in the course of transport of nuclear material to or from such installations. The Convention does not cover the issue of State responsibility or liability for nuclear damage under the general rules of public international law.

The 1997 Protocol does not substantially change the scope of application of the Vienna Convention as far as rights under public international law are concerned (see Section II.2(a) of this Commentary). On the other hand, the Protocol modifies the scope of application of the international civil liability regime in several respects. In the first place, it envisages the possibility of the inclusion or exclusion of a nuclear installation from the application of the 1997 Vienna Convention on the basis of the risk involved, and makes it clear that the Convention does not apply to installations used for non-peaceful purposes (see Section II.2(b) of this Commentary). Secondly, it extends the “geographical scope” of the Convention so as to cover damage “wherever suffered” (see Section II.2(c) of this Commentary). Finally, it gives a new definition of “nuclear damage”, which will be examined in Section II.3 of this Commentary.

### (a) Civil liability, State liability and rights under public international law

Article XVIII of the 1963 Vienna Convention states that the Convention “shall not be construed as affecting the rights, if any, of the Contracting Parties under the general rules of public international law in respect of nuclear damage”. This provision makes it clear, on the one hand, that rights under public international law are outside the scope of the Convention, which is exclusively concerned with the harmonization of the domestic rules relating to civil liability. On the other hand, the language of Article XVIII appears to cast doubt on the very existence of rights under public international law in respect of nuclear damage.

As far as the scope of the international civil liability regime is concerned, it must be pointed out that a State, as opposed to a private person, may be the operator of an installation covered by the Vienna Convention. A State acting in such capacity would, of course, be liable for nuclear damage under the Convention, *rectius* under domestic law incorporating or implementing the Convention. This is confirmed, first of all, by the definition of “operator”, read in conjunction with the definition of “person”, in Article I.1(c) and (a); secondly, Article XIV makes it clear that, “except in respect of measures of execution, jurisdictional immunities under rules of national or international law shall not be invoked in actions under this Convention before the courts competent pursuant to Article XI”. The State liable as the operator of the nuclear installation where, or in connection with which, a nuclear incident occurs can, therefore, be sued for compensation of nuclear damage.

Apart from the liability a State may incur as operator of a nuclear installation, it will be pointed out in Section II.4(b) of this Commentary that the 1997 Protocol introduces an element of supplementary compensation in the Vienna Convention; more specifically, if the Installation State opts

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In addition to the general provision of Article XXV, mention may also be made of Article XXVI.2 and 3, specifically dealing with the denunciation of the Convention in case of “revision”: a Contracting Party may denounce the Convention by notification to the Director General of the IAEA within twelve months following the first revision conference held pursuant to paragraph 1 of the same Article; in this case, denunciation takes effect one year after notification. However, since that conference ended on 12 September 1997, the period has expired and these provisions are no longer applicable.

for limiting the operator's liability to less than 300 million SDRs (or, during a transitional period, to less than 100 million SDRs), it must make public funds available in order to compensate damage in excess of that limit up to 300 million SDRs (or, during a transitional period, up to 100 million SDRs). In this case, however, the Convention appears to impose on the Installation State a mere international obligation vis-à-vis the other Contracting Parties; whether or not the State is also liable under its domestic law for damage exceeding the operator's liability limit appears to depend on the choice made by that same State when implementing that international obligation.

More generally, as for rights under public international law, it must be pointed out, in the first place, that each Contracting Party is bound by the Vienna Convention, vis-à-vis the other Contracting Parties, to adopt all the substantive and procedural rules and to take all the other measures, that may be necessary in its domestic legal system in order to comply with the provisions of the Convention. There can be no doubt that non-compliance with this obligation on the part of a Contracting Party would result in the violation of corresponding rights of the other Contracting Parties and that these rights would be actionable through the dispute settlement mechanisms provided for by public international law. Indeed, an important aspect of the 1997 amending Protocol is the inclusion in the Vienna Convention of a specific dispute settlement procedure, which will be described in Section II.11 of this Commentary.

Article XVIII of the 1963 Vienna Convention does not, however, relate to the international conventional rights arising out of the provisions of the Convention, but rather to the rights arising out of the "general rules of public international law in respect of nuclear damage". But then the very existence of any such rights is put in doubt by the language used in that provision.

This is obviously not the place for a discussion of the present state of public international law in respect of State liability for nuclear damage outside the Vienna Convention. However, it seems important to recall that the Standing Committee had been instructed to "consider international liability for nuclear damage, including international civil liability, international State liability, and the relationship between international civil and State liability".<sup>67</sup> As was pointed out in Section I.6 of this Commentary, the issue soon met with difficulties within the Committee; several delegations were of the view that the very concept of international State liability raised doubts, that it was necessary to await the results of the work of the UN International Law Commission on the subject,<sup>68</sup> and that, in

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<sup>67</sup> See Section I.6 of this Commentary.

<sup>68</sup> The topic of "international liability for injurious consequences arising from acts not prohibited by international law" was placed on the agenda of the UN International Law Commission in 1978. However, the Commission's work could not make rapid progress for a number of reasons, including the modest support given by State practice to the concept of "State liability", as well as the difficulties inherent in the relationship between that concept and the concept of "State responsibility" for internationally wrongful acts. The Commission was able to complete a set of draft articles on the prevention of significant transboundary harm from hazardous activities in 2001. In 2002 a working group of the Commission made some recommendations on the possible ways of making progress on the matter; it chiefly noted that a model of allocation of loss was to be developed in order for the work to be profitable. The Commission then appointed a new Special Rapporteur, Mr. Pemmaraju Sreenivasa Rao, for the topic. A *First report on the legal regime for allocation of loss in case of transboundary harm arising out of hazardous activities* was presented by the new Rapporteur on 21 March 2003 (UN document A/CN.4/531). The report concludes, inter alia, that "any regime that may be recommended should be without prejudice to claims under civil liability as defined by national law and remedies available at the domestic level or under private international law" (paragraph 153(a)); moreover, "the various models of liability and compensation have also confirmed that State liability is an exception and is accepted in the only case of outer space activities" (paragraph 153(d)). At the fifty-fifth session of the International Law Commission, there continued to be different views as to the "viability of the topic" (see *Report of the International Law Commission. Fifty-fifth session (5 May–6 June and 7 July–8 August 2003)*, UN document A/58/10, paragraphs 154 ff). At the fifty-sixth session of the International Law Commission in 2004, the International Law Commission

any event, the need for a regime of State liability for nuclear damage could be obviated by the establishment of a system of supplementary compensation for damage exceeding the operator's liability.<sup>69</sup> Although some proposals on State liability were indeed put forward within the Standing Committee, these proposals did not receive sufficient support and were eventually withdrawn.<sup>70</sup>

However, the Standing Committee did agree on a revision of Article XVIII, which, as amended by the 1997 Protocol, now reads as follows: "This Convention shall not affect the rights and obligations of a Contracting Party under the general rules of public international law".<sup>71</sup> This compromise solution apparently avoids casting doubt on the existence of such general rules; on the other hand, unlike in the original text of Article XVIII, no reference is expressly made to rules specifically relating to nuclear damage. As a result, Article XVIII still leaves the door open for opposing claims as to the existence of State liability for nuclear damage outside the Vienna Convention.

#### **(b) Installations covered**

Article I.1(j) of the 1963 Vienna Convention defines "nuclear installation" as including: (i) any nuclear reactor<sup>72</sup> other than one with which a means of sea or air transport is equipped for use as a source of power, whether for propulsion thereof or for any other purpose;<sup>73</sup> (ii) any factory using

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adopted on 23 July 2004, a set of eight draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities. The Commission decided to transmit the draft principles through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2006.

<sup>69</sup> See documents NL/2/4, pp. 7–9; SCNL/1/INF.4, pp. 15–18; SCNL/2/INF.2, pp. 2–3; SCNL/3/INF.2/Rev.1, Annex II; SCNL/4/INF.6, pp. 5–6 and 6–7; SCNL/6/INF.4, pp. 9–10; SCNL/7/INF.6, p. 9; SCNL/16/INF.3, p. 3.

<sup>70</sup> In particular, proposals were put forward by Australia and Italy at the third session of the Standing Committee: see document SCNL/3/INF.2/Rev.1, Annex III. At the fourth session, two joint proposals (documents SCNL/4/6 and SCNL/4/7) emerged from an Informal Working Group. These remained in the documentation without any decision being taken on them until they were finally withdrawn at the sixteenth session (see document SCNL/16/INF.3, p. 3).

<sup>71</sup> The Standing Committee decided to amend Article XVIII at the eighth session. However, the original draft amendment, which was based on a proposal submitted by Austria at the sixth session (document SCNL/6/13) only referred to the "rights" of a Contracting Party. Moreover, the original Austrian proposal made specific reference to rights "in respect of liability for nuclear damage", but this reference was opposed by Turkey (see documents SCNL/7/INF.5, pp. 9 and 75; SCNL/8/INF.4, pp. 13 and 29). At the seventeenth session (Part I), it was decided to add a reference to the "obligations" of a Contracting Party, allegedly "in order to maintain consistency with the 1963 Vienna Convention" (see document SCNL/17/INF.4, pp. 5 and 38). But, of course, no reference to such "obligations" is made in the 1963 text of Article XVIII.

<sup>72</sup> "Nuclear reactor" is defined in Article I.1(i) as "any structure containing nuclear fuel in such an arrangement that a self-sustaining chain process of nuclear fission can occur therein without an additional source of neutrons".

<sup>73</sup> As was pointed out in Section I.2 of this Commentary, the 1963 Convention exclusively relates to land-based nuclear installations. A proposal to include nuclear reactors generating power for vessels and airplanes was made during the seventeenth session of the Drafting Committee (document SCNL/17/4). It was pointed out, in this respect, that the 1962 Brussels Convention on the Liability of Operators of Nuclear Ships (referred to in Section I.1 of this Commentary) had never entered into force. But while some delegations supported the proposal, a number of other delegations objected to it. They noted that there were no civilian nuclear-powered vessels, with the exception of a few ice-breakers. In view of the difference of opinion, it was agreed that, although civilian nuclear-powered vessels were not covered by any existing international agreement in force, the Standing Committee could not take up this new issue at such a late stage of its negotiations (see document SCNL/17/INF.4, pp. 5–6).

nuclear fuel<sup>74</sup> for the production of nuclear material,<sup>75</sup> or any factory for the processing of nuclear material, including any factory for the re-processing of irradiated nuclear fuel; and (iii) any facility where nuclear material is stored, other than storage incidental to the carriage of such material.

Unlike the 1960 Paris Convention,<sup>76</sup> the 1963 Vienna Convention does not envisage the inclusion of other nuclear installations by a decision taken by a competent international body. The absence of a provision to this effect may be seen as precluding the possibility of taking into account recent or future developments and covering additional types of installations which may involve risks of a considerable magnitude, such as radioactive waste disposal facilities,<sup>77</sup> installations in the process of being decommissioned,<sup>78</sup> or other types of nuclear installations.<sup>79</sup> The 1997 Protocol inserts in the Vienna Convention a new provision, in Article I.1(j)(iv), whereby the definition of “nuclear installation” includes “such other installations in which there are nuclear fuel or radioactive products

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<sup>74</sup> “Nuclear fuel” is defined in Article I.1(f) as “any material which is capable of producing energy by a self-sustaining chain process of nuclear fission”.

<sup>75</sup> “Nuclear material” is defined in Article I.1(h) as including: “(i) nuclear fuel, other than natural uranium and depleted uranium, capable of producing energy by a self-sustaining chain process of nuclear fission outside a nuclear reactor, either alone or in combination with some other material; and (ii) radioactive products or waste”. “Radioactive products or waste” are defined in Article I.1(g) as “any radioactive material produced in, or any material made radioactive by exposure to the radiation incidental to, the production or utilization of nuclear fuel, but does not include radioisotopes which have reached the final stage of fabrication so as to be usable for any scientific, medical, agricultural, commercial or industrial purpose”.

<sup>76</sup> See Article 1(a)(ii) of the Paris Convention.

<sup>77</sup> As was pointed out in Section I.2 of this Commentary, the 1963 Convention does not specifically include radioactive waste facilities in the definition of “nuclear installation” (Article I.1(j)); on the other hand, the Convention includes in that definition facilities for the storage of nuclear substances (other than storage incidental to transport). Because the definition of “nuclear material” (in Article I.1(g) and (h)) covers radioactive waste, the Convention has sometimes been interpreted as applying to installations for the storage of radioactive waste without any further precision. However, a paper presented by OECD/NEA at the eighth session of the Standing Committee (document SCNL/6/1) made it clear that the issue needed further consideration. At that time, the Drafting Committee merely “took note” of the paper but considered it premature to discuss the issue (see document SCNL/8/INF.4, pp. 13–14). It may be interesting to add that, pursuant to a 1984 Decision of the NEA Steering Committee (NE/M(84)1), waste disposal facilities are to be considered as “nuclear installations” within the meaning of the Paris Convention during their pre-closure phase only. However, the 2004 Amending Protocol is intended to amend Article 1(a)(ii) of the Paris Convention so as to specifically include all “installations for the disposal of nuclear substances” without distinction. The Explanatory Report which is attached to the 2004 Protocol explains that “the Contracting Parties believe that it is desirable to have such facilities considered as “nuclear installations” in their post-closure phase as well” (paragraph 9).

<sup>78</sup> The 2004 Protocol to Amend the Paris Convention will amend Article 8(a)(ii) of the Convention in order to specifically include in the definition of “nuclear installation” all “installations in the process of being decommissioned”. See also paragraph 10 of the Explanatory Report which is attached to the 2004 Protocol.

<sup>79</sup> It may be interesting to mention, in this context, that at the fifth session, the Drafting Committee “showed interest” in the issues raised in a paper presented by OECD/NEA (document SCNL/5/2) concerning potential radiological risks that might be posed by fusion reactors when they were developed. It was “agreed” at the time to give further consideration to this matter in a future session (see document SCNL/5/INF.4, p. 9). A more elaborate OECD/NEA paper, marked as SCNL/6/4, was presented at the sixth session and is attached to document SCNL/6/INF.4 (see pp. 116–124); the Drafting Committee “took note” of the paper and delegations “agreed” that they would “consult with their relevant Governmental authorities regarding the conclusion drawn in the note and whether this issue required further consideration” (see document SCNL/6/INF.4, p. 13). At the seventh session, the Drafting Committee “decided” that it was “premature to consider coverage of future fusion installations by the third party liability regime” (see document SCNL/7/INF.6, p. 9).

or waste as the Board of Governors of the International Atomic Energy Agency shall from time to time determine”.<sup>80</sup>

Moreover, the 1997 Protocol also envisages the possibility of excluding low-risk installations from the application of the Convention. As was pointed out in Section I.2 of this Commentary, Article I.2 of the 1963 Vienna Convention envisages the possibility for the Installation State to exclude small quantities of “nuclear material” from the application of the Convention if the small extent of the risk involved so warrants, provided that maximum limits for the exclusion of such quantities have been established by the Board of Governors of the IAEA and the exclusion is within such limits. However, unlike the Paris Convention,<sup>81</sup> the 1963 Vienna Convention does not envisage the possibility of a similar exclusion in respect of low-risk “nuclear installations”. The 1997 Protocol amends Article I.2 of the Vienna Convention in order to allow for such exclusion, provided that criteria therefor have been established by the Board of Governors of the IAEA and the exclusion satisfies such criteria.

Finally, the 1997 Protocol clarifies the situation with respect to installations used for military purposes. The Preamble of the 1963 Vienna Convention states that one of the reasons for concluding the Convention was “the desirability of establishing some minimum standards to provide financial protection against damage resulting from certain peaceful uses of nuclear energy”. However, there is no further indication in the Convention as to whether or not it also applies to military facilities nor was the question discussed during the Conference which adopted the Convention.

First within the Working Group on Liability for Nuclear Damage and then within the Standing Committee, there was a widespread feeling that victims of all nuclear incidents should be compensated. However, there was a difference of opinion as to whether or not damage involving military facilities was already covered under the Vienna Convention. The prevailing opinion was that the amended Vienna Convention should state unambiguously that the civil liability regime applied, as a matter of principle, to all nuclear installations; it was conceded that the exclusion of any installation used for “non-peaceful” purposes should be possible through a specific declaration to that end on the part of the State operating such installation, but only if that State ensured compensation for nuclear damage arising therefrom, or in connection therewith, to the same extent as provided under the Convention.<sup>82</sup>

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<sup>80</sup> During its Fourth Meeting (7-11 February 2005), INLEX briefly discussed the scope of the existing definitions of “nuclear installation” in the various nuclear liability instruments and the possibility to expand the definition given to the Board of Governors of the IAEA by the 1997 Vienna Protocol. The Group recognized that the definition in the revised Vienna Convention “provided the possibility for the Board of Governors to expand the definition of “nuclear installation” to include, for example, ‘waste disposal facilities’ and ‘installations in the process of decommissioning’” and that the revised Paris Convention now expressly includes such facilities within the definition of ‘nuclear installation’”. The Group concluded that, “the definition of “nuclear installation” in all the instruments included operating reactors and facilities containing nuclear material” and felt that “it was premature at this time to take any action with respect to expanding the definition”. The Group further concluded that, “while expansion of the definition of “nuclear installation” in the revised Vienna Convention was not necessary for an effective and protective global regime, further study could be useful to evaluate the advisability of expanding the definition”, and recognized that, “as a practical matter, the Board of Governors would need broad support by all affected parties to approve such an expansion” (p. 8 of the Chairman’s Report).

<sup>81</sup> See Article 1(b) of the Paris Convention.

<sup>82</sup> See already the *Report of the Second Session of the Working Group* (document NL/2/4, p. 3). The first specific proposal to amend the Vienna Convention in the sense referred to in the text above was articulated during the first session of the Standing Committee and received “wide support”, but already at that time “one delegation” made it clear that it regarded the inclusion of military installations as “inappropriate in view of the fact that such installations are run by governments, and therefore non-insurable, as well as the classified nature of such installations” see (document SCNL/1/INF.4, pp. 5–6). Some drafting changes to

However, during the first part of the seventeenth session of the Standing Committee it was made clear that provisions to that effect would not meet with a general consensus and it was eventually decided to insert in the amending Protocol a provision whereby the Vienna Convention does not apply to nuclear installations used for non-peaceful purposes,<sup>83</sup> thus, the supposed ambiguity in the 1963 Convention is at least dispelled. This provision appears as Article I B of the 1997 Vienna Convention.

(c) **“Geographical scope”**

Article 2 of the 1960 Paris Convention contains a provision stating that the Convention does not apply to nuclear incidents occurring in the territory of non-Contracting States or to damage suffered in such territory, unless the national legislation of the operator liable otherwise provides. As was pointed out in Section I.2 of this Commentary, no corresponding provision can be found in the 1963 Vienna Convention.

In respect of **the place of a nuclear incident**, there can be no doubt that, under Article II, read in conjunction with the definitions of terms such as “operator” and “Installation State” in Article I, the 1963 Vienna Convention principally applies to nuclear incidents occurring in the territory of Contracting Parties; on the other hand, in the case of incidents occurring in the course of transport of nuclear material, it follows from the same definitions that the Vienna Convention does apply even to nuclear incidents occurring outside the territory of a Contracting Party, provided that the installation of the operator liable is located within such territory; moreover, if that installation is not situated within the territory of any State, the Convention applies if it is operated by a Contracting Party or under its authority. Given that the situation has not been changed by the 1997 Protocol, there seems to be no need here to elaborate further on this issue.<sup>84</sup> Since the place where the incident occurs has implications for the issue of jurisdiction under the Convention, the consequences of incidents in non-Contracting States will be examined later from this point of view.

As for **the place where damage is suffered**, the absence of an express limitation of its territorial scope leaves it open to question whether or not the 1963 Vienna Convention allows for coverage of damage suffered outside the territory of the Contracting Parties under the applicable substantive law, which will usually be the law of the Installation State. According to one view, the

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that proposal were examined and adopted during further discussions of the issue within the Standing Committee, or within its Drafting Committee, but such further discussions made it clear that “some delegations”, as opposed to “one”, had reservations on the inclusion of military installations, and preferred to deal with the issue in an optional protocol (see, for example, document SCNL/4/INF.6, pp. 2–3).

<sup>83</sup> The Russian delegation had already made its position clear in a document (SCNL/15/4) presented at the fifteenth session of the Standing Committee (see document SCNL/15/INF.5, p. 86). During the first part of the seventeenth session, “one delegation” reiterated its position that the amending Protocol should not cover nuclear installations used for non-peaceful purposes and urged deletion of the relevant draft provision, and “other delegations” supported this view (see document SCNL/17/INF.4, pp. 3–5). The decision to replace that provision with a new provision stating unambiguously that the Convention does not apply to installations used for non-peaceful purposes was taken within the Drafting Committee (see document SCNL/17/INF.4, p. 19). At the Diplomatic Conference, a proposal by Egypt (document NL/DC/L.6) tried to re-open the issue, but was not adopted.

<sup>84</sup> Within the Standing Committee, the issue was initially discussed together with the related issue of the place where damage is suffered. During the first session of the Standing Committee, a proposal was made and “widely supported” whereby the Convention should state clearly that it applied to nuclear damage suffered in the territory of a Contracting Party, or on or over the high seas, “regardless of where the nuclear incident causing that damage occurred”; however, as far as damage suffered in the territory of a non-Contracting State, the Convention should only apply in case of a nuclear incident “occurring in the territory of a Contracting Party” (see document SCNL/1/INF.4, p. 4). But the provisions on “geographical scope” that were eventually adopted no longer refer to the place where the nuclear incident occurs.

Vienna Convention, like the Paris Convention, should be interpreted as allowing for such coverage.<sup>85</sup> On the other hand, it cannot be overlooked that a provision similar to Article 2 of the Paris Convention had originally been envisaged for insertion in the Vienna Convention but was eventually deleted, apparently because of opposition to the notion that non-Parties might benefit.<sup>86</sup>

The major argument against covering damage suffered outside the territory of the Contracting Parties is that, with limited insurance funds to call on, adding more claimants would reduce the share available for victims in the Contracting Parties, without reciprocal benefits. On the other hand, damage outside the territory of Contracting Parties may well be suffered by their nationals or by, or on board, ships or aircraft flying their flags. Moreover, some commentators have questioned whether leaving victims in non-Contracting States without compensation is in line with public international law; indeed, it has been argued that the legality of the peaceful uses of nuclear energy is conditional upon an adequate system of compensation in case of damage.

The 1997 amending Protocol inserts in the Vienna Convention a new provision, Article I A, whereby the Convention applies, in principle, to nuclear damage “wherever suffered”.<sup>87</sup> Thus, the principle is the opposite of the one embodied in the existing text of Article 2 of the Paris Convention.<sup>88</sup>

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<sup>85</sup> In a *Note on the Relationship between the unrevised and the revised Vienna Convention* prepared by the Chairman of the Drafting Committee on 6 May 1994 (document IWG/4/INF.2) attached to the *Report of the Fourth Meeting of the Intersessional Working Group of the Standing Committee* (document SCNL/IWG/4/INF.4, p. 48 ff), it was pointed out that, although in 1964 the Standing Committee had taken the view that the Vienna Convention did not cover damage in a non-Contracting State (in this respect, see the following footnote), “the interpretation is neither binding nor undisputed”. The Note recalled, in this respect, that, by virtue of the 1988 Joint Protocol, the territorial scope of the Vienna Convention was extended to damage suffered in the States Party to both the Paris Convention and the Joint Protocol, and pointed out that “consequently, the Joint Protocol is based on the assumption that such extension is feasible under the Vienna Convention – also in relation to a Vienna State which is not a party to the Joint Protocol” (p. 50).

<sup>86</sup> See *Civil Liability for Nuclear Damage: Official Records of the International Conference on Civil Liability for Nuclear Damage*, Vienna, 1964 (IAEA, STI/PUB/54), pp. 183 f and 121 ff. Moreover, in April 1964 the (then) Standing Committee on Civil Liability for Nuclear Damage took the view that the Convention only applies to damage suffered within the jurisdiction of Contracting States or on the high seas, even where the nuclear incident occurs outside the territory of such Contracting States (see the background document on liability for nuclear damage prepared by the Secretariats of IAEA and NEA for the second session of the Working Group on Liability for Nuclear Damage (document NL/2/INF.2, p. 1).

<sup>87</sup> As was pointed out earlier, the initial idea was to cover damage suffered “in the territory of a non-Contracting State” only in case of “a nuclear incident occurring in the territory of a Contracting Party” whereas damage suffered “in the territory of a Contracting Party or on or over the high seas” would have been covered “regardless of where the nuclear incident causing that damage occurred” (see document SCNL/1/INF.4, p. 4). But already during the second session of the Standing Committee, it was decided to refer to damage “wherever suffered” and to omit any reference to the place of the nuclear incident (see the *Report of the Drafting Committee* in Annex I to document SCNL/2/INF.2, p. 1).

<sup>88</sup> Once it enters into force, the 2004 Protocol to amend the Paris Convention will bring the Paris Convention more or less in line with the 1997 Vienna Convention. However, unlike Article I A of the 1997 Vienna Convention, Article 2 of the Revised Paris Convention does not give the Installation State the faculty of excluding damage suffered in non-Contracting nuclear States on the basis of the premiss that nuclear damage is covered wherever suffered; rather, it directly provides that the Convention applies to damage suffered in the territory, or maritime zones, of a non-Contracting nuclear State only if that State, at the time of the nuclear incident: (a) is a Contracting Party to the 1963 Vienna Convention (and any amendment thereto which may be in force for it) and to the 1988 Joint Protocol, provided that the Installation State is also a Party to the Joint Protocol; or (b) has in force nuclear liability legislation “which affords equivalent reciprocal benefits, and which is based on principles identical to those of this Convention, including, inter alia, liability without fault of the operator liable, exclusive liability of the operator or a provision to the same effect, exclusive jurisdiction of the competent court, equal treatment of



There is, however, an important exception to the general rule. In fact, Article I A.2 and 3 allows the legislation of the Installation State to exclude damage suffered in a non-Contracting State which, at the time of the nuclear incident, “(a) has a nuclear installation in its territory, or in any maritime zones established by it in accordance with the international law of the sea; and (b) does not afford equivalent reciprocal benefits”.<sup>89</sup>

The idea behind this provision is that a nuclear State should either join the Vienna Convention or afford “reciprocal benefits” if it wants the funds available under the Convention to cover damage suffered in its territory. The question may arise of the precise meaning of reciprocity in this context. It seems obvious that the exclusion of damage suffered in a non-Contracting nuclear State could be based on the fact that the legislation of that State does not provide for compensation of damage suffered by victims in States party to the Vienna Convention. It is less obvious that the exclusion could be based on the fact that the legislation of that State does not ensure the same amount of compensation<sup>90</sup> or, a fortiori, that it does not conform with all the principles of nuclear liability embodied in the Vienna Convention.<sup>91</sup> The records of discussions within the Standing Committee do

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all victims of a nuclear incident, recognition and enforcement of judgements, free transfer of compensation, interests and costs”.

<sup>89</sup> Within the Standing Committee, there were initially divergent views on the question of reciprocity and on the discretionary nature of the extension of the scope of the Convention to damage suffered in the territory of a non-Contracting State. Although the proposal to extend the scope of the Convention received “wide support”, alternative proposals would have left such extension to the discretion of the Installation State and/or would have permitted the Installation State to subject such extension to the requirement that the non-Contracting State “shall afford reciprocal benefits”. But there was “general agreement” that the notion of “reciprocity” required further study and the suggestion was made from the beginning that it would not be appropriate to require reciprocity from a State without a nuclear industry (see document SCNL/1/INF.4, pp. 4–5). During the second session of the Standing Committee, it was decided to extend coverage to damage “wherever suffered”, but to allow the legislation of the Installation State to exclude from the application of the Convention damage suffered in the territory, or maritime zones, of a non-Contracting State. However there was still some controversy as to the possibility of excluding damage suffered in non-nuclear States and on the question of “reciprocity” (see the *Report of the Drafting Committee* in Annex I to document SCNL/2/INF.2, pp. 2–3). During the third session, the Drafting Committee decided to allow for the exclusion of damage suffered in the territory, or maritime areas, of a non-Contracting State only if that State, at the time of the incident, had a nuclear installation in its territory, or maritime areas, and afforded no “reciprocal benefits” (see the *Report of the Drafting Committee* in Annex I to document SCNL/3/INF.2/Rev.1). The question was again discussed as a result of the decision to include in the Vienna Convention an element of supplementary compensation provided by the Installation State beyond the operator’s liability limit, where this is established at less than 300 million SDRs (see Section II.4(b) of this Commentary), but the “prevailing view” was that the benefits of such additional compensation should not be withheld from non-nuclear States that are not Contracting Parties (see documents SCNL/9/INF.5, p. 9 and SCNL/13/INF.3, p. 9).

<sup>90</sup> It may interesting to mention, in this respect, that Article XIII.2 of the 1997 Vienna Convention allows the legislation of the Installation State to derogate from “the provisions” of the Convention, in so far as compensation is in excess of 150 million SDRs, with respect to damage suffered in the territory, or maritime zones, of a nuclear non-Contracting State which, at the time of the incident, “does not afford reciprocal benefits **of an equivalent amount**” (emphasis added). This provision will be examined in greater detail in section 8 below. However, it seems important to point out here that, in the context of Article XIII.2, the concept of reciprocity clearly refers to the amount of compensation.

<sup>91</sup> It may be interesting to recall, in this respect, the corresponding provision in the 2004 Protocol to Amend the Paris Convention, which was already referred to in footnote 88. It was pointed out in that footnote that, unlike Article I A of the 1997 Vienna Convention, Article 2 of the revised Paris Convention does not give the Installation State the faculty of excluding damage suffered in non-Contracting nuclear States on the basis of the premiss that nuclear damage wherever suffered is covered; rather, it directly provides that the Convention applies to damage suffered in the territory, or maritime zones, of a non-Contracting nuclear State only if that State, at the time of the nuclear incident meets certain conditions. Among such conditions, there is the requirement that it has nuclear liability legislation in place “which affords equivalent reciprocal

not throw much light on the precise meaning of “reciprocal benefits”. However, a discussion on the scope of the exclusion was held within the Drafting Committee during the Seventh Session, and it was “agreed” that “a Contracting Party could decide as to which non-Contracting State or States the exclusion would be applicable”.<sup>92</sup> It would seem that, under the general principles of the law of treaties, such a decision could not be challenged by the affected non-Contracting State or States.<sup>93</sup>

More specifically, under Article I A.2, the legislation of the Installation State may exclude coverage of damage suffered not only (a) in the “territory” of non-Contracting nuclear States, but also (b) in “any maritime zones” established by such States “in accordance with the international law of the sea”. The term “territory” used under (a) can be taken to include a coastal State’s internal and territorial waters.<sup>94</sup> Therefore, the “maritime zones” referred to under (b) are those zones, such as the continental shelf<sup>95</sup> and the exclusive economic zone,<sup>96</sup> which are not subject to a coastal State’s territorial sovereignty but rather to more limited “sovereign rights” and/or “jurisdiction”.<sup>97</sup>

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benefits **and** which is based on principles identical to those of this Convention ...” (emphasis added). It would, therefore, appear that, in the context of Article 2 of the revised Paris Convention, the expression “equivalent reciprocal benefits” does not, by itself, require conformity of legislation with the nuclear liability principles therein mentioned, which is considered as an additional requirement.

<sup>92</sup> See document SCNL/7/INF.6, p. 8.

<sup>93</sup> The question of the meaning of “equivalent reciprocal benefits” in Article I A of the 1997 Vienna Convention was discussed during the Fourth Meeting of INLEX (7-11 February 2005). The Group concluded that “any ambiguity related only to the extent that certain non-Contracting States might benefit and that such States would not be entitled to challenge the decision of a Contracting Party as to what countries were excluded. The exclusion of such States would not affect the overall operation of the global regime for Contracting Parties (other than make more funds available for compensating damage in Contracting Parties)” (p. 9 of the Chairman’s Report). This conclusion appears to be based on the international law of treaties. In fact, Article 34 of the 1969 Vienna Convention on the Law of Treaties states that “a treaty does not create either obligations or rights for a third State without its consent”. Moreover, Article 36 of the same Convention makes it clear that, although the third State’s consent is presumed where the treaty provides for “rights”, as opposed to “obligations”, “a right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States”. That is not the case as far as Article I A of the 1997 Vienna Convention is concerned; the extension of coverage to damage “wherever suffered” is clearly not intended to accord an international right to third States, but rather to extend the benefits of the Convention to the victims in those States. Once the Convention is implemented, these victims, including third States which have suffered nuclear damage in their own right, will, of course, have a right to compensation, but this right will derive from domestic law incorporating, or otherwise implementing, the Convention, and not directly from the Convention intended as a source of international law.

<sup>94</sup> In earlier drafts of the provision on “geographical scope”, it was expressly stated that the term territory included the territorial sea, but there was general agreement within the Standing Committee that, even without such an express statement, the term “territory” would have included the territorial sea, especially in view of the fact that a statement to that effect was inserted in the Exposé des Motifs attached to the text of the 1960 Paris Convention (paragraph 7). Article 1.1 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone states that “the sovereignty of a State extends, beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea”. Under Article 5.1 of the same Convention, “waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State”. Similar provisions are contained in Articles 2.1 and 8.1 of the 1982 United Nations Convention on the Law of the Sea. The 1982 Convention specifies that the maximum breadth of a State’s territorial sea is 12 nautical miles (Article 3).

<sup>95</sup> The continental shelf is not actually a sea area, since it comprises the seabed and subsoil of the submarine areas extending beyond a coastal State’s territorial sea. The coastal State enjoys “sovereign rights” over its continental shelf for the purpose of exploring it and exploiting its natural resources. These rights are exclusive and do not depend on occupation or on any express proclamation; on the other hand, they do not affect the status of the superadjacent waters, which may be subject to the regime of the high

In view of the fact that such “maritime zones” can extend to a considerable distance from the coast,<sup>98</sup> it seems important to point out that, under Article I A.4, any exclusion of damage suffered in

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seas or of the exclusive economic zone (if the coastal State has established such a zone) (see Articles 1 to 3 of the 1958 Geneva Convention on the Continental Shelf and Articles 76 to 78 of the 1982 United Nations Convention on the Law of the Sea). Under Article 80 of the 1982 Convention, the coastal State also enjoys the exclusive right to construct or authorize and regulate the construction, operation and use of, artificial islands, installations and structures over its continental shelf.

<sup>96</sup> The exclusive economic zone (EEZ) is a zone beyond and adjacent to a coastal State’s territorial sea in respect of which the coastal State has a complex of “rights, jurisdiction and duties”. The coastal State enjoys “sovereign rights” for the purpose of exploring and exploiting, conserving and managing the natural resources of the zone and with regard to other activities for its economic exploration and exploitation. The coastal State also has “jurisdiction” with regard to the establishment and use of artificial islands, installations and structures within its EEZ, as well as to marine scientific research and the protection and preservation of the marine environment. Unlike its rights over the continental shelf, the coastal State’s rights and jurisdiction in respect of the EEZ depend on an actual proclamation. The rules relating to the EEZ were first “codified” in Part V (Articles 55 to 75) of the 1982 United Nations Convention on the Law of the Sea.

<sup>97</sup> The question of the appropriate language to use in order to refer to maritime areas beyond a State’s “territory” was the subject of lengthy discussions within the Standing Committee from the very beginning of the negotiations relating to the “geographical scope” of the Convention. When the Standing Committee decided to cover damage “wherever suffered”, but to allow for the exclusion of damage suffered in a non-Contracting State, the original idea was to refer to damage suffered in the “territory, including the territorial sea”, of a non-Contracting State and in “the exclusive economic zone” established by that State in accordance with “international law” (see document SCNL/2/INF.2, Annex I). No reference was made to the continental shelf. On the other hand, if a non-Contracting State had not established an EEZ, the original proposal would have allowed the Installation State to exclude damage suffered in “an area beyond and adjacent to the territorial sea of that State determined in accordance with international law and extending not more than 200 nautical miles from the base lines from which the breadth of its territorial sea is measured” (see document SCNL/2/INF.2, Annex I). However, all reference to this “area” was deleted by the Drafting Committee during the seventh session (see document SCNL/7/INF.6, p. 8). During the thirteenth session, a proposal by Spain to insert references to the “contiguous zone” in paragraphs 2 and 3 of the article on “geographical scope” was discussed within the Drafting Committee but received “no support” (see document SCNL/13/INF.3, p. 9). But the question of the “contiguous zone” was again raised by Spain during the fourteenth session and an open-ended working group was set up in order to propose acceptable drafting changes; as a result, the present wording of the article was finally adopted (see document SCNL/14/INF.5, p. 27).

The contiguous zone is a zone within which the coastal State can exercise the control necessary to prevent and punish infringements of its customs, fiscal, immigration or sanitary laws and regulations, committed or about to be committed “within its territory or territorial sea” (see Article 24 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone and Article 33 of the United Nations Convention on the Law of the Sea). According to the 1982 Convention, the contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured.

<sup>98</sup> According to the 1982 Convention on the Law of the Sea, the EEZ can extend up to 200 nautical miles from the territorial sea baselines (Article 57). As for the continental shelf, Article 76 of the 1982 Convention envisages two possibilities: (a) if the “continental margin” does not extend up to a distance of 200 nautical miles from the territorial sea baselines, the rights of the coastal State over the seabed and subsoil extend up to that distance and are, in substance, absorbed by its rights within the EEZ; (b) if the “continental margin” extends to a distance of more than 200 nautical miles from the territorial sea baselines, the rights of the coastal State over the seabed and subsoil extend up to the outer edge of that continental margin. In this latter case, there is, however, a maximum limit: the continental shelf cannot extend beyond a distance of 350 nautical miles from the territorial sea baselines (or, alternatively, 100 nautical miles from the 2,500 metre isobath, which is the line connecting the depth of 2,500 metres). The “continental margin” comprises “the submerged prolongation of the land mass of the coastal State, and consists of the seabed and subsoil of the shelf, the slope and the rise”; it does not include “the deep ocean floor with its oceanic ridges or the subsoil thereof”.

such zones “shall not extend to damage on board or to a ship or an aircraft”. An exclusion pursuant to Article I A. 2, could, however, prevent compensation of damage suffered on or by artificial islands, installations and structures constructed within a coastal State’s exclusive economic zone or on its continental shelf, as well as other damage not suffered by or on board a ship or aircraft.<sup>99</sup>

As for damage suffered in the territory of a non-nuclear non-Contracting State, or in the maritime zones established by that State in accordance with the law of the sea, there can be no doubt that the 1997 Vienna Convention applies thereto. Moreover, inasmuch as the Convention applies to damage “wherever suffered”, damage suffered on the high seas, or in the maritime zones established by the Contracting Parties, is also covered.

It is important to point out that the new provisions on the so-called “geographical scope” of the 1997 Vienna Convention have no direct bearing on the nationality of individual claimants, and have to be read in conjunction with the non-discrimination provision contained in Article XIII of the Convention. The implications of this will be examined in greater detail in Section II.8 of this Commentary.

### 3. The new definition of nuclear damage

Another important feature of the 1997 Protocol to Amend the Vienna Convention is the introduction of a new and detailed definition of what is comprised in the concept of “nuclear damage” for purposes of compensation. The need to update the definition of “nuclear damage” was, indeed, one of the key issues in the negotiations within the Standing Committee (see Section II.3(a) of this Commentary); these led to the inclusion of a series of new heads of damage in order to ensure compensation of various categories of economic loss (see Section II.3(b) of this Commentary), as well as of measures of reinstatement of impaired environment and of preventive measures (see Section II.3(c) of this Commentary). Moreover, the 1997 Protocol modifies the Vienna Convention in respect of compensation of damage to the means of transport upon which the nuclear material involved was being carried at the time of a nuclear incident (see Section II.3(d) of this Commentary).

#### (a) Origin and general features of the new definition

As was alluded to in Section I.2 of this Commentary, the damage for which liability and compensation are envisaged under the 1963 Vienna Convention is directly linked to that suffered by individuals or their property; nuclear damage is in fact defined as meaning “loss of life, any personal injury or any loss of, or damage to, property”(Article I.1(k)(i)). Other kinds of damage are only included “to the extent that the law of the competent court so provides”(Article I.1(k)(ii)). Therefore, damage to the general environment (water, air, the soil, etc.) is, per se, outside the scope of the regime of civil liability and can only be compensated if the applicable substantive law so provides. Moreover, it is for the applicable law to determine the precise meaning of loss of, or damage to, property, and the extent to which environmental damage can be compensated under those heads. The wide discretion thus given to the national legislation of the Contracting Parties may give rise to uncertainties as to the extent of compensation to be paid in case of a nuclear incident.

In fact, after the Chernobyl incident, it became clear that the various legal systems of the States in which damage was suffered were likely to provide different answers to the questions of whether, and to what extent, the wide range of pecuniary losses that may derive from a serious nuclear

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<sup>99</sup> In the light of the new definition of nuclear damage, which will be examined in Section II.3 of this Commentary, such damage may include loss of income deriving from an economic interest in any use or enjoyment of the marine environment incurred as a result of a significant impairment of that environment; moreover, it may also include the costs of reasonable measures of reinstatement of impaired marine environment or of preventive measures taken in order to prevent or minimize damage.

incident could qualify as property damage. It was pointed out, for example, that there is a difference, from the legal point of view, between the financial loss due to the seizure of contaminated vegetables and the financial loss due to a decline in turnover caused by changing attitudes of customers afraid of the possible dangers of nuclear contamination. As for damage to the environment as such, the discussion centred on the extent to which it was necessary to compensate it, in view of the difficulties involved in its evaluation in monetary terms. There was a widespread feeling that, apart from economic loss or loss of profit, compensation should be limited to the costs of reasonable measures of reinstatement undertaken or to be undertaken; on the other hand, there was also some movement towards allowing compensation even when reinstatement is impossible.

From the beginning of the negotiations on the revision of the Vienna Convention, there was “general agreement” that the definition used in the Convention was “ambiguous and inadequate” and that a “more appropriate definition” should be developed.<sup>100</sup> On the other hand, it was clear to all delegations that a wider definition of nuclear damage could only have practical effect if sufficient financial resources were made available on the basis of the operator’s liability or on some other basis. The issue was, therefore, closely linked to that of the increase of the amount of compensation, which will be examined in Section II.4 of this Commentary. Moreover, it was feared that the inclusion of almost all possible types of damage in the new definition might seriously jeopardize compensation of damage for loss of life or personal injury. As will be seen in Section II.7 of this Commentary, the Protocol tries to deal with this problem by giving priority to claims for loss of life or personal injury in cases where the damage to be compensated exceeds the amount of money available for compensation.

As for the new definition, serious disagreements soon arose within the Standing Committee, mainly due to different conceptions of national tort law in respect of economic loss and environmental damage, and the definition eventually adopted represents a difficult compromise. The compromise, embodied in the new Article I.1(k) of the 1997 Vienna Convention, consists in adding to loss of life and personal injury and to loss of, or damage to, property a series of other heads of damage each of which, in principle, should be compensated, but only “to the extent determined by the law of the competent court”.<sup>101</sup>

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<sup>100</sup> See the *Report of the Second Session of the Working Group on Liability for Nuclear Damage* (document NL/2/4, p. 3).

<sup>101</sup> The first proposal discussed within the Standing Committee enumerated the various heads of damage without any reference to the possibility for the law of the competent court to determine the extent of compensation. In addition to loss of life or personal injury and loss of or damage to property, these heads included “loss or damage by contamination to the environment” as well as preventive measures; compensation for impairment of the environment was limited to “loss of profit from that impairment” and to costs of reasonable measures of reinstatement (see document SCNL/1/INF.4, pp. 6–7). When the Drafting Committee decided to include in the definition of nuclear damage “other loss of profit” unrelated to impairment of the environment, there was disagreement on whether or not coverage of damage under **that** head, as well as the extent of such coverage, should be left to be determined by the law of the competent court (see documents SCNL/2/INF.2, Annex I, p. 3; SCNL/3/INF.2/Rev.1, Annex I, p. 3). In addition, during the sixth session, the Drafting Committee “registered interest” in a German proposal (document SCNL/6/5) aimed at leaving to the law of the competent court the decision as to whether or not “pure economic loss” related to impairment of the environment, as opposed to measures of reinstatement, should be compensated (see document SCNL/6/INF.4, Annex I, pp. 10 and 31–34). A “detailed discussion” which took place within the Drafting Committee during the seventh session, made it clear that, whereas the “prevailing view” was in favour of leaving “pure loss of profit not related to impairment of the environment” to be determined by the law of the competent court, views were still “divided” on coverage of “pure economic loss related to environmental damage” (see document SCNL/7/INF/6, Annex I, pp. 7–8). However, at the eighth session, the “prevailing view” was in favour of referring both issues to the law of the competent court (see document SCNL/8/INF.4, Annex I, pp. 13 and 17). With the progress of negotiations it became increasingly clear that some delegations were in favour of subjecting even

Despite some ambiguity in this formulation, it must be stressed that the question of the admissibility of claims for most of the new heads of damage, i.e. those enumerated under Article I.1(k)(iii) to (vi), is not left to the discretion of national law. This is confirmed by the exception constituted by the residual head of damage enumerated under Article I.1(k)(vii), which can only be compensated “if permitted by the general law on civil liability of the competent court”.<sup>102</sup> For the other heads of damage, the law of the competent court will have to be referred to primarily in order to determine their precise meaning, especially in relation to the concept of property damage.<sup>103</sup>

Another important feature of the new definition relates to the cause of nuclear damage. Under the 1963 Vienna Convention, damage can only be deemed to be nuclear damage if it arises out of or results from the radioactive properties (or a combination of radioactive properties with toxic, explosive or other hazardous properties) of **nuclear fuel** or **radioactive products or waste** in a nuclear installation, or of nuclear material coming from, originating in or sent to such an installation. Damage caused by “other ionizing radiation emitted by any other source of radiation inside a nuclear installation” (Article I.1(k)(iii)) is only covered if the law of the Installation State so provides. However, the 1960 Paris Convention, which deals with this question in the definition of “nuclear

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compensation of measures of reinstatement to the law of the competent court, but that suggestion did not meet with “general agreement” (see document SCNL/13/INF.3, p. 4). Although a decision to “adopt” the revised definition was taken by the Standing Committee at the fourteenth session (document SCNL/14/INF.5, pp. 3–5), the issue was reopened as a result of discussions relating to the draft Convention on Supplementary Funding. The text which emerged from the sixteenth session (first part) would have subjected the extent of compensation of all categories of nuclear damage to the law of the competent court (see document SCNL/16/INF.3, pp. 20 and 25). But during the second part of the seventeenth session, the delegation of France proposed to relocate the proviso “to the extent determined by the law of the competent court” in order to avoid its application to loss of life or personal injury and to loss of or damage to property, and the present wording of the definition was finally adopted (see document SCNL/17.II/INF.7, pp. 4–5, 15, 17, and 22–23).

As a result of the new definition, and of the role still left to national law to give effect to the meaning of the particular heads of damage, a consequential amendment has been adopted in respect of Article II.6 of the Vienna Convention which, in the 1997 version, reads as follows: “No person shall be liable for any loss or damage which is not nuclear damage pursuant to sub-paragraph (k) of paragraph 1 of Article I but which could have been determined as such pursuant to the provisions of that sub-paragraph”. This provision relates to the principle of exclusive liability of the operator, which was explained in Section I.3(b) of this Commentary, and which has not been changed by the 1997 Protocol. It may be interesting to recall that, during the twelfth session, a decision to delete Article II.6 had been taken by the Drafting Committee (see document SCNL/12/INF.6, Annex I, p. 10). However, the issue was reopened at the Diplomatic Conference and the present text was adopted on the basis of a proposal by Sweden (document NL/DC/L.12) (see Annex I to the Report of the Committee of the Whole (document NL/DC/6.Add.1, p. 6)).

<sup>102</sup> The reason for the use of this expression, as opposed to “the law of the competent court”, will be explained later, in Section II.3(b) of this Commentary.

<sup>103</sup> The implications of the new definition of nuclear damage were discussed by INLEX at its fourth meeting (7-11 February 2005). The Group noted that “the definition of ‘nuclear damage’ in the CSC and in the revised Vienna and Paris Conventions make it clear that the additional categories are covered ‘to the extent determined by the law of the competent court’. The Group concluded, in this context, that the definition of ‘nuclear damage’ in the 1963 Vienna Convention was sufficiently broad to encompass all types of damage resulting from a nuclear incident but the parameters of the types of damage actually covered were dependent on the law of the competent court. The addition of explicit categories of damage such as ‘impairment of the environment’ and ‘economic loss’ in the definition of ‘nuclear damage’ in the revised Paris and Vienna Conventions and the CSC was intended to require the competent court to consider such damage. The addition of the phrase ‘to the extent determined by the law of the competent court’ was intended to emphasize that the breadth of such coverage continued to be left to the competent court to determine. The Group felt that it was desirable to leave this discretion as to the exact coverage of nuclear damage to national law and the competent court, recognizing at the same time that this may result in different coverage in different situations” (p. 4 of the Chairman’s Report).

incident”, covers damage due to ionizing radiations emitted by “any source of radiation inside a nuclear installation”.<sup>104</sup>

The new Article I.1(k) brings the 1997 Vienna Convention in line with the 1960 Paris Convention by providing that damage is covered to the extent that it “arises out of or results from ionizing radiation emitted by any source of radiation inside a nuclear installation, or emitted from nuclear fuel or radioactive products or waste in, or of nuclear material coming from, originating in, or sent to, a nuclear installation, whether so arising from the radioactive properties of such matter, or from a combination of the radioactive properties with toxic, explosive or other hazardous properties of such matter”. In any case, there must be an emission of ionizing radiation before damage can give rise to compensation under the Convention;<sup>105</sup> the only exception relates to preventive measures, which will be referred to in Section II.3(c) of this Commentary.

**(b) The new heads of damage: (i) categories of economic loss**

Coming now to the new heads of damage enumerated under Article I.1(k)(iii) to (vii), these include, in the first place, three categories of so-called “economic loss”, otherwise known as *lucrum cessans*. The **first category** of economic loss, enumerated under (iii) is constituted by consequential economic loss arising from loss of life, personal injury or loss of, or damage to, property which is incurred by a person entitled to claim in respect of such loss or damage. For example, medical costs, loss of earnings due to illness or death will fall under this head; loss of income deriving from the destruction of contaminated crops or from the halt in production consequential to damage to a factory will also fall under this head. However, this kind of economic loss is to be compensated in so far as it is not already included in the concepts of loss of life, personal injury, or loss of, or damage to, property under the law of the competent court, i.e. the applicable substantive law.

The **second category** of economic loss, enumerated under (v), is constituted by “loss of income deriving from an economic interest in any use or enjoyment of the environment, incurred as a result of a significant impairment of that environment”.<sup>106</sup> This category of economic loss is

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<sup>104</sup> See Article 1(a)(i) of the 1960 Paris Convention.

<sup>105</sup> The original proposal discussed within the Standing Committee was drafted in a different way, based on the wording used in the existing text of the Vienna Convention. It referred to damage arising out of, or resulting from: “the radioactive properties or a combination of radioactive properties with toxic, explosive or other hazardous properties of nuclear fuel or radioactive products or waste in, or of nuclear material coming from, originating in, or sent to a nuclear installation; or other ionizing radiation emitted by any source of radiation inside a nuclear installation” (see document SCNL/1/INF.4, p. 7). The present (rather convoluted) wording only emerged during the seventeenth session (Part I) on the basis of a proposal made by the United Kingdom, which was apparently intended to “clarify that liability should only arise if radioactive release occurs” (see document SCNL/17/INF.4, pp. 4, 16–17, and 24). In this respect, it must be mentioned that a proposal had been made by Israel (document SCNL/12/2) whereby damage caused by authorized releases would be excluded. The proposal was discussed within the Drafting Committee during the thirteenth session but received “no support” and was withdrawn (see document SCNL/13/INF.3, Annex I, p. 9). A new proposal to the same effect was submitted by Israel at the Diplomatic Conference (document NL/DC/L.17), but was not adopted.

<sup>106</sup> The original proposal discussed within the Standing Committee included “loss of profit” together with the costs of reasonable measures of reinstatement in a single head of damage constituted by “loss or damage by contamination to the environment”, without any reference to the need for that loss to derive from an economic interest in the use or enjoyment of the environment (see document SCNL/1/INF.4, pp. 6–7). As from the eighth session of the Standing Committee, the definition of nuclear damage enumerated measures of reinstatement as a separate head, and included “loss of profit from impairment of the environment”, together with other “loss of profit”, in another head of damage which could only be compensated “if determined by the law of the competent court”, but still without any reference to the need for that loss to derive from an economic interest in the use or enjoyment of the environment (see document

sometimes labelled as “pure economic loss” because it is an economic loss incurred by a person which is not related to any property damage suffered by that person. For example, fishermen, who do not own the fish in the sea, may suffer a loss because such fish is contaminated; similarly, a person managing a hotel at some holiday resort, who does not own the public beach close to his hotel, may suffer a loss because tourists stay away for fear that the beach may be contaminated. As was pointed out in Section II.3(a) of this Commentary, it is, however, necessary that the loss arises out of an emission of ionizing radiation. If, for example, a ship with nuclear substances sinks, but there is no emission, economic loss suffered as a result of widespread public fear of contamination will not be covered.<sup>107</sup>

Moreover, this category of economic loss is to be compensated, in its turn, only in so far as it is not already included in the concept of property damage under the “law of the competent court”. The competent court will also have to decide if the impairment of the environment is “significant”.<sup>108</sup> Finally, the competent court will have to answer the difficult question of the remoteness of claims, which is left open by the definition; going back to the examples given above, it will have to decide if the fishermen’s suppliers, who may have suffered a loss as well, are too remote in the chain of causation, or if the hotel is sufficiently close to the contaminated beach and depends on that beach for its turnover.<sup>109</sup>

Finally, the **third category** of economic loss, enumerated under (vii) is constituted by “any other economic loss, other than that caused by the impairment of the environment”.<sup>110</sup> This category of economic loss may also be labelled as “pure economic loss”, since it is not related to any property damage suffered by the person entitled to claim compensation. However, unlike the category

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SCNL/8/INF.4, p. 17). The present wording was only adopted during the seventeenth session (first part) on the basis of a proposal of the United Kingdom, which was intended to “restrict economic loss from impaired environment to certain types” (see document SCNL/17/INF.4, pp. 5, 16, and 24).

<sup>107</sup> At its fourth meeting (7-11 February 2005), INLEX discussed the issue of possible damage that could be compensated under this head. It “considered situations such as hotels or fishing businesses relying on beaches or fish stocks harmed by releases and concluded that the competent court could indeed cover such damage. The Group also concluded that subsistence fisheries could also be covered” (p. 4 of the Chairman’s Report).

<sup>108</sup> The original proposal discussed within the Standing Committee made no reference to the need for that impairment to be significant (see document SCNL/1/INF.4, pp. 6–7). On this question, see the discussion relating to measures of reinstatement in Section II.3(c) of this Commentary.

<sup>109</sup> The corresponding provision in the 2004 Protocol to Amend the 1960 Paris Convention leaves less discretion to the competent court, since it covers loss of income deriving from a “direct” economic interest in the use or enjoyment of the environment. The issue of discrepancies between new definitions of nuclear damage in the revised Paris and Vienna Convention (and the Convention on Supplementary Compensation) was discussed by INLEX at its fourth meeting (7-11 February 2005). On this specific issue, the Group concluded that “the addition of ‘direct’ was an attempt to narrow the scope of economic loss covered”. The Group also noted, however, that “a court always had to consider at what point damage becomes too remote to recover and that the inclusion of ‘direct’ provides guidance on how a court should consider remoteness but still leaves the ultimate determination with the competent court” (p. 3 of the Chairman’s Report).

<sup>110</sup> There was no reference to this residual head of damage in the original proposal discussed within the Standing Committee (see document SCNL/1/INF.4, pp. 6–7). Already during the second session of the Standing Committee reference to the residual head of damage was incorporated in the draft text, but there was still disagreement on whether or not coverage of damage under this head, as well as the extent of such coverage, should be left to be determined by the law of the competent court (see documents SCNL/2/INF.2, Annex I, p. 3; SCNL/3/INF.2/Rev.1, Annex I, p. 3). The fact that the provision relates to “pure economic loss” was expressly recognized, for example, in document SCNL/5/INF.4, Annex I, p. 6. As from the eighth session, this category of economic loss was enumerated together with “loss of profit from impairment of the environment” (see, for example, document SCNL/8/INF.4, p. 17), but it was again listed as a separate category in the draft which emerged during the seventeenth session (first part) (see document SCNL/17/INF.4, p. 24).



enumerated under (v), it does not derive from an economic interest in a use or enjoyment of the environment. For example, if a factory is damaged as a result of a nuclear incident and damage leads not only to a halt in production but also to a loss of jobs on the part of the employees thereof, these employees will suffer a loss which is not covered under either (iii) or (v).<sup>111</sup> As was alluded to earlier, however, this residual category of economic loss can only be compensated if permitted by the “general law on civil liability of the competent court”.<sup>112</sup> Consequently, whereas compensation for the other heads of damage must be provided although the extent of coverage is left to the “law of the competent court”, the admissibility of claims under this head is totally dependent upon the provisions of the applicable substantive law.

As for the reference to the “general law on civil liability of the competent court”, as opposed to simply the “law of the competent court”, the records of negotiations within the Standing Committee do not throw much light on the meaning of that reference,<sup>113</sup> but it may be assumed that the primary motive behind the adoption of this wording was a concern that compensation should not be available under this head unless it could also be available for damage arising from sources other than a nuclear incident, e.g. an oil spill, or a release of a hazardous substance; in addition, whereas, as was pointed out earlier, the expression “law of the competent court” is defined as including the rules of private international law of the forum, the expression “general law on civil liability of the competent court”, which is not defined in the 1997 Vienna Convention, appears to be intended to refer to the *lex fori*, i.e. the substantive tort law of the forum, irrespective of whether or not that is the applicable law under the rules of private international law of the forum.<sup>114</sup>

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<sup>111</sup> The original proposal referred to “loss of profit”. The term “economic loss” was substituted for “loss of profit” during the seventeenth session (first part) of the Standing Committee. According to the delegation of the United Kingdom, which proposed it, the change was supposed to “make it clear” that the loss “concerned businesses rather than individuals” (see document SCNL/17/INF.4, p. 16). But whether or not that result has actually been achieved is open to question.

<sup>112</sup> The residual category of economic loss is not covered by the new definition of “nuclear damage” adopted in the 2004 Protocol to Amend the 1960 Paris Convention, a definition which is otherwise almost identical to that found in the 1997 Protocol to Amend the Vienna Convention. Apparently, as is stated in the Explanatory Report attached to the 2004 Protocol, “the Paris Convention States were simply not convinced that this head of damage was not already covered by other heads of damage included in the definition” (paragraph 12). As was pointed out in footnote 109, the issue of discrepancies between new definitions of damage in the revised Paris and Vienna Conventions (and the Convention on Supplementary Compensation was discussed by INLEX at its fourth meeting (7-11 February 2005). On this specific issue, the Group concluded that, like the inclusion of the word “direct” to qualify economic interest adversely affected by an impairment of the environment, the failure to refer to this residual category of economic loss in the revised Paris Convention “also was an attempt to narrow the discretion of the competent court”. The Group further concluded that “adherence to the revised Vienna Convention and the CSC would therefore ensure the broadest coverage of ‘economic loss’” (p. 3 of the Chairman’s Report). The implications of this for the application of the Convention on Supplementary Compensation will be examined in Section III.5(d) of this Commentary.

<sup>113</sup> The original proposal referred to the “law of the competent court” (see document SCNL/2/INF/2, p. 3). The present wording was only adopted during the seventeenth session (first part) of the Standing Committee as a result of a proposal by the United Kingdom which had been discussed during open-ended informal consultations held before the beginning of the Session. A brief record of those consultations is attached as Annex III to the *Report of the Standing Committee*, but this does not clarify the reasons behind the adoption of the present wording (see document SCNL/17/INF.4, pp. 16–18).

<sup>114</sup> This interpretation was endorsed by INLEX at its Fourth Meeting (7-11 February 2005): see p. 9 of the Chairman’s Report.

**(c) The new heads of damage: (ii) measures of reinstatement of impaired environment and preventive measures**

Quite apart from these three categories of economic loss, another new head of damage, enumerated under (iv), relates to the **impairment of the environment**. In view of the difficulties involved in the monetary evaluation of environmental damage as such, and apart from loss of income deriving from an economic interest in the use or enjoyment of the environment which, as seen above, is included under (v), the solution, based on similar solutions adopted by other international conventions,<sup>115</sup> consists in limiting compensation to the costs of **measures of reinstatement** of impaired environment which are actually taken or to be taken.<sup>116</sup> In addition, the impairment of the environment must not be “insignificant”; but, as was pointed out in respect of economic loss caused by an impairment of the environment, the question of what is a significant impairment is left to the appreciation of the competent court.<sup>117</sup>

The competent court will also have to determine the extent to which damage is to be compensated under this head; in particular, it is expressly stated that damage is to be compensated under this head only in so far as it is not already included in sub-paragraph (ii), i.e. in the concept of property damage, under the applicable substantive law. For example, measures taken by a farmer whose land has been contaminated will be included, in most cases, in the concept of property damage; sub-paragraph (iv) is, therefore, mainly designed to cover measures taken in respect of areas owned by the general public.

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<sup>115</sup> Reference can be made, in this respect, to the 1992 Protocol to Amend the International Convention on Civil Liability for Oil Pollution Damage of 1969, as well as to the Council of Europe’s 1993 Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment.

<sup>116</sup> At its fourth meeting (7-11 February 2005), INLEX observed that “none of the existing nuclear liability instruments appears to encompass compensation for general degradation of the environment in cases where there is no economic loss and where no measures of reinstatement are taken”. In this context, the Group concluded that subparagraphs (iv) and (v) in the definition of ‘nuclear damage’ “were sufficiently broad to permit a competent court to cover any quantifiable economic loss resulting from environmental damage” and that “it would be for the competent court to determine where to draw the line on the degree of proximate cause required”. As was seen in footnote 107 above, the Group made some examples of damage that could be compensated under (v). It further concluded that “the definitions do not appear to be intended to cover purely non-economic losses such as loss of aesthetic value with no related quantifiable economic loss and that this represented a delineation where compensation could be made available ... consistent with wider international practice in instruments of a similar kind” (p. 4 of the Chairman’s Report).

<sup>117</sup> As was pointed out in that context, the original proposal discussed within the Standing Committee included “loss of profit” together with the costs of reasonable measures of reinstatement in a single head of damage constituted by “loss or damage by contamination to the environment”, without any reference to the need for that contamination to be significant (see document SCNL/1/INF.4, pp. 6–7). During the sixth session, the Drafting Committee “registered interest” in a German proposal (document SCNL/6/5), aimed, inter alia, at defining “impairment of the environment” as “a considerable and lasting adverse impact on nature and landscape by contamination” (see document SCNL/6/INF.4, Annex I, pp. 10 and 31–34). However, during the seventh session, it became apparent that “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”; an informal working group was set up in order to deal with this question, but the wording “unless insignificant” was added together with an alternative wording (“unless at tolerable levels”) proposed by some delegations (see document SCNL/7/INF/6, Annex I, pp. 7–8). During the eleventh session a decision was taken in favour of the first option. “One delegation” explained that the expression “unless at tolerable levels” was inspired by a provision in the Council of Europe’s Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment and was intended to avoid “disputes as to whether any increase, however minor, in basic radioactivity would amount to environmental damage, even though such increase may be permitted by the local regulatory authority”. However, it was pointed out in response that “it would be for the court to determine what is insignificant or intolerable, and that, therefore, there was little difference between the two alternatives” (see document SCNL/11/INF.5, p. 12).

The amending Protocol inserts in the 1997 Vienna Convention a definition of “measures of reinstatement”, to be found in Article I.1(m), whereby these consist of “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”. Moreover, under this definition, “the law of the State where the damage is suffered is to determine who is entitled to take such measures”.

Finally, another head of damage, enumerated under (vi), is constituted by the costs of **preventive measures**. Indeed, in many legal systems the compensation of damage resulting from a tort may be refused or at least reduced if the claimant fails to take reasonable steps to avoid or mitigate damage. It seems, therefore, reasonable to ensure compensation for the costs of such measures even where they turn out to be ineffective, since they are taken in the interest of the person liable. In the case of nuclear damage, such preventive measures may range from the taking of iodine pills to the evacuation of an entire city or area. Moreover, under sub-paragraph (vi), the costs of preventive measures also include “further loss or damage caused by such measures”; for example, damage caused by means of decontamination.

The amending Protocol inserts in the 1997 Vienna Convention a definition, to be found in Article I.1(n), whereby “preventive measures” means “any reasonable measures taken by any person after a nuclear incident has occurred to prevent or minimize damage”, but “subject to any approval of the competent authorities required by the law of the State where the measures were taken”. The fact that preventive measures are said to be measures taken by “any person” would seem to include measures taken by both private persons and public authorities; in the case of measures taken by public authorities, it would seem that at least the costs which would not have been incurred without the occurrence of a nuclear incident should be compensated. As for the need for a previous authorization, this clearly refers to measures taken by private persons; the fact that such measures have been authorized by a competent public authority indicates that such measures are considered, at least *prima facie*, to be reasonable; on the other hand, if such approval is not required by the law of the State where the measures are taken, the fact that these measures have not been previously authorized does not prevent compensation if they, nevertheless, appear to be reasonable.<sup>118</sup>

In respect of the **reasonableness** of both measures of reinstatement and preventive measures, Article I.1(o) makes it clear that findings as to the appropriateness and proportionality of such measures are to be made, in principle, under the law of the competent court, i.e. the applicable

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<sup>118</sup> No reference was made to prior authorization in the original proposal discussed within the Standing Committee. The suggestion that preventive measures should only be covered if they were authorized by the competent authority was first made within the Drafting Committee during the eleventh session. At that time, however, it was pointed out that “it would be for the court to decide whether preventive measures were reasonable” and the suggestion was not adopted (see document SCNL/11/INF.5, Annex 1, p. 13). At the sixteenth session, the Chairman of the Standing Committee presented a *Note containing Elements for Finalizing the Preparation of the Draft Supplementary Funding Convention*, where “preventive measures” were defined as “any reasonable measures taken or approved by the competent authorities of an affected, or likely to be affected, Contracting party...”. However, it was pointed out within the Committee that the text established “a new category of preventive measures” which differed from “the notion of mitigation of damage in most legal systems”. It was therefore “agreed for further consideration” to supplement the original text of the definition of preventive measures so as to require “any approval by competent authorities required by the law of the State where measures were taken” (see document SCNL/16/INF.3, p. 4, Annex I, p. 10, and Annex III, pp. 20–21). At the Diplomatic Conference, Ukraine proposed to define preventive measures so as to exclude “routine maintenance activities taken to ensure normal conditions of operation of a nuclear installation” (document NL/DC/L.4), but the proposal was not adopted.

substantive law.<sup>119</sup> However, some guidance is given in this respect. Regard must be had to “all the circumstances” of the particular case, such as, for example, the nature and extent of the damage incurred or, in the case of preventive measures, of the risk thereof; the extent to which the measures are likely to be effective; and relevant scientific and technical expertise.

As a result of the decision to cover preventive measures, the definition of “nuclear incident” in Article I.1(l) has been amended in order to cover not only occurrences causing nuclear damage, but also, in respect of preventive measures, occurrences creating “a grave and imminent threat of causing such damage”. Moreover, the last sentence of Article I.1(k) makes it clear that, as far as preventive measures are concerned, it is not necessary that the damage arises out of or results from an emission of ionizing radiation. For example, in the case of a sunken ship with nuclear substances on board, which was alluded to above, the costs of preventive measures may well be recoverable. In principle, there must be a grave and imminent threat of such an emission; preventive measures cannot be taken on the basis of mere speculation that radiation might be released in the future. But it was pointed out above that it is for the law of the competent court to determine whether or not preventive measures were “reasonable” taking into account the nature and extent of the risk of nuclear damage involved, the extent to which such measures appeared likely to be effective at the time when they were taken, as well as relevant scientific and technical expertise. Similarly, it is for the law of the competent court to determine, on the basis of the reasonableness test, whether the costs of preventive measures can be compensated in the case of a “false alarm” at a nuclear installation, i.e. where the warning system is alerted, but in fact nothing went wrong.<sup>120</sup>

#### **(d) Damage to property giving rise to compensation**

Under both the old and the new definition of “nuclear damage”, loss of, or damage to, property gives rise to compensation under the Vienna Convention. However, Article IV.5 of the 1963 Convention provides that the operator shall not be liable for nuclear damage (a) to the nuclear installation itself or to any property on the site of the installation which is used or to be used in connection with that installation; or (b) to the means of transport upon which the nuclear material involved was being carried at the time of the nuclear incident.

As far as damage under (a) is concerned, no derogation is allowed from the exclusion of compensation. The purpose of the exclusion is to avoid a situation in which the financial security

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<sup>119</sup> The definition finally adopted by the Standing Committee simply referred to “measures which are appropriate and proportionate having regard to all the circumstances” (see document SCNL/17.II/INF.7, p. 24). The definition was, however, amended at the Diplomatic Conference on the basis of a proposal by Australia (document NL/DC/L.10) aimed at clarifying that it is for the competent court to decide as to the reasonableness of the measures taken.

<sup>120</sup> At its fourth meeting (7-11 February 2005), INLEX discussed the issue of compensation for economic loss sustained as a result of a perceived risk (p. 5 of the Chairman’s Report). The Group concluded that “in those situations where there is no release of radioactive material but there is a situation which creates a grave and imminent threat of nuclear damage, such that there is a nuclear incident and that preventive measures are taken to address the grave and imminent threat, then the cost of those preventive measures and any further costs or damage related thereto are covered by the revised definition of ‘nuclear damage’. The Group further concluded that it would be for the competent court to determine which further loss or damage, if any, was caused by the undertaking of those preventive measures. In addition, the Group concluded that this broad reading of the conventions was consistent with the objective of the conventions to provide that, if there is a nuclear incident, any claim for damage resulting therefrom must be brought within the framework of the conventions and cannot be brought outside it. The Group noted that the definitions of ‘preventive measures’ and of ‘reasonable measures’ provide guidance to a competent court in determining what damage might be considered to be caused by the undertaking of preventive measures in response to a grave and imminent threat” The Group also noted that, “if there were no basis for the competent court to determine the existence of a nuclear incident, then the conventions would not come into effect and general tort law would apply”.

constituted by the operator is used principally to compensate such damage, to the detriment of third parties. However, unlike the corresponding provision in the 1960 Paris Convention,<sup>121</sup> Article IV.5(a) of the 1963 Vienna Convention makes no reference to other nuclear installations, including an installation under construction, which may be located on that same site, nor to property used in connection with such other installations. The 1997 Protocol amends the Vienna Convention in this respect, in order to bring it in line with the 1960 Paris Convention.<sup>122</sup>

As for damage under (b), Article IV.6 of the 1963 Vienna Convention allows the Installation State to provide by legislation that such damage is covered, provided that the operator's liability for other nuclear damage is not reduced to less than US \$5 million for any one nuclear incident, i.e. the minimum amount which can be established under Article V. In practice, if the damage other than that to the means of transport is less than this amount, the part of the amount not used is available, if necessary, for compensation of damage to the means of transport, but then only if the legislation of the Installation State so provides. However, the 1960 Paris Convention covers damage to the means of transport as a matter of principle, but specifies that compensation for such damage must not have the effect of reducing the operator's liability in respect of other damage to an amount less than that established as the limit of his liability.<sup>123</sup> In this respect also, the 1997 Protocol amends the Vienna Convention in order to bring it in line with the Paris Convention.<sup>124</sup>

#### 4. The revised limits of compensation

The primary objective of the revision of the 1963 Vienna Convention was undoubtedly the increase of the minimum level of liability therein provided for. The aftermath of the Chernobyl incident made it clear that the potential extent of damage caused by a serious nuclear incident is very large. The minimum liability ceiling of US \$5 million<sup>125</sup> fixed by the Convention appeared to be too low, especially in the light of the absence of a system of supplementary compensation whereby public funds could be made available to compensate damage in excess of that amount. Moreover, as was

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<sup>121</sup> See Article 3(a)(ii)1, of the 1960 Paris Convention.

<sup>122</sup> Under Article 6 of the 1997 Protocol, Article IV.5, is replaced by the following text: "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".

<sup>123</sup> See Article 7(c) of the 1960 Paris Convention.

<sup>124</sup> Under the amended text of Article IV.5, which was reproduced in footnote 122, no reference is made any longer to the exclusion of damage to the means of transport. Article IV.6 is replaced by the following text: "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". The language used reflects the new limits of the operator's liability, which will be referred to in detail in Section II.4 of this Commentary. A consequential amendment is the deletion of Article IV.7(b) of the Vienna Convention, which allows for the operator's liability outside the Convention, i.e. under the ordinary rules of tort law, for damage to the means of transport; on this provision, see Section I.3(b) of this Commentary.

<sup>125</sup> As was pointed out in Section I.3(c) of this Commentary the United States dollar referred to in the Convention is defined in Article V.3 as "a unit of account equivalent to the value of the United States dollar in terms of gold on 29 April 1963, that is to say US \$35 per one troy ounce of fine gold". Therefore, the minimum liability amount established by the Convention is in fact significantly higher than might appear at first sight. Article V.4 further provides that the sum may be converted into national currency in round figures.

pointed out in Section II.3 of this Commentary, the need for an increase was made even more obvious by the desirability of amending the definition of nuclear damage in order to cover all possible losses deriving from a nuclear incident. The 1997 Protocol substantially raises the minimum limits of compensation (see Section II.4(a) of this Commentary) and gives the Installation State two options in respect of the legal basis therefor (see Section II.4(b) of this Commentary). Moreover, it expressly provides for the case where the operator's liability is unlimited (see Section II.4(c) of this Commentary) and establishes a "simplified" procedure for amending the liability limits (see Section II.4(d) of this Commentary).

**(a) The new limits of compensation**

From the beginning of negotiations there was "general agreement" that the existing financial limits under the Vienna Convention were "inadequate". It was suggested that the limits should not be lower than what could reasonably be insured; on the other hand, the view was also expressed that the limits should be commensurate with the risk and not be linked to insurance capacity.<sup>126</sup> Although there were occasional discussions on this issue throughout the negotiations, it was agreed that the issue would best be addressed when the process of revision had reached its final stage. In fact, a decision on the limits of compensation was only taken within the Standing Committee at the fifteenth session.<sup>127</sup>

The 1997 Protocol amends Article V.1 of the Vienna Convention in order to ensure compensation of nuclear damage up to at least 300 million SDRs.<sup>128</sup> As will be explained in Section II.4(b) of this Commentary, the Installation State can either limit the operator's liability to that amount or to an amount of at least 150 million SDRs, provided that it makes public funds available to compensate damage in excess of that amount up to 300 million SDRs.<sup>129</sup>

However, for a transitional period of 15 years from the date of the entry into force of the Protocol, the Installation State can limit compensation to no less than 100 million SDRs.<sup>130</sup> This means that, until 4 October 2018, there could be very different compensation limits in the various Contracting Parties to the Protocol.<sup>131</sup> But even irrespective of that transitional period, there could be very different compensation limits in the Contracting Parties to the amending Protocol, on the one hand, and in the

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<sup>126</sup> See document NL/2/4, p. 4.

<sup>127</sup> See document SCNL/15/INF.5, p. 5.

<sup>128</sup> Under Article I.1(p) of the 1997 Vienna Convention, "'Special Drawing Right', hereinafter referred to as SDR, means the unit of account defined by the International Monetary Fund and used by it for its own operations and transactions".

<sup>129</sup> See Article V.1(a) and (b). As is the case under the 1963 Convention, the 1997 Vienna Convention provides, on the one hand, that "interests and costs awarded by a court in actions for compensation of nuclear damage shall be payable in addition to the amounts referred to in Article V" and, on the other, that those amounts "may be converted into national currency in round figures". However, these provisions now appear in a new Article V A rather than in Article V itself.

<sup>130</sup> See Article V.1(c). A proposal that a phasing-in provision be included in the amended Vienna Convention was made by Bulgaria at the fifteenth session of the Standing Committee and was supported by "a number of countries" on the basis that such a provision "would facilitate the entry into force" of the revised Convention (see document SCNL715/INF.5, pp. 5–6). A provision to this effect was adopted at the sixteenth session, but the 15-year phasing-in period was therein said to start from the date of the adoption of the Protocol (see document SCNL/16/INF.3, pp. 8 and 29). During the first part of the seventeenth session, the phasing-in period was made to start from the date of the opening for signature of the Protocol (see document SCNL/17/INF.4, pp. 19 and 30). Finally, at the Diplomatic Conference the decision was taken to refer to the date of the entry into force of the Protocol (see the Report of the Committee of the Whole, Annex I, document NL/DC/6.Add.1, p. 9).

<sup>131</sup> No State has yet taken advantage of this possibility.

Contracting Parties to the unamended Vienna Convention, on the other.<sup>132</sup> Moreover, inasmuch as the limits envisaged in Article V are minimum limits, the amounts of compensation available in the Contracting Parties to the 1997 Protocol may continue to be different even after the elapse of the transitional period.<sup>133</sup>

Quite apart from the transitional compensation amount, the amended Article V.2 allows the Installation State to establish a lower amount of liability of the operator in view of the “nature” of the nuclear installation or of the nuclear substances involved, as well as of the “likely consequences” of an incident originating therefrom. This new provision, which is based on a similar provision in the 1960 Paris Convention,<sup>134</sup> is intended to avoid burdening operators with insurance or financial security costs which are not justified by the risks involved, e.g. in the operation of certain small research reactors or laboratories. However this option is subject to the condition that the reduced liability amount so established may not be less than 5 million SDRs. Moreover, if the damage in fact caused by an incident is in excess of the operator’s liability limit, the Installation State must make public funds available to compensate that damage up to 300 million SDRs (or, during the transitional period, 100 million SDRs).

Another new provision, based, in its turn, on a similar provision in the 1960 Paris Convention,<sup>135</sup> has been inserted in the amended Article V.3, whereby “the amounts established by the Installation State of the liable operator in accordance with paragraphs 1 and 2 of this Article and paragraph 6 of Article IV<sup>136</sup> shall apply wherever the nuclear incident occurs”. This provision is intended to make it clearer that, in the case of a nuclear incident in the course of transport of nuclear material, the operator is not liable for varying amounts depending on the countries crossed in the course of the voyage; the amounts of compensation will, in the same way as for nuclear incidents occurring at nuclear installations, be determined by the legislation of the Installation State implementing the Convention.

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<sup>132</sup> However, as was pointed out in Section II.1 of this Commentary, a Contracting Party to the 1997 Protocol can declare, at the time of ratification or accession, that it does not want to be in treaty relations with the Contracting Parties to the unamended 1963 Vienna Convention; a Contracting Party to the 1963 Vienna Convention cannot make such a declaration at the time of ratification of, or accession to, the 1997 Protocol, but can denounce the 1963 Convention in accordance with Article XXV thereof.

<sup>133</sup> As will be pointed out in Section II.8 of this Commentary, the existence of different amounts of compensation in the various Contracting Parties may be considered as a ground for allowing the Installation State to derogate from “the provisions” of the Convention in so far as damage exceeds 150 million SDRs

<sup>134</sup> See Article 7(b)(ii) of the Paris Convention.

<sup>135</sup> See Article 7(d) of the Paris Convention.

<sup>136</sup> The amended Article IV.6 relates to compensation for damage caused to the means of transport, which — as was pointed out in Section II.3(c) of this Commentary — is covered under the 1997 Vienna Convention. Compensation for such damage must not have the effect of reducing the operator’s liability in respect of other damage to less than 150 million SDRs (or any higher amount established by the legislation of the Installation State) or, during the transitional period, to less than the transitional amount established pursuant to Article V.1(c). In practice, if the damage other than that to the means of transport is less than the limit of the operator’s liability, the part of the amount not used is available, if necessary, for compensation of damage to the means of transport. If, on the other hand, the damage other than that to the means of transport is equal to, or exceeds, the limit of the operator’s liability but is still less than 300 million SDRs, it can be compensated on the basis of the public funds to be made available by the Installation State.

**(b) The two options as to the legal basis for compensation**

Irrespective of the minimum levels of compensation, the 1997 Protocol gives the Installation State two options, which need to be explained in some detail. Under the **first option**, the operator's liability can be limited to not less than 300 million SDRs (or, during the transitional period, 100 million SDRs). This does not necessarily mean that the operator has to maintain insurance, or other financial security, up to that amount. In fact, Article VII.1(a) of the 1997 Vienna Convention still provides that the operator "shall be required to maintain insurance or other financial security covering his liability for nuclear damage in such amount, of such type and in such terms as the Installation State shall specify".<sup>137</sup> However, that provision still adds that "the Installation State shall ensure the payment of claims for compensation ... which have been established against the operator by providing the necessary funds to the extent that the yield of insurance or other financial security is inadequate to satisfy such claims, but not in excess of the limit, if any, established pursuant to Article V". Thus, where the operator is not required, or is unable, to insure his liability, or to maintain other financial security, up to the limit of 300 million SDRs (or, during the transitional period, 100 million SDRs), the Installation State will have to provide public funds up to that amount in order to cover the operator's liability.

Under the **second option**, the operator's liability can be limited to not less than 150 million SDRs (or, during the transitional period, to an unspecified amount lower than 100 million SDRs), provided that the Installation State makes public funds available to compensate damage in excess of that amount up to at least 300 million SDRs (or, during the transitional period, 100 million SDRs). Even if this option is taken, it remains true that, in theory, the operator could not be required, or could be unable, to insure his liability up to 150 (or 100) million SDRs and that the Installation State would then have to provide funds in order to ensure coverage of the operator's liability; in addition to that, however, the Installation State would still have to provide public funds in excess of the operator's liability, up to 300 (or 150) million SDRs.

The 1997 Protocol has, therefore, introduced an element of supplementary compensation into the Vienna Convention, since the additional funds made available by the Installation State under the second option could not technically be considered as cover of the operator's liability.<sup>138</sup> On the other hand, in the context of the 1997 Vienna Convention this new element exclusively relates to the legal basis for compensation and does not affect the total amount of compensation available.<sup>139</sup> Moreover,

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<sup>137</sup> In the case of transport of nuclear material to or from a nuclear installation, Article III of the Vienna Convention requires the operator liable to provide the carrier with a certificate issued by or on behalf of the insurer or other financial guarantor furnishing the financial security required pursuant to Article VII. However, unlike the 1960 Paris Convention (Article 4(c)), the 1963 Vienna Convention does not expressly allow a Contracting Party to exclude this obligation in relation to carriage which takes place wholly within its own territory. The 1997 Protocol amends Article III of the Vienna Convention in order to bring it in line with the Paris Convention.

<sup>138</sup> The Draft Protocol which the Standing Committee, at the end of its negotiations, recommended for adoption contained an Article V B.2, whereby "the obligation of the operator to pay compensation, interest or costs out of public funds made available pursuant to sub-paragraphs (b) and (c) of paragraph 1 of Article V shall only be enforceable against the operator as and when such funds are in fact made available" (see document SCNL/17.II/INF.7, p. 29). This provision was deleted at the Diplomatic Conference on the basis of a proposal by the United Kingdom (document NL/DC/L.18) which pointed out, inter alia, that Article V B 2 operates on the mistaken basis that the operator has an obligation to pay compensation, interest or costs out of public funds made available under Article V.1(b) and (c). In fact, the operator has no such obligation under those sub-paragraphs.

<sup>139</sup> The origin of this second option can be traced to the desire on the part of many delegations to include in the Vienna Convention an element of supplementary compensation, i.e. one or more tiers of compensation in addition to the first tier based on the operator's liability as covered by financial security, which emerged



as was alluded to in Section II.2(a) of this Commentary, Article V, appears to impose on the Installation State a mere international obligation to make public funds available: the question of whether or not the Installation State, as opposed to the operator, is liable under its domestic law for damage exceeding the operator's liability limit is left open by the 1997 Vienna Convention and has to be answered on the basis of the law of the Installation State.

The 1997 Protocol contains some further provisions relating to the situation where the Installation State is to make public funds available in order to compensate nuclear damage. As was pointed out in Section I.3(c) of this Commentary, Article II.3 of the 1963 Vienna Convention provides that, in cases where nuclear damage engages the liability of more than one operator and the damage attributable to each operator is not separable, the operators involved are "jointly and severally liable", i.e. all of them — or, alternatively, each of them — may be sued for the whole amount of the damage; as a result, the total amount of compensation available in such a case is the sum of the liabilities of the operators involved.<sup>140</sup> Moreover, under Article II.4, where several nuclear installations of one and the same nuclear operator are involved in one nuclear incident, such an operator is liable in respect of each installation involved up to the amount applicable with respect to him pursuant to Article V. These provisions remain unchanged in the 1997 Vienna Convention. However, in both cases a proviso is added whereby the Installation State may limit the amount of public funds made available per incident to the difference, if any, between the amounts thereby established and the amount established pursuant to Article V.1.<sup>141</sup>

Moreover, Article X of the 1997 Vienna Convention provides that, in situations where the operator has a right of recourse, i.e. where this is expressly provided for by a contract in writing or where the incident results from an action or omission done with intent to cause damage,<sup>142</sup> that right

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at the very beginning of the negotiations (see documents NL/2/4, p. 4; SCNL/1/INF.4, p. 9). However, negotiations within the Standing Committee soon concentrated on the drafting of a separate convention on supplementary funding (see document SCNL/2/INF/2, p. 3). As a result of difficulties in these negotiations, which had given birth to alternative draft conventions, the idea of including in the Vienna Convention itself an element of extra funding provided by the Installation State, beyond the operator's financial guarantee, emerged again at the eighth session; this idea was embodied in a proposal by Denmark and Sweden (document SCNL/8/2), which was presented as "a possible basis of compromise" in case no consensus could be reached on the existing draft conventions on supplementary compensation. This proposal was adopted at the ninth session and became the basis of the present text of Article V. It is significant that, during a discussion of the two options, some delegations indicated that, "although they were in favour of the insertion of an Installation State tier in the Vienna Convention, this idea was not adequately reflected in the Danish-Swedish proposal" and, more particularly, that "option a was already contained in option b" (see document SCNL/9/INF.5, pp. 5, 7, 10 and 18).

<sup>140</sup> However, as is specified in Article II.3(b), this rule does not apply to a nuclear incident involving nuclear material in the course of carriage in one and the same means of transport, or, in the case of storage incidental to carriage, in one and the same nuclear installation; in such cases, the total liability cannot exceed the highest amount established with respect to any one of the operators whose liability is engaged.

<sup>141</sup> Both provisos were adopted at the ninth session on the basis of a Note by the Chairman of the Drafting Committee concerning "textual adjustments for the Vienna Convention consequential to" the proposal by Denmark and Sweden to insert in the Convention an element of supplementary compensation (see document SCNL/9/INF.5, pp. 10 and 21).

<sup>142</sup> It may be interesting to point out, in this respect, that the issue of channelling of liability was briefly discussed at the beginning of the negotiations on the revision of the Vienna Convention and that the view was expressed, in that context, that a recourse procedure should be made available to operators in cases where nuclear damage is the result of fault on the part of the manufacturer, supplier or carrier. However, that idea did not receive sufficient support and did not result in any amendment to the existing provisions (see documents NL/2/4, p. 4; SCNL/1/INF.4, p. 8).

“may also be extended to benefit the Installation State insofar as it has provided public funds” pursuant to the Convention.<sup>143</sup>

**(c) The case where the operator’s liability is unlimited**

During negotiations within the Standing Committee, some support was expressed for the idea of unlimited liability of the operator. On the other hand, it was pointed out by some delegations that unlimited liability might prove illusory if the assets of the operator were not adequate, and that that the focus should rather be on providing an adequate financial cover for the operator’s liability.<sup>144</sup> But, as was pointed out in Section I.3(c) of this Commentary, the liability limits established by the 1963 Vienna Convention are minimum limits, and the same still holds true for the 1997 Vienna Convention. Therefore, nothing prevents the Installation State from establishing higher limits for the operator’s liability or, indeed, no limit at all. Some States have in fact opted for unlimited liability of the operators of nuclear installations.

However, even where the Installation State has opted for unlimited liability, it still has to decide up to what amount the operator is required to maintain insurance or other financial security covering his liability, since insurance coverage cannot be unlimited. The 1963 Vienna Convention is silent on this issue and thus leaves the Installation State free to establish the amount of insurance or other financial security covering the operator’s liability. On the other hand, under Article VII.1 of the 1963 Convention, the Installation State would have to provide public funds in order to ensure the payment of all claims established against the operator, irrespective of any limit it may have established for the amount of insurance or other financial security, to the extent that the yield of financial security is inadequate to satisfy such claims.

The situation is very different under the 1997 Vienna Convention. The amending Protocol inserts in Article VII.1(a) of the Convention a new provision to the effect that, where the liability of the operator is unlimited, the Installation State cannot establish a limit lower than 300 million SDRs for the financial security he is required to maintain. On the other hand, this same provision introduces a limit to the State’s obligation to cover the operator’s liability which is not present in the 1963 Convention; in fact, the Installation State is still required to ensure the payment of claims established against the operator to the extent that the yield of the financial security is inadequate to satisfy such claims, but only up to 300 million SDRs (or any higher amount it may have established as the limit of that financial security).<sup>145</sup>

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<sup>143</sup> This provision was adopted, in its turn, as a result of the adoption of the proposal by Denmark and Sweden to insert in the Vienna Convention an element of supplementary compensation (see document SCNL/9/INF.5, pp. 10–11 and 21).

<sup>144</sup> See documents NL/2/4, p. 5; SCNL/1/INF.4, p. 9. At the third session, a draft provision was adopted whereby the operator could not have benefited from limitation of liability in case he had deliberately not fully applied binding regulations on nuclear safety and had knowledge that the incident could have been avoided if those regulations had been applied (so-called “breakability” of limitation of liability) (see document SCNL/3/INF.2/Rev. 1, Annex I, p. 5). But that provision (which appeared in square brackets indicating lack of consensus within the Standing Committee) was deleted at the fifth session (see document SCNL/6/INF.4, pp. 8 and 15). At the eighth session, Poland put forward a new proposal (document SCNL/8/7/Rev.1), aimed at introducing unlimited liability in the revised Vienna Convention, but only in respect of personal damage (see document SCNL/8/INF.4, pp. 3–4, 5 and 98). At the sixteenth session, the Standing Committee “recognized that, while the motives of the proposal by Poland ... were widely shared, its substance did not meet with support in view of its complex legal and practical implications” (see document SCNL/16/INF.3, pp. 2–3).

<sup>145</sup> The idea that “it would be unreasonable to require unlimited financial security if a Contracting Party provided for unlimited liability of the operator” was first “recognized” within the Drafting Committee at

In this respect also, the amending Protocol takes the special situation of low-risk installations into account. Under Article VII.1(b) of the 1997 Vienna Convention, the Installation State, “having regard to the nature of the nuclear installation or the nuclear substances involved and to the likely consequences of an incident originating therefrom”, may establish a lower amount of financial security of the operator, provided that “in no event shall any amount so established be less than 5 million SDRs”. If, however, the damage in fact caused by an incident proves to be in excess of that amount, the Installation State must ensure the payment of claims for compensation which have been established against the operator by providing necessary funds up to 300 million SDRs or any higher amount established pursuant to Article VII.1(a).<sup>146</sup>

**(d) The “simplified” procedure for amending the liability amounts**

Apart from the increase of liability amounts, the 1997 Protocol inserts in the Vienna Convention a new provision, Article V D, which purports to establish a simplified procedure for the revision of the liability limits. Under that procedure, an amendment of the limits of liability referred to in Article V will not require the convening of a diplomatic conference. A meeting of the Contracting Parties will be convened for that purpose by the Director General of the IAEA if one third of such Parties so request, and the amendment will be adopted by a two-thirds majority of the Parties present and voting. The amendment will then be notified to all Contracting Parties for acceptance and will enter into force if at least one third of the States which were party to the Convention at the time when the amendment was adopted have communicated their acceptance within 18 months of that notification.

On the other hand, if the amendment has not been so accepted within 18 months, it will be considered as rejected. Moreover, even if it is so accepted, the amendment will only enter into force for the Parties which have accepted it, and for those which will accept it thereafter. Similarly, if a State becomes a Party to the 1997 Vienna Convention after one such amendment has entered into force, it is free to decide if it wants to be bound by the amendment; if it manifests no different intention at the time of ratification or accession, that State will be considered as bound by the amendment, but only in relation to those States which are also bound by it. In sum, it may be questioned if this is really a simplified amendment procedure representing a viable alternative to the convening of a full diplomatic conference.<sup>147</sup>

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the thirteenth session, but the provision adopted at that time was drafted in a slightly different way (see document SCNL/13/INF.3, pp. 9 and 69). The current wording of the provision was adopted at the fourteenth session (see document SCNL/14/INF.5, pp. 27 and 43).

<sup>146</sup> This provision was inserted at the sixteenth session of the Drafting Committee on the basis of a proposal by Japan (see document SCNL/16/INF.3, pp. 17 and 34).

<sup>147</sup> From the very beginning of negotiations, there was “agreement” on the need to provide in the Vienna Convention for a “simplified procedure” for the updating of the liability limits “having regard to recent conventions as well as relevant recommendations such as those of UNCITRAL”; the Secretariat was requested to prepare a proposal therefor (see documents NL/2/4, p. 6; SCNL/1/INF.4, p. 14). The original proposal already envisaged the adoption of an amendment at a specially convened meeting of the Contracting Parties by a two-thirds majority; however, it further envisaged that, after its notification to all Contracting Parties, the amendment would be deemed to have been accepted, and would enter into force for **all** Contracting Parties, if one third of them had not communicated their non-acceptance within 6 months (see document SCNL/2/INF/2, Annex I, pp. 7–8). But opposition to this idea soon emerged within the Standing Committee, and alternative texts appeared at the fifth session (see document SCNL/5/INF/4, Annex I, pp. 7 and 20–21). At the sixth session, it was decided that an objecting Contracting Party would not be bound by an updated liability limit, but the procedure still envisaged that an amendment would enter into force for States which had not objected to it within a given time from its adoption and notification (see

## 5. The causes of exoneration from liability

As was pointed out in Section I.3(a) of this Commentary, one of the basic principles of the international regime of civil liability for nuclear damage is the principle of “absolute” liability of the operator of a nuclear installation. However, Article IV.3 of the 1963 Vienna Convention allows for some causes of exoneration from liability. In fact, the operator incurs no liability under the Convention if the damage caused by a nuclear incident is directly due: (a) to an act of “armed conflict, hostilities, civil war or insurrection”; (b) to a grave natural disaster of an exceptional character. In the latter case, however, the law of the Installation State may provide to the contrary.

The 1997 Protocol amends Article IV.3 in order to do away with the latter cause of exoneration. The idea behind this amendment is that nuclear installations should be built and maintained to withstand natural disasters, including those of an exceptional character.<sup>148</sup> As for the remaining causes of exoneration, Article IV.3 has been redrafted in order to make it clearer that, whereas the person suffering damage has to prove that such damage has been caused by a nuclear incident in a nuclear installation covered by the Convention, or in the course of transport of nuclear material to or from such an installation, it is for the operator of that installation to prove that the damage is directly due to an act of “armed conflict, hostilities, civil war or insurrection”.

In the light of recent events in international relations, it seems important to point out that an act of terrorism is not, per se, a cause of exoneration from nuclear liability; this is confirmed by the travaux préparatoires of both the 1963 Convention<sup>149</sup> and the 1997 Protocol.<sup>150</sup> On the other hand, this is clearly not the appropriate place to discuss the complex issue of whether or not a particular act may rise to the level of an act of “armed conflict, hostilities, civil war or insurrection”.<sup>151</sup>

As to the meaning of these expressions, it must be recognized that the language used in Article IV.3, which clearly derives from identical language used in Article 9 of the 1960 Paris Convention, is not entirely satisfactory; it would have been far better to simply refer to an act of “armed conflict”.<sup>152</sup>

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document SCNL/6/INF.4, Annex I, pp. 11 and 25–26). Finally, at the twelfth session, as a result of the opinion of “many delegations” that a tacit acceptance procedure “may conflict with constitutional requirements in some countries”, it was decided to provide for an explicit approval procedure and to “make it clearer that an amendment will not be binding on a State which has not approved it” (see document SCNL/12/INF.6, p. 7). The present procedure was adopted by the Drafting Committee at the thirteenth session (see document SCNL/13/INF.3, pp. 10 and 71–72).

<sup>148</sup> The suggestion to delete Article IV.3(b) of the Vienna Convention was made at the very first session of the Standing Committee and was “widely supported” (see document SCNL/1/INF.4, p. 8). At the third session the proposal to delete that provision was adopted by the Standing Committee (see document SCNL/3/INF.2/Rev.1, Annex I, p. 4). At the fourteenth session, a proposal to exclude grave natural disasters from the coverage of the Convention was again made, but received “no support” (see document SCNL/14/INF.5, p. 27).

<sup>149</sup> See *Civil Liability for Nuclear Damage: Official Records of the International Conference on Civil Liability for Nuclear Damage*, Vienna, 1964 (IAEA, STI/PUB/54), p. 46.

<sup>150</sup> See document SCNL/13/INF.3, p. 13.

<sup>151</sup> At its Fourth Meeting (7-11 February 2005) INLEX concluded that “the phrase ‘... armed conflict, hostilities, civil war or insurrection’ ... was not intended to include acts of terrorism, as an exoneration” (p. 9 of the Chairman’s Report).

<sup>152</sup> It is significant, in this respect, that a number of recent international instruments dealing with the suppression of terrorism expressly exclude from the definition of terrorist acts “the activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law” (see Article 19 of the 1998 International Convention for the Suppression of Terrorist Bombing; Article 4, paragraph 2, of the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism; Article 2, paragraph 4(b), of the Convention on the Physical Protection of

In fact, under the modern international law of armed conflicts (otherwise known as “international humanitarian law”), the term “armed conflict” includes both international and non-international armed conflicts;<sup>153</sup> consequently, the concept of an act of “civil war” or “insurrection” may be deemed to be equivalent to the modern concept of an act of (non-international) “armed conflict”. Moreover, recent international humanitarian law treaties make it clear that situations of “internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature” are excluded from the concept of non-international “armed conflict”.<sup>154</sup>

On the other hand, the concept of an act of “hostilities” is rather more ambiguous and could be taken to refer to an act committed in the context of a situation which remains below the threshold of an armed conflict governed by international humanitarian law. In order to avoid that result, it could be argued, on the basis of the interpretation apparently given in the Exposé des motifs of the 1960 Paris Convention, that an act of “hostilities” can only exclude liability if committed in the context of hostilities of a political nature “such as civil war or insurrection”.<sup>155</sup> More generally, it could be argued that the expression “act of armed conflict, hostilities, civil war or insurrection” is intended to refer to an act of international or non-international armed conflict.<sup>156</sup>

## 6. The extension of liability in time

In addition to the low amount of the operator’s liability, the limitation of that liability in time, as provided for in the 1963 Vienna Convention, also appeared to be inadequate. A widespread feeling that the period of ten years therein provided for was too short emerged from the relevant literature, especially in view of the peculiarities of some radiation effects; it was pointed out, in particular, that

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Nuclear Material and Nuclear Facilities, as amended on 8 July 2005. At the regional level, see also Article 1 of the EU Council Framework Decision 2002/475/JHA on combating terrorism).

<sup>153</sup> In a famous decision of 2 October 1995, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia found that “an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State”. It further found that “international humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved”. (*Prosecutor v. Dusko Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, Case No. IT-94-1-AR72, 35, International Legal Materials, 1996, pp 32 ff, paragraph 70).

<sup>154</sup> See Article 1.2 of the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II); Article 1.2 of the 1996 amended Protocol II annexed to the 1981 UN Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects; Article 22.2 of the 1999 Protocol (II) Additional to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict; Article 8.2(f) of the 1998 Rome Statute of the International Criminal Court. Article 1.1 of the 1977 Protocol makes it clear that the Protocol does not apply to all situations which are above the threshold of armed conflict as defined in paragraph 2, but only to those which take place in the territory of a Contracting Party “between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol”. But this much higher threshold is not required by the 1949 Geneva Conventions, whose common Article 3 applies to non-international armed conflicts, and by the more recent treaties quoted above. Nor is it required by international customary law as spelled out in the above-mentioned Tadić decision.

<sup>155</sup> See paragraph 48. According to this interpretation, the term “hostilities” would add nothing to the other terms employed.

<sup>156</sup> This interpretation was endorsed by INLEX at its Fourth Meeting (7-11 February 2005): see p.9 of the Chairman’s Report.

latent personal injury such as cancer may become manifest many years after radiation exposure, especially as far as genetic damage was concerned.

From the very beginning of negotiations for the revision of the Vienna Convention there was “general agreement” on the need to extend the period of limitation for the submission of claims relating to personal injury.<sup>157</sup> As a result, the 1997 Protocol amends Article VI of the Vienna Convention to the effect that, whereas rights of compensation in respect of other damage are still extinguished if an action is not brought within ten years from the date of the nuclear incident, a longer period of thirty years applies to the extinction of rights of compensation in respect of loss of life and personal injury.<sup>158</sup> The extended period appears in the new paragraph 1(a) of Article VI.

Moreover, the possibility still remains for the law of the competent court to provide for longer periods of extinction if, under the law of the Installation State, the liability of the operator is covered for a longer period by insurance or other financial security, including State funds. In that case, the period of extinction cannot be longer than the period for which the operator’s liability is so covered. This possibility is envisaged in Article VI.1(a).

Of course, in both cases the possibility of obtaining compensation after the elapse of ten years from the date of the incident will largely depend on whether or not the funds available have already been exhausted. Indeed, Article VI.1(c) makes it clear that the additional claims thus admitted to compensation, i.e. both the claims relating to loss of life and personal injury and, in case of an extension under Article VI.1(b), the claims relating to other types of damage, are to be satisfied without reducing the amount of coverage available for the claims introduced within the basic ten-year period.<sup>159</sup>

Article VI.3 of the 1963 Vienna Convention currently allows the law of the competent court to establish “a period of extinction or prescription of not less than three years from the date on which the person suffering nuclear damage had knowledge or should have had knowledge of the damage and of the operator liable for the damage”. The 1997 Protocol amends paragraph 3 of Article VI in order to make the three-year period mandatory. However, it will still be for the law of the competent court to qualify that period as an absolute period of extinction, or as a period of prescription, which can be suspended or even interrupted, where this is recognized, by a mere extrajudiciary demand.<sup>160</sup> In either case, however, the period of ten years or, as far as claims in respect of loss of life or personal injury are concerned, thirty years from the date of the nuclear incident cannot be exceeded.

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<sup>157</sup> See documents NL/2/4, p. 5; SCNL/1/INF.4, pp.9–11. A suggestion was made at that time to establish a separate limit for environmental damage as well, but it did not receive sufficient support.

<sup>158</sup> As was alluded to earlier, the 1997 Protocol also gives priority to claims for loss of life or personal injury in cases where the damage to be compensated exceeds the amount of money available for compensation (see Section II.7 of this Commentary).

<sup>159</sup> In this respect, the 2004 Protocol amending the 1960 Paris Convention, which also extends to 30 years the period of extinction or prescription for actions for loss of life and personal injury, has adopted a different solution. Under the amended Article 8(b) of the Paris Convention, actions for compensation brought within the longer period established by national legislation cannot affect the right of compensation of any person who has brought an action: (i) within a thirty-year period in respect of personal injury or loss of life; (ii) within a ten-year period in respect of all other damage.

<sup>160</sup> In some legal systems extinctive prescription can be interrupted, causing the running of a new period of prescription, not only by the bringing of a legal action, but also by the recognition of the right of compensation on the part of the person liable or by any other way through which the person entitled to claim can bring about the so-called *mora debendi*, for example, by a letter where the claim is stated.

Other provisions in Article VI remain unchanged and, in particular, paragraph 4 still allows a person who suffers an aggravation of damage for which he has already brought a claim within the applicable period of extinction to amend his claim after that period has expired provided that no final judgement has been entered and unless the law of the competent court otherwise provides.

On the other hand, paragraph 2, calling for a separate twenty-year period of extinction for rights of compensation relating to damage caused by an incident involving nuclear material which has been stolen, lost, jettisoned or abandoned, has been deleted. It was deemed unnecessary to retain such a special provision in view of the rarity of the events therein provided for.

## 7. The nature, form and extent of compensation and the priority given to claims for loss of life or personal injury

As was pointed out in Section I.4 of this Commentary, Article VIII of the 1963 Vienna Convention states that, “subject to the provisions of this Convention, the nature, form and extent of the compensation, as well as the equitable distribution thereof, shall be governed by the law of the competent court”. This provision remains unchanged in Article VIII.1 of the 1997 Vienna Convention. Indeed, as was explained in Section II.3(a) of this Commentary, this general clause now finds a specification in Article 1.1(k) of the 1997 Convention, whereby the law of the competent court is to determine the extent to which nuclear damage other than loss of life or personal injury and loss of or damage to property gives rise to compensation.

Thus, for example, the law of the competent court is to direct the granting of annuities and their amounts, as well as the effect on the victim’s claim of contributory negligence on his part. Moreover, it is for the law of the competent court to decide whether measures for equitable distribution should be taken in advance or at the time when the actions are brought. Such measures may involve providing a limit per person suffering damage or limits for damage to persons, damage to property and other kinds of nuclear damage. However, the 1997 Protocol restricts the discretion given to the law of the competent court in one important respect, by inserting in Article VIII a new paragraph relating to priority for claims for loss of life or personal injury.

As was pointed out in Section II.3(a) of this Commentary, the inclusion in the new definition of nuclear damage of additional categories of damage might have a negative influence on the availability of financial resources for compensation of loss of life or personal injury. As was explained in Section II.6 of this Commentary, under the 1997 Convention claims for loss of life or personal injury benefit from an extension of the time limit for their submission, but, under Article VI.1(c), claims submitted within the longer thirty-year period can only be compensated if the funds available have not already been exhausted in order to compensate claims introduced within the basic ten-year period.

Article VIII.2 of the 1997 Vienna Convention provides that, “subject to application of the rule of sub-paragraph (c) of paragraph 1 of Article VI, where in respect of claims brought against the operator the damage to be compensated under this Convention exceeds, or is likely to exceed, the maximum amount made available pursuant to paragraph 1 of Article V, priority in the distribution of the compensation shall be given to claims in respect of loss of life or personal injury”. This provision aims at preserving the favourable status of the victims who are likely to suffer most as a result of a nuclear incident, thus ensuring a proper balance of fairness in compensation of nuclear damage.<sup>161</sup>

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<sup>161</sup> The view that priority should be given to personal injury claims was expressed at the very beginning of discussions on the revision of the civil liability regime; on the other hand, some opposition was voiced at the time on the basis that such prioritizing might discourage the taking of preventive measures, or that most

## 8. The applicable law and the principle of non-discrimination

As was pointed out in Section I.4 of this Commentary, the competent court will first of all apply the self-executing provisions of the Vienna Convention, to the extent that these have been incorporated and made directly applicable in the domestic legal system or the national legislation specifically enacted in order to implement these provisions.<sup>162</sup>

As for matters which the Convention leaves to the discretion of national law, several matters are left to be determined by the “law of the competent court”, which is still defined as “including any rules of such law relating to conflict of laws”.<sup>163</sup> In particular, as was pointed out in Section II.3 of this Commentary, it is for the law of the competent court to determine the extent to which damage is to be compensated under the new heads enumerated in Article I.1(k), as well as the reasonableness of both measures of reinstatement of impaired environment and preventive measures. Moreover, as was pointed out in Section II.7 of this Commentary, Article VIII.1 still provides that, “subject to the provisions of this Convention, the nature, form and extent of the compensation ... shall be governed by the law of the competent court”. But in respect of several other matters, the 1997 Vienna Convention, like the unamended 1963 Convention, still refers to the law of the competent court.<sup>164</sup>

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personal injuries could be compensated under social security schemes (see document NL/2/4, p. 6). A rather complex proposal was articulated at the first session of the Standing Committee; this proposal involved the proportional reduction of claims, the preferential appropriation of a given percentage of the total sum distributable in order to meet claims for loss of life or personal injury, as well as special provisions for the case where loss of life and personal injury are compensated by national or public health insurance, social insurance, etc. (see document SCNL/1/INF.4, pp. 14–15). However, at the sixth session, the “prevailing view was in favour of inclusion in the Vienna Convention of provisions establishing general principles of priority leaving modalities of their implementation to the law of the competent court” (see document SCNL/6/INF.4, pp. 10–11 and 21). A provision very similar to the one now appearing in the 1997 Convention was adopted at the seventh session: see document SCNL/7/INF/6, pp. 10 and 18). As a result of a restructuring of Article VI, a final drafting change was adopted at the sixteenth session (see document SCNL/16/INF.3, p. 22). It may be interesting to mention that the 2004 Amending Protocol has not adopted a corresponding amendment in respect of the 1960 Paris Convention; and no explanation for this is given in the attached Explanatory Report.

<sup>162</sup> As was pointed out in Section I.2 of this Commentary the term “incorporation” is used in this Commentary to denote the legal operation by which an international treaty can be considered as part of a State’s domestic law; the term “self-executing” is used to denote the possibility for the provisions of a treaty, once incorporated in a Contracting Party’s legal system, to be directly applied by national courts or, more generally, domestic law-applying officials without the need for implementing legislation. For more details on this issue, see Section III.4 of this Commentary.

<sup>163</sup> It may be interesting to point out, in this respect, that the 2004 Protocol to Amend the 1960 Paris Convention has departed from this traditional rule: Article 14(b) of the Paris Convention is thereby amended so as to define “national law” and “national legislation” as “the law or the national legislation of the court having jurisdiction under this Convention over claims arising out of a nuclear incident, excluding the rules on conflict of laws relating to such claims”. The Explanatory Report attached to the 2004 Protocol states that “such exclusion reflects modern trends in private international law without, however, depriving the competent court of the right to determine questions of private international law which are not determined by the choice of law rules under the Convention” (paragraph 38).

<sup>164</sup> In particular, it is for the “law of the competent court” to provide if direct action lies against the person furnishing financial security in order to cover the operator’s liability (Article II.7); if the operator may be relieved from his obligation to pay compensation in respect of the damage suffered by a person who caused such damage through gross negligence or by an act or omission done with intent to cause damage (Article IV.2); if, in derogation of the ordinary period of extinction, rights of compensation are only extinguished after a longer period, corresponding at most to the period for which the operator’s liability is covered by financial security under the law of the Installation State (Article VI.1 of the 1963 Convention; Article VI.1(b) of the 1997 Convention); if the possibility of amending claims is excluded (Article VI.4). In other respects, however, the 1997 Protocol has restricted the discretion previously left to the law of the



On the other hand, even if the competent court is not a court of the Installation State, that court will have to refer to determinations made by the Installation State in respect of matters such as the designation of the liable operator (Article I.1(c)), the limit, if any, of the operator's liability (Article V) or the limit of liability cover (Article VII).<sup>165</sup> Moreover, as was pointed out in Section II.2(c) of this Commentary, if the Installation State has enacted legislation in order to exclude damage suffered in nuclear non-Contracting States, the competent court will have to give effect to such legislation (Article I A).<sup>166</sup> Finally, as was recalled in Section II.6 of this Commentary, it will have to apply the "law of the Installation State" in order to ascertain whether the operator's liability is covered by insurance in a situation where the "law of the competent court" provides that rights of compensation against the operator are extinguished after a period longer than the otherwise applicable ten-year, or thirty-year, period (Article VI.1(b)).<sup>167</sup>

Whatever law is the applicable law, Article XIII.1 of the 1997 Vienna Convention still provides that "this Convention and the national law applicable thereunder shall be applied without any discrimination based upon nationality, domicile or residence". As was pointed out in Section II.2(c) of this Commentary, the new provisions on the so-called "geographical scope" of the Convention have no direct bearing on the nationality of individual claimants, and have to be read in conjunction with the non-discrimination principle embodied in Article XIII. In fact, provided that damage is suffered within the "geographical scope" of the Convention, claims can be brought by nationals of non-Contracting States also; conversely, if damage is suffered outside that "geographical scope", claims cannot even be brought by nationals of Contracting Parties.

This does not create any problems as long as no exception is made to the general principle, embodied in Article I A.1 of the 1997 Convention, that damage is covered wherever suffered. On the

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competent court. In particular, the three-year period from the date on which the person suffering nuclear damage had knowledge, or should have had knowledge, of the damage and of the operator liable therefor is made mandatory under the 1997 Convention and the law of the competent court may only provide as to whether that period is a period of prescription or extinction (Article VI.3).

<sup>165</sup> Other matters are left to be determined by the Installation State: in particular, the Installation State may determine that several nuclear installations of one operator which are located at the same site shall be considered as a single nuclear installation (Article I.1(j)); it may determine that any nuclear installation or small quantities of nuclear material are excluded from the application of the Convention if criteria for such exclusion have been established by the Board of Governors of the IAEA (Article I.2); it may limit the amount of public funds to be made available in cases where nuclear damage engages the liability of more than one operator (Article II.3(a)) or where several nuclear installations of one and the same operator are involved in one nuclear incident (Article II.4); it may exclude the operator's obligation to provide the carrier with a certificate issued on behalf of the insurer in relation to carriage which takes place wholly within its own territory (Article III).

<sup>166</sup> Another matter which is left to be determined by the legislation of the Installation State relates to the possibility that a carrier of nuclear material, or a person handling radioactive waste, may, at his request and with the consent of the operator concerned, be designated or recognized as operator (Article II.2). Although Article X does not expressly say so, it could be argued, in addition, that it is for the legislation of the Installation State to provide for an extension of the right of recourse to benefit the Installation State in so far as it has provided public funds pursuant to the Convention. On the other hand, the 1997 Convention no longer envisages the possibility for the legislation of the Installation State to provide that the operator's liability extends to damage to the means of transport of nuclear material, since that damage is now mandatorily covered (see Section II.3(d) of this Commentary).

<sup>167</sup> On the other hand, the question of whether or not nuclear damage includes damage arising out of, or resulting from, ionizing radiation emitted from sources inside a nuclear installation other than nuclear fuel or radioactive products or waste is no longer left to be answered by the "law of the Installation State" (see Section II.3(a) of this Commentary). Similarly, the "law of the Installation State" is no longer relevant in order to determine whether or not the operator is liable for nuclear damage caused by a nuclear incident due to a grave natural disaster (see Section II.5 of this Commentary).

other hand, if, under Article I A.2 and 3, the legislation of the Installation State excludes damage suffered in non-Contracting nuclear States not affording reciprocal benefits, nationals of such States could still claim compensation for damage suffered on the high seas or in the territory, or maritime zones, of any Contracting Party; conversely, nationals of Contracting Parties could not claim compensation for damage suffered in the territory, or in the maritime zones, of any non-Contracting nuclear State, except for damage suffered by, or on board, a ship or aircraft, which is covered under Article I A.4.

But quite apart from the possibility of excluding damage suffered in non-Contracting nuclear States from the “geographical scope” of the Convention, the 1997 Protocol adds a new paragraph 2 to Article XIII, whereby, “notwithstanding paragraph 1 of this Article, insofar as compensation for nuclear damage is in excess of 150 million SDRs, 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”.

This provision originated from the inclusion in the Vienna Convention of the option for the Installation State to limit the operator’s liability to not less than 150 million SDRs while covering the damage in excess of that amount, and up to at least 300 million SDRs, out of public funds.<sup>168</sup> As was pointed out in Section II.4(b) of this Commentary, this option was presented as introducing an element of supplementary compensation into the Vienna Convention, but in fact only provides for an alternative basis for compensation without actually affecting the total amount available. Be that as it may, it must be stressed that the new provision is drafted in a way that makes it applicable to compensation in excess of 150 million SDRs quite irrespective of the basis for such compensation; in other words, even if the Installation State has established the operator’s liability at 300 million SDRs, it could still avail itself of the possibility envisaged in Article XIII.2.

In addition, it must be recognized that the drafting of the new provision is not entirely satisfactory and could give rise to doubts as to its precise implications. Inasmuch as it refers to “another State”, as opposed to a “non-Contracting State”, Article XIII.2 is clearly intended to apply to a Contracting Party also. On the other hand, whereas the context of the new provision might be seen as implying that a derogation could only relate to the non-discrimination principle, a broader interpretation is also possible, since reference is made to the possibility of derogating from “the provisions” of the Convention. Under this broader interpretation, it could be argued, for example, that the legislation of the Installation State could establish lower amounts of compensation in respect of damage suffered in a State not affording reciprocal benefits; this interpretation may be seen as reinforced by the fact that the new provision is intended to apply to a nuclear State not affording “reciprocal benefits of an equivalent amount”, a language which clearly refers to the amounts of compensation.

In other words, when it comes to damage suffered in a nuclear Contracting Party, lack of reciprocity, under the strict interpretation of Article XIII.2, would only allow for a derogation from the

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<sup>168</sup> The original proposal by Denmark and Sweden (document SCNL/8/2/Rev.1) envisaged the inclusion of an additional provision in the “geographical scope article”, whereby, with regard to compensation for damage exceeding 150 million SDRs, the legislation of the Installation State could have excluded damage suffered in “any” nuclear State not affording “equivalent reciprocal benefits” (see document SCNL/8/INF.4, p. 32). But a provision almost identical to the one finally included in Article XIII.2 was adopted at the ninth session, when the Danish-Swedish proposal was endorsed by the Standing Committee (see document SCNL/9/INF.5, pp. 9 and 20). The “prevailing view” was in fact against “the exclusion of compensation from public funds of damage in non-nuclear States which are not party to the Convention”.

non-discrimination principle; for example, the Installation State could exclude damage suffered by nationals of that State. Under the broader interpretation of that provision, the Installation State could establish lower amounts of compensation in respect of damage suffered in a Contracting Party which does not provide reciprocal benefits of an equivalent amount, for example because it has availed itself of the phasing-in provision in Article V.1(c).<sup>169</sup>

The same holds true as far as damage suffered in a non-Contracting nuclear State is concerned, but then only if the legislation of the Installation State chooses not to exclude that damage. In fact, since Article I A.2 and 3 allows the legislation of the Installation State to exclude such damage from “the application” of the Convention, it could be argued that Article XIII. 2 would not even apply in such a case. On the other hand, it was pointed out in Section II.2(c) of this Commentary that, whereas there is no doubt that an exclusion under Article I A.2 and 3 could be based on the fact that the legislation of the third State concerned does not cover damage suffered in the States party to the Vienna Convention, it is not so obvious that such an exclusion could be based on the mere fact that the same amount of compensation is not made available. Therefore, if the Installation State opts for a strict interpretation of Article I A.2 and 3, it could still avail itself of the possibility envisaged in Article XIII.2.

## 9. The new provisions on jurisdiction

During the negotiations within the Standing Committee the view was expressed that, at least in the case of a major nuclear incident, the processing of a large number of claims arising therefrom might be difficult for national courts; proposals were, therefore, made in order to envisage the possibility of establishing an international tribunal or claims commission. But none of these proposals met with general agreement and it was eventually decided to maintain the existing system which recognizes the jurisdiction of national courts.<sup>170</sup>

On the other hand, one of the most important innovations adopted by the 1997 Protocol is represented by the new provisions on jurisdiction. These will have far-reaching implications in cases where the nuclear incident occurs during the transport of nuclear material to or from an installation situated in the territory of a State party to the Vienna Convention.

As was pointed out in Section I.4 of this Commentary, Article XI.1 of the 1963 Vienna Convention provides that, as a rule, jurisdiction over actions against the operator liable for compensation of nuclear damage lies exclusively with the courts of the Contracting Party within

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<sup>169</sup> The broader interpretation was endorsed by INLEX at its Fourth Meeting (7-11 February 2005): the Group concluded that Article XIII.2 “permits the Installation State to establish lower amounts of compensation in respect of damage suffered in a nuclear country which does not provide for reciprocal benefits of an equivalent amount, for example because it has availed itself of the phasing-in provision in Article V.1(c). Such action would not violate the non-discrimination principle set forth in paragraph 1 of Article XII as long as the Installation State made at least 150 million SDRs available” (p. 10 of the Chairman’s Report).

<sup>170</sup> See already document NL/2/4, p. 6. The first proposal to amend Article XI of the Vienna Convention to that effect was made at the very first session of the Standing Committee (see document SCNL/1/INF.4, pp. 11–12). Further proposals were made by Austria, the Netherlands, Egypt, Israel and Turkey at the first two meetings of the Intersessional Working Group (see documents IWG.1, Annex VI; IWG.2, Attachment I B.2, pp. 45 ff). At the fourth session of the Standing Committee, it was agreed to establish an informal working group coordinated by the Netherlands in order to elaborate a compromise single draft text (see document SCNL/4/INF.6, pp. 4 and 37). At the sixth session, the Standing Committee provisionally adopted a revised Dutch proposal for further consideration (see document SCNL/6/INF.4, pp. 8–9 and 22–23). The proposal remained in the Committee’s documentation until the twelfth session, when it was decided to delete it (see document SCNL/1/INF.6, p. 8).

whose territory the nuclear incident occurs. Thus, if an incident occurs in an installation situated in the territory of a Contracting Party, the courts of the Installation State will have jurisdiction. On the other hand, if the incident occurs, in the course of transport of nuclear material to or from a nuclear installation, in the territory of a Contracting Party other than the Installation State, the courts of that other Party will have jurisdiction.

But an incident causing damage for which an operator is liable under the Convention can also occur, in the course of transport of nuclear material, outside the territory of a Contracting Party.<sup>171</sup> In that case, Article XI.2, of the 1963 Vienna Convention provides that exclusive jurisdiction lies with the courts of the Installation State, i.e. the State in whose territory the installation of the operator liable is situated. Thus, these courts will have jurisdiction if the incident occurs, in the course of transport of nuclear material, in (or above) the territory of a non-Contracting Party; similarly, they will have jurisdiction if the incident occurs on (or above) the high seas.

The term “territory” in Article XI can be deemed to include maritime areas, such as the territorial sea and internal waters, subject to the coastal State’s territorial sovereignty. Thus, if the incident occurs in (or above) a Contracting Party’s territorial sea, the courts of that Party will have jurisdiction; on the other hand, if the incident occurs in (or above) the territorial sea of a non-Contracting State, the courts of the Installation State will have jurisdiction. As for those maritime areas which are not subject to the coastal State’s territorial sovereignty but to more limited “sovereign rights” and/or “jurisdiction”, the term “territory” cannot apply to them. Consequently, if an incident occurs within (or above) one such zone, irrespective of whether or not the coastal State is a Party to the 1963 Vienna Convention, jurisdiction will lie with the courts of the Installation State.<sup>172</sup>

The 1997 Protocol inserts in Article XI of the Vienna Convention a new paragraph 1 bis, whereby, “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 ... lie only with the courts of that Party”.<sup>173</sup>

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<sup>171</sup> This can happen, first of all, when nuclear material is sent from the operator of an installation situated in the territory of a Contracting Party to the operator of an installation situated in the territory of another Contracting Party; under Article II.1(b)(i)-(ii) and (c)(i)-(ii), of the Vienna Convention, either the sending operator or the receiving operator is held liable in that case. Moreover, the same can happen when nuclear material is sent from the operator of an installation situated in the territory of a Contracting Party to a person within the territory of a non-Contracting State, or in the opposite situation where a person within a non-Contracting State sends nuclear material to the operator of an installation situated in a Contracting Party; under Article II.1(b)(iv) and (c)(iv), of the Vienna Convention, the operator remains liable, in the first instance, until the material has been unloaded from the means of transport by which it arrived in the territory of the non-Contracting State, whereas, in the second instance, he becomes liable as soon as the material has been loaded for transport.

<sup>172</sup> It is perhaps necessary to recall that, by their very nature, these provisions are only binding on the Contracting Parties. The Vienna Convention cannot prevent the law of a non-Contracting State within whose territory, or maritime zones, a nuclear incident occurs from conferring jurisdiction upon national courts for actions against the operator liable or, indeed, any other person who may be liable under the applicable tort law. On the other hand, the Contracting Parties are not obliged by the Vienna Convention to recognize and enforce judgements entered by the courts of that State.

<sup>173</sup> The new provision originally emerged from discussions relating to the Convention on Supplementary Compensation, and then at the very end of negotiations within the Standing Committee. It was part of a “package” prepared by the Chairman of the Standing Committee which was presented at the sixteenth session (see document SCNL/16/INF.3, Annex I, p. 12). Only at the seventeenth session (Part II) was it decided to insert an identical provision in the Protocol to Amend the Vienna Convention (see document SCNL/17.II/INF.7, pp.4 and 34).

The choice of the exclusive economic zone,<sup>174</sup> as opposed to other maritime zones beyond the coastal State's territorial sea,<sup>175</sup> was primarily motivated by the fact that the EEZ is a recognized, clearly demarcated and broad maritime zone. According to Article 57 of the 1982 Convention on the Law of the Sea, the EEZ can extend up to 200 nautical miles from the territorial sea baselines. The exclusive economic zone is, however, an optional zone and only exists if the coastal State has made an express proclamation to that end. Whereas there may be good reasons behind a coastal State's decision not to establish an exclusive economic zone, the drafters of the 1997 Protocol felt that it would have been unreasonable to ask the victims of a nuclear incident occurring within two hundred miles from a Party's coast to bring their actions in the courts of the Installation State simply because the coastal State had not (yet) established an EEZ. This explains the provision whereby, if an EEZ has not been established, jurisdiction still lies with the courts of the Incident State if the incident occurs "in an area not exceeding the limits of an exclusive economic zone, were one to be established"; however, in order for this rule to apply, the coastal State must have notified the Depositary of such an area "prior to the nuclear incident".<sup>176</sup>

Given the breadth of the exclusive economic zone, the new provision on jurisdiction in the 1997 Protocol makes it much more likely that, in the case of a nuclear incident occurring in the course of maritime transport, the courts of the Incident State, as opposed to the courts of the Installation State, will have jurisdiction under the Vienna Convention.<sup>177</sup> These courts will then be able to apply to all

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<sup>174</sup> The exclusive economic zone is a zone beyond and adjacent to a coastal State's territorial sea in respect of which the coastal State has a complex of "rights, jurisdiction and duties". The coastal State enjoys "sovereign rights" for the purpose of exploring and exploiting, conserving and managing the natural resources of the zone and with regard to other activities for its economic exploration and exploitation. The coastal State also has "jurisdiction" with regard to the establishment and use of artificial islands, installations and structures within its EEZ, as well as to marine scientific research and the protection and preservation of the marine environment. The rules relating to the EEZ were first "codified" in Part V (Articles 55 to 75) of the 1982 United Nations Convention on the Law of the Sea.

<sup>175</sup> For a brief discussion of the various maritime zones envisaged by the international law of the sea and of the extension thereof, see the footnotes to Section II.2(c) of this Commentary.

<sup>176</sup> This provision was only inserted in the Protocol at the Diplomatic Conference, on the basis of a proposal by the United Kingdom (document NL/DC/L.2 and Rev.1 and 2). The UK proposal was intended to "cover the position of states which have not declared official EEZ's but do possess equivalent maritime zones established in accordance with international law"; moreover, it was said to "bring the ... draft Protocol into line with the existing International Maritime Organization conventions on liability for oil pollution damage (IOPC) and damage caused by hazardous and noxious substances (HNS)". The proposal was adopted, at the fourth plenary meeting by 41 votes to 1 with 17 abstentions (see document NL/DC/SR.4, pp. 3–4). On the basis of the same UK proposal the need for prior notification to the Depositary was also inserted in the Protocol at the Diplomatic Conference. Because of the way the provision is drafted, however, prior notification appears to be required on the part of a State which has established an exclusive economic zone also.

<sup>177</sup> It is, however, necessary to recall, in this respect (see Section II.1 of this Commentary), that, until all Contracting Parties to the 1963 Vienna Convention join the 1997 amending Protocol, the Contracting Parties to the 1997 Protocol will also be in treaty relations with the States that are party only to the 1963 Convention, unless they express a contrary intention upon ratification or accession (or, in the case of States which were already Parties to the 1963 Convention at the time of ratification of the 1997 Protocol, or accession thereto, unless they denounce the 1963 Convention in accordance with Article XXV). Article 30.4(b), of the 1969 Vienna Convention on the Law of Treaties, dealing with the "application of successive treaties relating to the same subject matter", states that: "When the parties to the later treaty do not include all the parties to the earlier one: ... as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations". This provision can be regarded as a codification of customary international law, and, as is specified by Article 40.4, of the same Convention, it also applies to the case where a multilateral treaty is amended by a successive treaty; on the other hand, the provision is said to be "without prejudice ... to any question of

aspects of liability not regulated by the Convention their national law or, as the case may be, the law of a foreign State applicable under the national rules of private international law. This could be an incentive for non-nuclear States currently not party to the Vienna Convention, or indeed to any other nuclear liability convention, to join the Convention, so that a final judgement rendered by the competent national court will be recognized and enforced in all the other Contracting Parties.<sup>178</sup>

In view of the concerns expressed by some delegations during the negotiations within the Standing Committee,<sup>179</sup> it is perhaps worth pointing out that this new provision on jurisdiction is not intended to extend a coastal State's "sovereign rights" and "jurisdiction" within its EEZ beyond what is permitted by the international law of the sea, nor is it intended to encroach upon the freedoms of the high seas in cases where the coastal State has not established an EEZ. A clear statement to that effect has been inserted at the end of the new paragraph 1 bis of Article XI.<sup>180</sup> In fact, the 1963 Vienna Convention already permits the exercise of civil jurisdiction for nuclear incidents occurring beyond a Party's territorial sea, and the only effect of the new provision is to create a new uniform rule whereby the courts of the Incident State, as opposed to those of the Installation State, will have jurisdiction.

The question may arise, in this context, of which courts would have jurisdiction if an incident occurs in an area where the EEZs (or equivalent areas) of two or more Contracting Parties with opposite or adjacent coasts overlap. Of course, it can safely be assumed that in most cases a dispute as to competing claims deriving from the notification of overlapping zones (or areas) under Article XI.2 would be solved prior to the nuclear incident. In fact, as will be pointed out in Section II.11 of this Commentary, one of the features of the 1997 Protocol is the adoption, in a new Article XX A, of a dispute settlement procedure which results in a binding judicial decision or arbitral award. On the other hand, such provision can be opted out of by any State wishing to ratify, or accede to, the Protocol. Article XI.3 of the Vienna Convention, in both the 1963 and 1997 versions, provides that where, under the relevant paragraphs of that Article, jurisdiction would lie with the courts of more than one Contracting Party, jurisdiction shall lie: (a) if the nuclear incident occurred partly outside the territory of any Contracting Party and partly within the territory of a single Contracting Party, with the courts of the latter; and (b) in any other case, with the courts of that Contracting Party which is determined by agreement between the Contracting Parties whose courts would be competent under the

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responsibility that may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty". Consequently, if an incident occurs in the EEZ (or equivalent area) of a Contracting Party to the 1997 Protocol but the Installation State is a Party to only the 1963 Convention, the 1963 Convention will apply and jurisdiction will lie with the courts of the Installation State. On the other hand, if both the Incident State and the Installation State are Parties to the 1997 Protocol but damage is suffered also in a State which is a Contracting Party to only the 1963 Convention, the former States would be faced with conflicting treaty obligations; in fact, whereas under the 1997 Protocol the courts of the Incident State would have jurisdiction, under the 1963 Convention jurisdiction would lie with the courts of the Installation State. At the Diplomatic Conference, a proposal aimed at avoiding such conflicts was made by Belgium (document NL/DC/L.13), but was not adopted. As will be seen in Section III.9(b) of this Commentary, a provision aimed at avoiding similar conflicts was inserted in the Convention on Supplementary Compensation.

<sup>178</sup> During the negotiations, it was repeatedly pointed out that the issue of jurisdiction was connected with the definition of nuclear damage, and that the non-nuclear coastal States having international shipping routes within their EEZ wished to ensure their jurisdiction over claims resulting from nuclear incidents in such zones "as a protection against a narrow definition of nuclear damage that may be applied by the law of the Installation State" (see, for example, document SCNL/17/INF.4, Annex III, p. 14).

<sup>179</sup> See, for example, document SCNL/17.II/INF.7, p. 4.

<sup>180</sup> That statement was only inserted at the Diplomatic Conference on the basis of the UK proposal referred to in footnote 176 (document NL/DC/L.2 and Rev.1 and 2).

relevant paragraphs of Article XI. The provision under (b) may now be deemed to apply also to the case where the incident occurs in a place located in overlapping EEZs (or equivalent areas).<sup>181</sup>

Of course, if the interested Parties reach an agreement under Article XI.3, such agreement will only be relevant for the purposes of jurisdiction under the Vienna Convention and will not, as such, affect the final delimitation of the exclusive economic zone. The same can be said in respect of the settlement of a dispute relating to jurisdiction through the procedure envisaged in Article XX A.<sup>182</sup>

## 10. Other issues relating to jurisdiction and to the recognition of judgements

The uniform rules on jurisdiction provided for in Article XI of the Vienna Convention, in both the original and the amended text, are said to apply to “actions under Article II”, which relates to the operator’s liability.<sup>183</sup> However, it seems important to recall, in this respect, that, under Article II.7, “direct action shall lie against the person furnishing financial security pursuant to Article VII, if the law of the competent court so provides”.<sup>184</sup> Therefore, direct actions against insurers or other financial guarantors will have to be brought before the same court which, under Article XI, has jurisdiction in respect of actions against the operator.

But quite apart from the question of jurisdiction for direct actions against the insurer, another question as to the scope of Article XI may arise as a result of the two options which the 1997 Protocol gives to the Installation State as to the basis for compensation of nuclear damage. As was explained in Section II.4(b) of this Commentary, Article V of the 1997 Vienna Convention gives the Installation State the option to establish the limit of the operator’s liability to no less than 150 million SDRs (or, in the transitional period, to an unspecified amount lower than 100 million SDRs), provided that it makes public funds available to compensate damage in excess of that amount up to at least 300 million SDRs (or, during the transitional period, 100 million SDRs). As was pointed out in that context, if this option is taken, it could be argued that the operator is technically not liable for damage exceeding 150 million

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<sup>181</sup> On the other hand, if no agreement is reached, Article XI.3(b) provides for no alternative solution. Under Article 13(c)(ii) of the 1960 Paris Convention, the issue is not left to be resolved by an agreement between the Parties concerned; rather, jurisdiction lies with the courts of the Contracting Party determined, at the request of a Contracting Party concerned, by the Tribunal established by the Convention on the Establishment of a Security Control in the Field of Nuclear Energy of 20 December 1957. That Tribunal is to decide in favour of the Contracting Party “most closely related to the case in question”.

<sup>182</sup> It is significant, in this respect, that the 2004 Protocol Amending the Paris Convention, which adopts new provisions on jurisdiction corresponding to those in Article XI.2 of the 1997 Vienna Convention, expressly states that “the exercise of jurisdiction under this Article as well as the notification of an area made pursuant to paragraph (b) of this Article shall not create any right or obligation or set a precedent with respect to the delimitation of maritime areas between States with opposite or adjacent coasts” (Article 13(e) as amended). In addition, an express provision is inserted in Article 17, relating to the settlement of disputes under the Paris Convention, to the effect that “disputes concerning the delimitation of maritime boundaries are outside the scope of this Convention” (Article 17(d) as amended).

<sup>183</sup> The uniform rules on jurisdiction do not, therefore, cover actions in recourse by the operator, or by the Installation State, under Article X.

<sup>184</sup> At the first meeting of the Intersessional Working Group a proposal intended to accord the victims of nuclear damage a right of direct action independently of the provisions of national law was recommended by the Group for consideration by the Standing Committee (see document IWG.1, Annex IV). At the third session of the Standing Committee, the proposal was included within square brackets in the Committee’s documentation (see document SCNL/3/INF.2/Rev.1, p. 7). However, “little support” was expressed for the proposal at the fifth session and the Committee decided to remove it from its documentation (see document SCNL/5/INF.4, p. 8).

SDRs (or for the lower amount established during the transitional period). On the other hand, it was also pointed out in that context that the State's obligation to make public funds available to compensate damage in excess of the operator's liability appears to be in the nature of a mere international obligation vis-à-vis the other Contracting Parties to the 1997 Convention; the question of whether the State is liable under its domestic law for damage exceeding the limit of the operator's liability is left open by the Convention.

In any event, Article XI exclusively relates to jurisdiction over actions under Article II, i.e. actions against the operator and direct actions against the person furnishing financial security pursuant to Article VII. As for the public funds to be made available by the Installation State, the 1997 Protocol merely inserts in the Vienna Convention a new Article V B whereby "each Contracting Party shall ensure that persons suffering damage may enforce their rights to compensation without having to bring separate proceedings according to the origin of the funds provided for such compensation".<sup>185</sup>

As for the payment of claims for compensation, the 1997 Protocol inserts in the Vienna Convention a new Article V C specifically dealing with the case where the courts having jurisdiction are those of a Contracting Party other than the Installation State. Where that is the case, the public funds required to compensate nuclear damage, irrespective of whether they are intended as cover of the operator's liability or as supplementary compensation, may be made available by the State whose courts have jurisdiction, and the Installation State will then have to reimburse the sums so paid.<sup>186</sup> On the other hand, the State whose courts have jurisdiction has to make sure that the Installation State is enabled to intervene in the proceedings and to participate in any settlement concerning compensation.

Another important feature of the 1997 Protocol is the insertion in the Vienna Convention of a new Article XI A, whereby "the Contracting Party whose courts have jurisdiction shall ensure that in relation to actions for compensation of nuclear damage – (a) any State may bring an action on behalf of persons who have suffered nuclear damage, who are nationals of that State or have their domicile or residence in its territory, and who have consented thereto; and (b) any person may bring an action to enforce rights under this Convention acquired by subrogation or assignment".<sup>187</sup>

One final point needs to be made in respect of jurisdiction under the Vienna Convention. Article XI of the 1963 Convention refers to "the courts" having jurisdiction. The use of the plural form is in line with the terminology usually employed in international conventions relating to civil jurisdiction. In fact, in some legal systems a distinction can be made between "jurisdiction", which denotes the extent to which a State's courts are entitled to exercise judicial power, and "competence",

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<sup>185</sup> This provision emerged in the context of the proposal by Denmark and Sweden intended to insert in the Vienna Convention an element of extra funding provided by the Installation State (see document SCNL/8/INF.4, pp. 30–31) and was adopted by the Standing Committee at the ninth session (see document SCNL/9/INF.5, pp. 19–20). The question of who is to be sued in the event of an incident causing damage in excess of the operator's liability limit was discussed by INLEX at its Fourth Meeting (7–11 February 2005). The Group "concluded that ... Article V.B of the revised Vienna Convention imposes an obligation on a Contracting Party to ensure that its national law resolves any such questions in a manner that does not require victims to bring separate proceedings according to the origin of the funds provided for compensation. This means that an Installation State would need to establish the appropriate mechanisms to ensure access to compensation, at the time it established a limit on operator liability lower than the compensation amount established by national law" (p. 12 of the Chairman's Report).

<sup>186</sup> The decision to give the jurisdiction State a mere faculty, as opposed to an obligation, to advance payments was taken at the ninth session as a result of the concerns expressed by some delegations that an obligation would have placed a "heavy burden" on the State, and of the opposition expressed by others to the extension of the obligation to non-nuclear States (see document SCNL/9/INF.5, pp. 11–12).

<sup>187</sup> A draft amendment to this effect was first adopted by the Standing Committee at the fifth session on the basis of a proposal by Germany and Sweden (see document SCNL/5/INF. 4, p. 19).



which denotes the entitlement of a State's court, as opposed to another court of the same State, to adjudicate a case. The term "jurisdiction" in Article XI is clearly intended to denote the extent to which the courts of a State Party are entitled to exercise judicial power in respect of civil actions against the operator of a nuclear installation, whereas the determination of the "competent" court is left to that State's procedural law.<sup>188</sup>

It is generally understood that only one court should be "competent" in relation to the same nuclear incident,<sup>189</sup> but the fact that Article XI of the 1963 Convention does not actually say so may be a source of doubts. The 1997 Protocol clarifies this point by inserting words to that effect in a new paragraph 4, added at the end of Article XI.<sup>190</sup> Of course, the new paragraph will not preclude the possibility for the procedural law of the State whose courts have "jurisdiction" to provide for one or more levels of appeal from that "competent" court. Despite a minor change in terminology, this still results from Article XII of the 1997 Convention, which makes it clear that only "a judgment that is no longer subject to ordinary forms of review",<sup>191</sup> which is "entered by a court of a Contracting Party having jurisdiction", shall be recognized and enforced in the territory of all the other Parties.

## 11. The new dispute settlement procedure

Unlike the 1960 Paris Convention, the 1963 Vienna Convention makes no provision for the settlement of disputes between Contracting Parties concerning its interpretation or application. An Optional Protocol Concerning the Compulsory Settlement of Disputes was adopted on 21 May 1963 at the same Diplomatic Conference which adopted the Vienna Convention. But this Protocol, which only entered into force on 13 May 1999, has at present only two Parties.

Of course, Contracting Parties to the 1963 Vienna Convention may be party to other bilateral or multilateral treaties on the settlement of international disputes which may apply in the event of a dispute concerning the interpretation or application of the Vienna Convention. Moreover, Contracting Parties may have declared, under the so-called "optional clause" in Article 36.2 of the International Court of Justice's Statute, that they recognize as compulsory, in relation to any other State accepting the same obligation, the jurisdiction of the International Court of Justice. However, it is a well-known

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<sup>188</sup> The fact that a clear distinction between "jurisdiction" and "competence" is not made in all legal systems may explain the terminological inconsistencies in the Vienna Convention. Article XI refers to "jurisdiction", but several provisions in the Convention refer to the law of the "competent" court. This may be seen as confirming the soundness of the distinction from a theoretical point of view. On the other hand, Article I.1(e) defines the "law of the competent court" as the law of the court having "jurisdiction" under the Convention.

<sup>189</sup> This assumption is confirmed by the fact that the Vienna Convention often refers to the law of the competent "court", as opposed to "courts".

<sup>190</sup> In this respect also, the fact that a clear distinction between "jurisdiction" and "competence" is not made in all legal systems may explain the language used in the new Article XI.4, whereby "the Contracting Party whose courts have jurisdiction shall ensure that only one of its courts shall have **jurisdiction** in relation to any one nuclear incident" (emphasis added). It may be interesting to recall that this provision resulted from a proposal originally made in the context of discussions relating to the setting of priorities in the distribution of compensation: it was suggested that "the setting of priorities might be facilitated by the establishment of a single forum with respect to any given nuclear incident" (see document SCNL/1/INF.4, pp. 14–15).

<sup>191</sup> The 1963 Vienna Convention refers to a "final judgment". The new terminology was adopted at the fourteenth session of the Standing Committee in order to bring the language of Article XII in line with the language used in the Convention on Supplementary Compensation (see document SCNL/14/INF.5, pp. 28 and 30). As will be pointed out in Section III.9(d) of this Commentary, there was "a difference of opinion" regarding the meaning of the term "final judgment", and the Secretariat of the IAEA was asked to prepare a text "based on terminology used in other international treaties".

fact that under general international law there is no obligation to settle international disputes and all procedures for such settlement rest on the consent of the Parties.

The 1997 Protocol inserts in the Vienna Convention a new provision, Article XX A, whereby, if a dispute concerning the interpretation or application of the Convention is not settled within six months by negotiation, or any other peaceful means of the Parties' choice, any Party can, by way of a unilateral request, submit it to arbitration or refer it to the International Court of Justice for decision.<sup>192</sup> Since arbitration, as opposed to judicial settlement, usually presupposes the establishment of an ad hoc arbitrator or arbitral tribunal, Article XX A provides that, if the Parties to the dispute cannot agree on the organization of the arbitration, each of them may request the Secretary General of the United Nations or the President of the International Court of Justice to appoint one or more arbitrators. Ultimately, therefore, the dispute will be settled by an arbitral award or by a decision of the International Court of Justice, either of which would be binding on the Parties.

However, Article XX A.3 allows each State to opt out of this compulsory dispute settlement procedure by a declaration made when ratifying, accepting, approving or acceding to the Convention. The situation is, therefore, not essentially different from the one existing under the 1963 Vienna Convention and Optional Protocol: the only difference is that a State not wishing to be bound by the new dispute settlement procedure has to make a specific declaration to that effect; without such a specific declaration, ratification of, or accession to, the amending Protocol will automatically entail an obligation to submit to the compulsory dispute settlement procedure provided for in Article XX A of the 1997 Vienna Convention.

So far, none of the States which have ratified the 1997 Protocol have made a declaration to that effect. In any event, Article XX A.4 adds that a declaration made in accordance with paragraph 3 can at any time be withdrawn by notification to the Depositary.

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<sup>192</sup> A suggestion to include a dispute settlement provision in the Vienna Convention was made at the very first session of the Standing Committee (see document SCNL/1/INF.4, p. 15). The first proposal was articulated during the second session and the first meeting of the Intersessional Working Group, and was provisionally adopted at the third session (see documents SCNL/2/INF.2, p. 9; IWG.1, Annex II; SCNL/3/INF.2/Rev.1, pp. 10–11). A minor amendment was articulated during the second meeting of the Intersessional Working Group and adopted at the fifth session (see documents IWG.2, Annex II; SCNL/4/INF.6, p. 23; SCNL/5/INF.4, pp. 32–33).

### III. The Convention on Supplementary Compensation for Nuclear Damage

#### 1. Supplementary compensation under pre-existing national legislation and international conventions

Among the general principles on which the special regime of nuclear liability is based are the limitation of the operator's liability in amount and/or the limitation of liability cover by insurance or other financial security. As was pointed out earlier, these principles are justified by the need not to put a prohibitive burden on persons engaging in nuclear activities, in order not to discourage them from engaging in such activities; on the other hand, they are a clear disadvantage for persons suffering damage, and whatever ceiling is established by national law may seem arbitrary in the light of the potential consequences of a major nuclear incident.

Even before the development of an international legal regime of nuclear liability, the need to ensure adequate compensation for damage exceeding the amount of the operator's liability was met in several countries by making provision to cover such damage from public funds. This extra coverage was either automatically provided for by rules setting forth a specific obligation of the State to assume liability up to a certain amount, or simply envisaged in the form of special measures to be adopted by means of ad hoc legislation in case of a major accident; in some legal systems, the two methods were combined by providing for a specific obligation up to a certain amount and reserving for ad hoc legislation the additional coverage that may be required in the light of the damage actually caused.

When the international civil liability regime was first developed in the regional framework of the OEEC (now OECD), it was suggested from many sides that a conventional obligation on the part of the Installation State to ensure supplementary coverage up to a given amount should be clearly set forth in the Paris Convention which was then being negotiated. This suggestion was, however, not adopted, and the 1960 Paris Convention merely allows each State Party to take such measures as it deems necessary to provide for an increase in the amount of compensation.<sup>193</sup> But it was soon recognized that leaving the matter to the absolute discretion of the Installation State was not a viable option, and this led to the adoption of the 1963 Brussels Convention Supplementary to the Paris Convention.<sup>194</sup>

The Brussels Convention, which is only open to States party to the Paris Convention,<sup>195</sup> established a regional system of additional coverage of damage provided partly by the Installation State and partly by all the Contracting Parties together.<sup>196</sup> In other words, not only is the Installation State obliged to provide public funds up to a certain amount in order to cover damage in excess of the operator's liability limit, but a "third layer" of compensation is envisaged, whereby all the Contracting Parties, in a spirit of mutual solidarity, are obliged to provide public funds up to an additional amount in order to cover damage in excess of the first two layers of compensation.

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<sup>193</sup> See Article 15 of the Paris Convention.

<sup>194</sup> See Section I.1 of this Commentary. As for the situation under the 1997 Vienna Convention, see Section II.4(c) of this Commentary.

<sup>195</sup> See Articles 1, 19 and 22 of the Brussels Convention.

<sup>196</sup> See Article 3 of the Brussels Convention.

Unlike the Paris Convention, the 1963 Vienna Convention does not expressly envisage the possibility for the Contracting Parties to establish a system of additional compensation for damage exceeding the operator's liability. On the other hand, the Vienna Convention only provides for minimum liability amounts; it leaves the Installation State free to establish a higher limit, irrespective of the possibilities of the operator to obtain coverage of his liability, provided that it makes the necessary funds available to ensure the payment of claims established against the operator to the extent that the yield of insurance or other financial security is inadequate to satisfy such claims.<sup>197</sup> But few States have taken this option, and no supplementary convention was adopted in respect of the 1963 Vienna Convention.

The Diplomatic Conference which resulted in the adoption of the 1963 Vienna Convention had actually raised the issue of supplementary compensation. In the resolution of 19 May 1963 asking the IAEA to establish a Standing Committee in order to review issues relating to the Convention, the Conference recommended that one of the Committee's tasks should be "to study the desirability and feasibility of setting up an international compensation fund for nuclear damage and the manner in which such a fund would work" not only "to enable operators to meet their liability under Article V of the Convention", but also in order to cover "damage exceeding the amount therein provided".<sup>198</sup> The Board of Governors' decision of 18 September 1963 which established the Standing Committee did refer to the tasks set forth in the Conference resolution of 19 May 1963;<sup>199</sup> however, the discussions within the Standing Committee, which only held six series of meetings between its establishment and 1987, never led to the adoption of a system of supplementary compensation for the 1963 Vienna Convention.

## 2. The origin of the new Convention

After the Chernobyl incident, the idea of supplementary funding at the world level attracted renewed interest. One proposal put forward at that time was to study the feasibility of developing a new instrument on State liability for transboundary damage which could complement the civil liability conventions and provide a framework for establishing a comprehensive nuclear liability regime.<sup>200</sup> When the Standing Committee was re-established, one of its tasks was to consider "international State liability, and the relationship between international civil and State liability". On the other hand, as was pointed out earlier, several delegations raised doubts as to the existence of an international regime of State liability for nuclear damage, and took the view that the need for such a regime could be obviated by the establishment of a system of supplementary funding similar to the one created by the 1963 Brussels Convention, but applicable at the world level.<sup>201</sup>

The issue of supplementary funding was given thorough consideration within the Standing Committee. Work centred at first on the elaboration of a world convention which would supplement both the Vienna Convention and the Paris Convention, and would only be open to States party to either one of those Conventions. Various alternative approaches were explored, such as the establishment of additional tiers of compensation by the Installation State, through pooling of

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<sup>197</sup> See Section I.3(c) of this Commentary.

<sup>198</sup> See document CN-12/48, Annex I, also reproduced in document GOV/931 of 7 August 1963, Annex I.

<sup>199</sup> See document GOV/931 of 7 August 1963 and document GOV/OR 329, paragraphs 34–72.

<sup>200</sup> See document GC (SPL.1)/8.

<sup>201</sup> See I.6 and Section II.2(a) of this Commentary.

operators and by the Contracting Parties collectively.<sup>202</sup> As was pointed out earlier, the Standing Committee eventually decided to insert an element of supplementary funding, namely the tier of compensation by the Installation State, in the Protocol amending the Vienna Convention also.<sup>203</sup>

As for the additional tier of compensation, the difficulties involved in the establishment of an international fund at the world level soon became apparent, especially if the model was to be the 1963 Brussels Convention. Most delegations were of the view that non-nuclear States should also be encouraged to join the new convention, but it was difficult to see how such States could accept to contribute financially to the establishment of a fund which would largely be used to compensate damage suffered in the Installation State, except in the case where the nuclear incident occurred in the course of transport or in an installation situated near a frontier. Moreover, it was pointed out that even nuclear States which were able to ensure high levels of nuclear safety might find it difficult to contribute to such a fund, inasmuch as mutual solidarity of nuclear States was largely regarded as presupposing comparable levels of nuclear safety.

The situation began to evolve as a result of the gradual emergence of the idea that the international funds to be made available under the world supplementary funding convention, unlike those envisaged in the 1963 Brussels Convention, should only be used in order to compensate so-called “transboundary damage”, i.e. damage suffered outside the territory of the Installation State.<sup>204</sup> However, although this idea looked attractive to both non-nuclear and nuclear States, some nuclear States were firmly against it, because, in their view, it would contradict one of the basic principles of the international nuclear liability regime, i.e. the principle of non-discrimination, and might even create difficult constitutional problems in some legal systems. A compromise solution was eventually reached whereby the international funds should be used, in part, to compensate transboundary damage

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<sup>202</sup> A first draft convention supplementary to the Vienna Convention and to the Paris Convention was prepared by the IAEA Secretariat at the request of the Standing Committee, and was presented at the first meeting of the Intersessional Working Group (see document IWG.1, Annex V). At the third session, the Standing Committee adopted that draft as the basis for future consideration, together with an alternative proposal by Poland (see document SCNL/3/INF.2/Rev.1, pp. 2–3 and Annex I, pp. 1–2). However, other alternative proposals soon emerged and, in particular, a joint proposal by France and the United Kingdom was included in the Committee’s documentation at the sixth session (see document SCNL/8/INF.4, pp. 3–4, 5, and 63 ff). The original draft convention prepared by the Secretariat, which became known as the “levy draft”, and the alternative draft convention proposed by France and the United Kingdom, which became known as the “pool draft”, soon became the centre of negotiations. The difficulty of reaching a compromise between the two approaches led to recurrent discussions on whether the linkage between the revision of the Vienna Convention and supplementary funding should be maintained or the two issues should be “decoupled”, leaving supplementary funding to be discussed after the adoption of an amending protocol for the Vienna Convention. As was pointed out in Section II.4(b) of this Commentary, the joint Danish-Swedish proposal (document SCNL/8/2/Rev.1), aimed at inserting in the Vienna Convention itself an element of supplementary compensation, was intended as a possible alternative solution; however, negotiations on the drafting of a supplementary funding convention continued notwithstanding the adoption of the Danish-Swedish proposal (see document SCNL/9/INF.5, pp. 5–8). At the ninth session, the Standing Committee requested the Secretariat to prepare a new draft convention, which was presented at the fourth meeting of the Intersessional Working Group and became known as the “collective State contributions draft” (see document IWG.4/INF.4, Annex I). The “levy draft” and the “pool draft” were finally removed from the documentation at the eleventh session (see document SCNL/11/INF.5, p.6). As for the new “collective State contributions” draft, it will be explained later that this was finally merged with an alternative United States proposal and became the basis for the present Convention on Supplementary Compensation: see footnote 208.

<sup>203</sup> See Section II.4(b) of this Commentary.

<sup>204</sup> The idea was put forward in a “non-paper” (document SCNL/8/6) presented by the United States at the eighth session (see document SCNL/8/INF. 4, pp. 4 and 104–108).

only and, in part, to compensate damage suffered both inside and outside the territory of the Installation State.<sup>205</sup>

### 3. The “free standing” character of the Convention

#### (a) The relation of the new Convention with the conventions on civil liability for nuclear damage

As was pointed out in Section III.2 of this Commentary, the original idea within the Standing Committee was to elaborate a convention supplementary to both the Paris Convention and the Vienna Convention and open only to States party to either one of those conventions. It soon became clear, however, that not all nuclear States were prepared to amend their national legislation in order to comply with all the principles of international nuclear liability embodied in those conventions.<sup>206</sup>

Reference was made, in particular, to the legislation of the United States of America, based on the 1957 Price–Anderson Act, which created the world’s first national regime of nuclear liability. That legislation, instead of “channelling” liability exclusively to the operator (so-called “legal channelling”), envisages a system of “omnibus” coverage for any person who may be liable for nuclear damage under the general law of torts (so-called “economic channelling”).<sup>207</sup>

At the same time, the participation of the United States in the future regime was deemed essential in order to ensure the availability of sufficient funds for supplementary compensation. Consequently, it was eventually decided to elaborate a convention open not only to the States party to either the Paris Convention or the Vienna Convention but also to the States party to neither convention, provided that their legislation conforms to certain basic principles of nuclear liability;

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<sup>205</sup> See Section III.7 of this Commentary.

<sup>206</sup> It was pointed out in Section I.2 of this Commentary that the 1963 Vienna Convention is silent on the question of permissible reservations, and that a reservation purporting to exclude the application of one of the basic principles of nuclear liability could probably be deemed to be incompatible with the object and purpose of the Convention. At the second session of the Working Group on Liability for Nuclear Damage, the view was expressed that “the inclusion of a reservation clause in the Vienna Convention should be considered so as to afford more States the opportunity to become party to it” (see document NL/2/4, p. 6). However, “no views” were expressed on the issue at the first session of the Standing Committee, and the issue was no longer discussed (see document SCNL/1/INF.4, p. 14). On the other hand, the question of reservations to the Vienna Convention was touched upon by the United States proposal, which will be referred to in the following footnote.

<sup>207</sup> The suggestion to further study “the concurrent or alternative use of economic channelling along with legal channelling as a means of guaranteeing the set amount of financial cover” was made by “one delegation” at the very first session of the Standing Committee (see document SCNL/1/INF.4, p. 8). During the first meeting of the Intersessional Working Group, the United States put forward a specific proposal concerning economic channelling (see document IWG.1, Attachment). The American proposal remained in the Committee’s documentation for a long time without being discussed, in part due to a desire to postpone the discussion on the part of the US delegation itself pending further information on a survey being undertaken in the United States on the application of strict liability in state law. The proposal was removed from the Committee’s documentation at the tenth session without giving rise to specific amendments to the Vienna Convention. In fact, the United States delegation came to the conclusion that “a revised Vienna Convention is not expected to be either a universal instrument which attracts the adherence of all important countries or a source of sufficient compensation which a majority of countries can accept” (see document IWG/4/4); from then on, it concentrated on its new draft convention on supplementary compensation (the “umbrella draft”), which will be referred to in the following footnote.

moreover, it was also decided to insert in the Convention a so-called “grandfather clause”, in order to allow the United States to participate in the regime without changing its national legislation.<sup>208</sup>

The Preamble to the 1997 Convention on Supplementary Compensation makes it clear that the purpose of the new Convention is the establishment of a worldwide liability regime “to supplement and enhance” measures provided not only in the Vienna Convention and in the Paris Convention, but also in national legislation “consistent with the principles of these Conventions”. For this reason, the Convention sets out specific provisions on civil liability for nuclear damage in an Annex thereto, and Article II.3 states that the Annex constitutes an integral part of the Convention. Article II.1 states that the purpose of the Convention is to supplement the system of compensation provided pursuant to national law which: (a) implements the Paris Convention or the Vienna Convention; or (b) complies with the provisions of the Annex. Although, under Article XVII, the Convention is open for signature on the part of “all” States until it enters into force, Articles XVIII and XIX make it clear that instruments of ratification, acceptance or approval, as well as instruments of accession, shall be accepted only on the part of States party to either the Vienna Convention or the Paris Conventions or of States declaring that their national law complies with the provisions of the Annex.<sup>209</sup>

Moreover, the Preamble “recognizes” that “such a worldwide liability regime would encourage regional and global co-operation to promote a higher level of nuclear safety in accordance with the principles of international partnership and solidarity”. In this respect, Articles XVIII and XIX specify that a State having on its territory a nuclear installation as defined in the Convention on Nuclear Safety of 17 June 1994 will have to be a Party to that Convention before it can ratify, or accede to, the Convention on Supplementary Compensation.

#### **(b) The principles of nuclear liability embodied in the Annex**

A cursory glance at the liability provisions contained in the Annex to the Convention on Supplementary Compensation makes it clear that these are based on the general principles common to both the Vienna Convention and the Paris Convention. The Annex provides, in particular, for: “absolute” and exclusive liability of the operator of a nuclear installation (Article 3); limitation of liability in amount and/or of liability cover by insurance or other financial security (Articles 4 and 5); limitation of liability in time (Article 9).

These principles have been extensively examined in Sections I and II of this Commentary and there seems to be no need here to examine the provisions of the Annex in any great detail; in fact,

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<sup>208</sup> A detailed proposal in the form of a new draft convention (document IWG/4/4) was presented by the United States at the fourth meeting of the Intersessional Working Group (see document IWG.4/INF.4, pp. 37 ff) and became known as the “umbrella draft”. This “umbrella draft” soon became the centre of negotiations, together with the “collective State contributions draft” which was referred to in footnote 202. The prevailing view within the Standing Committee was that the two drafts were not mutually exclusive and, after an informal drafting meeting which took place in May 1995, a decision to merge the two drafts in a single “merged draft”, containing the “grandfather clause”, was taken at the twelfth session (see document SCNL/12/INF.6, pp. 2–5 and 44 ff. A new draft convention (the “September draft”), which first had an Annex setting forth the principles of nuclear liability for States not party to either the Vienna or the Paris Convention, emerged from another informal meeting which took place in September 1995, and was adopted at the thirteenth session (see document SCNL/13/INF.3, pp. 17 ff). On the basis of this “September draft”, the Convention on Supplementary Compensation was eventually adopted.

<sup>209</sup> Under Articles XVIII and XIX, each Contracting Party is required to provide the Depositary with a copy, in one of the official languages of the United Nations, of the provisions of its national law. Copies of such provisions are to be circulated by the Depositary to all other Contracting Parties.

most of these provisions are based on corresponding provisions in the Vienna Convention.<sup>210</sup> There is, however, an important exception which deserves to be mentioned. Unlike the Vienna Convention, the Annex contains specific provisions relating to “carriage”, which are based, in part, on corresponding provisions in the Paris Convention.<sup>211</sup>

Article 6.1, states that, “with respect to a nuclear incident during carriage, the maximum amount of liability of the operator shall be governed by the national law of the Installation State”. This appears to be a mere restatement of the rule embodied in Article 4.3, whereby the liability amounts established by the Installation State apply “wherever the nuclear incident occurs”; this rule can also be found in Article V.3, of the 1997 Vienna Convention. On the other hand, the other two paragraphs of Article 6 have no corresponding provisions in the Vienna Convention, and it is difficult to understand why they were not inserted in the 1997 amending Protocol also.<sup>212</sup>

Article 6.2, provides that a Contracting Party may subject the carriage of nuclear material through its territory to the condition that the maximum amount of liability of the foreign operator concerned be increased if it considers that such amount does not adequately cover the risks involved. However, the maximum amount thus increased, which applies only to incidents occurring in the territory of the State being transited, cannot exceed the maximum amount of liability of operators of nuclear installations situated in the territory of that State.

Moreover, paragraph 3 excludes the application of paragraph 2 in two cases: the first relates to “carriage by sea where, under international law, there is a right of entry in cases of urgent distress into ports of a Contracting Party or a right of innocent passage through its territory”,<sup>213</sup> the second relates to “carriage by air where, by agreement or under international law, there is a right to fly over or land on the territory of a Contracting Party”. It is thus made clear that, whereas the special international regime of nuclear liability per se affords no right to enter the territory of a Contracting Party, in cases where there is such a right under general international law or under other international conventions, the transit of nuclear material can be made subject to no special condition.

Apart from Article 6, the Annex’s provisions appear to be, from a general point of view, rather less detailed than the provisions of either the Paris Convention or the Vienna Convention, thus leaving

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<sup>210</sup> This was made explicit when the “September draft”, which first had an Annex setting forth the principles of civil liability to be inserted in the legislation of States not party to either the Vienna Convention or the Paris Convention, became the basis for negotiations within the Standing Committee (see document SCNL/13/INF.3, p. 3).

<sup>211</sup> See Article 7(d) to (f) of the Paris Convention.

<sup>212</sup> It is significant, in this respect, that some delegations wanted to insert these provisions in the main body of the Convention rather than in the Annex; in fact, this would have made them applicable to all States, including Parties to the Vienna Convention, wishing to join the Convention on Supplementary Compensation. It was pointed out at the time that the best way to achieve “equality with the Vienna Convention and Paris Convention” was to retain the text in the Annex and at the same time insert the provisions in the Protocol to amend the Vienna Convention also (see document SCNL/13/INF.3, pp. 14–15 and 53). However, when a final decision was made to retain these provisions in the Annex, no corresponding provisions were in fact inserted in the 1997 Protocol, nor were any reasons given for that (see document SCNL/14/INF.5, p. 32).

<sup>213</sup> In this context, the term “territory”, which is also employed in Article 7(f)(i) of the Paris Convention, clearly refers to a Contracting Party’s maritime territory, i.e. to its internal and territorial waters. In the case of a so-called “Archipelagic State”, a Contracting Party’s maritime “territory” would also include its “archipelagic waters” if archipelagic baselines have been drawn in accordance with Article 47 of the 1982 United Nations Convention on the Law of the Sea. A right of innocent passage only exists in a State’s internal waters in exceptional situations, whereas it exists as a rule in a State’s territorial sea and in an archipelagic State’s archipelagic waters.



a greater discretion to national law. It seems important to point out, in particular, that not all the improvements of the nuclear liability regime which are embodied in the 1997 Protocol to Amend the Vienna Convention have been incorporated in the Annex.

In particular, the list of nuclear installations covered, which can be found in Article 1.1(b) of the Annex, is based on the corresponding provision of the 1963 Vienna Convention, and there is no possibility for the Board of Governors of the IAEA to include other types of installations.<sup>214</sup> Secondly, there is no provision in the Annex on the coverage of nuclear damage “wherever suffered”;<sup>215</sup> as will be explained in Section III.5(c) of this Commentary, the Convention on Supplementary Compensation leaves an Annex State free to exclude damage suffered in non-Contracting States, irrespective of whether or not these States have a nuclear installation in their territory. Thirdly, Article 3.5(b) of the Annex, like the corresponding provision in the unrevised Vienna Convention, excludes the operator’s liability for damage caused by a nuclear incident directly due to a grave natural disaster of an exceptional character, unless the law of the Installation State provides to the contrary.<sup>216</sup> Fourthly, Article 9 of the Annex, like the corresponding provision in the unrevised Vienna Convention, provides for a general ten-year period of extinction for rights of compensation, and does not provide for a longer period for rights relating to loss of life and personal injury;<sup>217</sup> on the other hand, Article 9.2, like the unrevised Vienna Convention, provides for a separate twenty-year period of extinction for rights relating to damage caused by an incident involving nuclear material which has been stolen, lost, jettisoned or abandoned.<sup>218</sup> Finally, no mandatory provision is made in the Annex for giving priority in the distribution of compensation to claims in respect of loss of life or personal injury.<sup>219</sup>

The greater discretion which the Annex leaves to national law can be explained by a desire on the part of the drafters of the Convention on Supplementary Compensation to permit universal adherence thereto; in order to provide a linkage among countries with different liability regimes, it was thought desirable to set forth the “minimum basic criteria that should characterize any domestic or

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<sup>214</sup> In this respect, see Section II.2(b) of this Commentary. See also Section III.5(b) of this Commentary.

<sup>215</sup> In this respect, see Section II.2(c) of this Commentary.

<sup>216</sup> In this respect, see Section II.5 of this Commentary.

<sup>217</sup> In this respect, see Section II.6 of this Commentary. It may be interesting to recall that the US “umbrella draft” did provide for a thirty year extinction (or prescription) period in respect of loss of life or personal injury (see document SCNL/IWG/4/INF.4, p. 43). The “merged draft” had alternative provisions on this issue, one of which was based on the corresponding proposal to amend the Vienna Convention (see document SCNL/12/INF.6). When the “September draft” became the basis of negotiations, a footnote to the provision relating to the period of extinction made it clear that the provision was based on Article VI of the 1963 Vienna Convention, but added that “some experts preferred that provisions on time limits based on the provisions in the Basic Text for revision of the Vienna Convention be inserted in the main body of the convention on supplementary funding” (see document SCNL/13/INF.3, p. 15 and 55–56). However, at the fourteenth session the Drafting Committee deleted the footnote with little discussion of the issue (see document SCNL/14/INF.5, p. 32).

<sup>218</sup> In this respect also, see Section II.6 of this Commentary.

<sup>219</sup> In this respect, see Section II.7 of this Commentary. Article 9.4 of the Annex does provide that the national law of a Contracting Party “shall contain provisions for the equitable and timely satisfaction of claims for loss of life or personal injury filed within ten years from the date of the nuclear incident”. But this provision leaves considerable more discretion to national law than the corresponding provision in the Protocol to Amend the Vienna Convention; moreover, it only applies “if the national law of a Contracting Party provides for a period of extinction or prescription greater than ten years from the date of a nuclear incident”. It must be pointed out, in this latter respect, that the possibility for the “law of the competent court” to provide for a period of extinction or extinction longer than ten years is only envisaged by Article 9.2 if, under the “law of the Installation State”, the operator’s liability is covered by insurance (or other financial security) or by State funds for such longer period.

international nuclear liability system”.<sup>220</sup> The desire to permit universal adherence is also at the basis of the “grandfather clause”.

**(c) The “grandfather clause”**

The Annex also provides for exclusive liability of the operator of the nuclear installation (Article 3.9 and 10). However, it was mentioned earlier that, in order to allow for the participation of the United States of America without changing its legislation, which is based on the concept of “economic”, as opposed to “legal”, channelling of nuclear liability, a so-called “grandfather clause” was inserted in the Annex (Article 2). In respect of this “grandfather clause”, it must be pointed out that, although the clause uses language potentially applicable to other States, in practice it is intended to apply to the United States only;<sup>221</sup> in fact, the clause refers to a State whose national law contained certain provisions on 1 January 1995, and the United States appears to be the only State whose legislation contained those provisions on that date.

Under Article 2.1, the national law of a Contracting Party is deemed to be in conformity with the provisions of Articles 3, 4, 5 and 7 of the Annex if, on 1 January 1995, it contained provisions that: (a) provide for strict liability for substantial off-site nuclear damage; (b) require the indemnification of any person other than the operator liable in so far as that person is liable to pay compensation; (c) ensure the availability for such indemnification of at least 1000 million SDRs in respect of a civil nuclear power plant and at least 300 million SDRs in respect of other civil nuclear installations.

On the basis of this clause, the United States is allowed to derogate from the provisions of the Annex relating to the operator’s liability (Article 3), the liability amounts (Article 4), the financial security which the operator is required to have and maintain (Article 5), and the liability of more than one operator (Article 7). Moreover, under Article 2.2 and 3, the “grandfather clause” allows the United States to apply a definition of “nuclear damage” wider than the one set forth in Article I.1(f) of the Convention,<sup>222</sup> as well as a specific definition of “nuclear installation”.<sup>223</sup>

It must be pointed out, however, that while the Price–Anderson Act covers all nuclear incidents occurring within the United States, it only covers a nuclear incident outside the United States if the incident results from an activity on behalf of the US Department of Energy involving material owned by the US or the incident results from an activity covered by a license issued by the US Nuclear Regulatory Commission. Thus, it does not cover all incidents in respect of which the US courts might have jurisdiction under the Convention on Supplementary Compensation.

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<sup>220</sup> See the explanatory note preceding the original “umbrella draft” presented by the United States (document IWG/4/4).

<sup>221</sup> When the “grandfather clause” first appeared in the context of the “merged draft”, it was explicitly “agreed” within the Drafting Committee that “the formulation should be specifically drafted to take account of the United States Price Anderson Act”, and, on this basis, “no objections” were raised against its inclusion in the draft (see document SCNL/12/INF.6, p. 12).

<sup>222</sup> On this question, see Section III.5(d) of this Commentary.

<sup>223</sup> Under Article 2.3, “nuclear installation” means: (a) any “civil nuclear reactor” other than one with which a means of sea or air transport is equipped for use as a source of power; (b) any “civil facility” for processing, reprocessing or storing irradiated nuclear fuel or radioactive products or waste; (c) any “other civil facility” for processing, reprocessing or storing nuclear material unless the Contracting Party determines that the small extent of the risks involved warrants its exclusion. For the purposes of Article 2.3(b), facilities for processing, reprocessing or storing radioactive products or waste are only included if such products or waste: (1) result from the reprocessing of irradiated nuclear fuel and contain significant amounts of fission products; or (2) contain elements that have an atomic number greater than 92 in concentrations greater than 10 nano-curies per gram. These facilities handle highly radioactive material with significant potential for widespread serious consequences if released.

Article 2.4 of the Annex states that “where that national law of a Contracting Party which is in compliance with paragraph 1 of this Article does not apply to a nuclear incident which occurs outside the territory of that Contracting Party, but over which the courts of that Contracting Party have jurisdiction pursuant to Article XIII of this Convention, Articles 3 to 11 of the Annex shall apply and prevail over any inconsistent provisions of the applicable national law.”<sup>224</sup> It is thus made clear that the “grandfather clause” only applies in so far as the Price–Anderson Act applies; in other situations where US courts might have jurisdiction under the Convention, these courts would have to apply the self-executing provisions of the Annex, including those relating to “legal channelling”.<sup>225</sup>

#### 4. The need for implementing legislation

As was pointed out in Section III.3(a) of this Commentary, the Convention on Supplementary Compensation is open to all States party to either the Paris Convention or the Vienna Convention. In Article I(a) and (b) of the Convention, both the “Vienna Convention” and the “Paris Convention” are defined as including “any amendment thereto” which may be in force for a State Party.<sup>226</sup> Thus, as far as the Vienna Convention is concerned, both the States party to the 1997 amending Protocol and those party to the unamended 1963 Convention only may ratify, or accede to, the Convention on Supplementary Compensation.

The new Convention is thus based on the assumption that a worldwide system of supplementary compensation for nuclear damage, must, to some extent, coexist with different national liability regimes. More specifically, the drafters of the Convention felt that, apart from the “grandfather clause”, the basic principles of nuclear liability have to be the same for all States; but harmonization of the legal details was considered to be more appropriate at the regional level and inconsistent with an international nuclear liability regime that aimed at achieving broad adherence on a global basis. As was pointed out in Section III.3(b) of this Commentary, this is also confirmed by the fact that the provisions of the Annex are largely based on the unamended version of the Vienna Convention.

This coexistence of different liability regimes is, however, only accepted to a certain extent. Some basic requirements for joining the Convention on Supplementary Compensation are in fact not contained in the Annex, but rather in the main body of the Convention and, as a result, they have to be complied with by all States wishing to ratify, or accede to, the Convention. More specifically, all Contracting Parties, irrespective of whether they are party to the Paris Convention, the Vienna Convention, any amendment thereto, or no convention at all, will be required to adopt minimum limits of compensation of nuclear damage at the national level (Article III), as well as uniform rules on jurisdiction (Article XIII). Moreover, some degree of harmonization in the definition of nuclear damage is also required by the new Convention (Article I(f)). In so far as these provisions are not

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<sup>224</sup> This paragraph did not appear in the original version of the “grandfather clause” and was only inserted at the Diplomatic Conference on the basis of a proposal by the United States itself (document NL/DC/L.23), as revised by a proposal by Australia (document NL/DC/L.32).

<sup>225</sup> On the question of which is the applicable base convention in the event of an incident involving nuclear material in the course of transport, see Section III.10(a) of this Commentary.

<sup>226</sup> The 1988 Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention, which was referred to in Section I.5 of this Commentary, is also open to States party to different versions of the two conventions (see Articles I, VI and IX of the Joint Protocol).

self-executing, they will need implementing legislation even if they have been directly incorporated within the domestic law of a Contracting Party.<sup>227</sup>

Apart from these requirements, a State party to either the Paris Convention or the Vienna Convention, whatever version is in force for it, will not need to change its domestic legislation on nuclear liability in any other respect in order to join the Convention on Supplementary Compensation, and will only be required to implement the specific obligations relating to supplementary compensation. On the other hand, a State party to neither the Paris Convention nor the Vienna Convention will also be required to conform its domestic law to the provisions on nuclear liability contained in the Annex to the Convention on Supplementary Compensation.

Like the States party to either the Vienna Convention or the Paris Convention in respect of the liability provisions contained therein, the States party to neither convention can choose between the mere incorporation of the Annex provisions in their domestic legal system, thus allowing for the direct application of those provisions which are self-executing, and the adoption of legislation specifically implementing those provisions.<sup>228</sup> Indeed, the Contracting Parties' intent to consider most of the Annex provisions as self-executing if, in accordance with constitutional requirements, they are incorporated in a State's domestic legal order is reflected in the Chapeau of the Annex itself, whose first sentence states that "a Contracting Party which is not a Party to any of the Conventions

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<sup>227</sup> On the meaning of "incorporation" and of "self-executing" see the following footnote. As for the self-executing character of the provisions referred to in the text, all of these issues will be examined in greater detail in the following sections. It will result from that examination that, whereas the provisions relating to jurisdiction can in part be considered as self-executing, those relating to the national compensation amount and to the definition of nuclear damage require implementing legislation in so far as domestic law is not already consistent with them.

<sup>228</sup> As was pointed out in Section I.2, this Commentary is not the place to discuss the relationship between international and domestic law either from a general point of view or in respect of the specific question of the application of treaties in a Contracting Party's domestic legal system. However, since the same terms are sometimes used with a different meaning, it was there clarified that in this Commentary the term "incorporation" is used to denote the legal operation by which an international treaty can be considered as part of a State's domestic law; the term "self-executing" is used to denote the possibility for the provisions of a treaty, once incorporated in a Contracting Party's legal system, to be applied by domestic courts or, more generally, domestic law-applying officials, without the need for implementing legislation.

It seems useful to add here that in some legal systems, such as the English system (and the system in other British Commonwealth States), treaties are not incorporated and require an enabling Act of Parliament in so far as they affect private rights or liabilities, result in charge of public funds, or require modification of the common law or statute for their enforcement in the courts; in these systems, the distinction between self-executing and non-self-executing provisions has no practical value, since implementing legislation is required irrespective of the character of the particular treaty rules and the implementing statute, rather than the treaty itself, will be given effect by domestic courts. In other legal systems, however, such as the system in the United States of America, treaties are automatically incorporated by virtue of a constitutional provision and, to the extent that they, or particular provisions thereof, are found to be self-executing, they can be directly applied by domestic courts without the need for implementing legislation. The same holds true for those legal systems, such as the Italian system, which take a middle course consisting in the adoption of ad hoc legislative provisions incorporating individual treaties in the domestic legal order; domestic courts are thus allowed to directly apply those treaties in so far as their provisions are held to be self-executing. Once a treaty has been incorporated in a State's domestic legal system, the question of whether or not that treaty, or a particular provision thereof, can be considered as self-executing is usually left to be determined by domestic courts or, more generally, by domestic law-applying officials; without going into unnecessary details, it sometimes happens that a treaty, or a particular treaty provision, is held to be self-executing within the domestic legal order of one Contracting Party whereas in another Contracting Party domestic courts or other law-applying officials are not prepared to apply that same treaty or treaty provision in the absence of implementing legislation. However, the intent of the Parties to the treaty is usually taken into account.

mentioned in Article I(a) or (b) of this Convention shall ensure that its national legislation is consistent with the provisions laid down in this Annex, insofar as those provisions are not directly applicable within that Contracting Party”.<sup>229</sup>

On the other hand, not all of the Annex’s provisions can be regarded as self-executing; in fact, like the Paris Convention and the Vienna Convention, the Annex leaves some discretion to national law. Moreover, the special situation of the non-nuclear States has to be taken into account in this context. In fact, the Annex Chapeau has a second sentence to the effect that “a Contracting Party having no nuclear installation on its territory is required to have only that legislation which is necessary to enable such a Party to give effect to its obligations under this Convention”.<sup>230</sup>

It is important to underline, first of all, that the second sentence in the Annex Chapeau refers to obligations under the “Convention” and not just to the provisions laid down in the Annex itself. In fact, it follows from what was said earlier that non-nuclear States, like all other States wishing to join the Convention on Supplementary Compensation would have to implement, in addition to the specific obligations relating to supplementary compensation, those provisions relating to nuclear liability which are contained in the main body of the Convention. In particular, there is no doubt that they would have to implement Article XIII, relating to jurisdiction, and Article I(f), relating to the definition of nuclear damage. In so far as these provisions are not self-executing, they will need implementing legislation on the part of a Contracting Party, nuclear or non-nuclear, even if they have been incorporated within its domestic law.<sup>231</sup>

On the other hand, Article III, in so far as it relates to the minimum national compensation amount, makes explicit reference to those Contracting Parties which are considered to be “Installation States” within the meaning of Article I(e). This provision defines an “Installation State”, in relation to a nuclear installation, as “the Contracting Party within whose territory that installation is situated or, if it is not situated within the territory of any State, the Contracting Party by which or under the authority of which the nuclear installation is operated”. Therefore, a Contracting Party “having no nuclear installation on its territory” is clearly in no position to give effect to the obligation under Article

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<sup>229</sup> This qualification was added at the Diplomatic Conference on the basis of a number of proposals aimed at meeting the concerns of non-nuclear States wishing to join the Convention on Supplementary Compensation (see documents NL/DC/L.27 (United States, together with Australia, Austria, New Zealand and Sweden); NL/DC/L.30 (United States)). These proposals also resulted in the addition of a second sentence to the Chapeau, which will be referred to shortly in the text. But, as far as the first sentence of the Chapeau is concerned, there can be no doubt that this applies equally to both nuclear and non-nuclear States wishing to join the Convention. As was pointed out in document NL/DC/L.27, “many countries may wish to regard the Annex or parts thereof as self-executing in order to avoid the need to pass duplicative national legislation in order to give them effect”. The same could be said in respect of most of the provisions in either the Paris Convention or the Vienna Convention.

<sup>230</sup> As was alluded to in the preceding footnote, the second sentence was added to the Annex Chapeau at the Diplomatic Conference. A proposal to this effect was put forward by New Zealand (see document NL/DC/L. 24). As a result of the setting up of a specific Working Group on the Annex Chapeau, this proposal was merged with the proposals intended to qualify the first sentence of the Chapeau, which were referred to in a preceding footnote (see document NL/DC/L.31). It may be interesting to add that New Zealand had also proposed the adoption of a resolution of the Conference, whereby the Conference would not only have “agreed” that non-nuclear States were only required to have in place legislation consistent with the provisions applicable to them, but would have also “invited” the Secretariat of the IAEA to prepare and distribute either model legislation for such States or appropriate guidelines. However, the Diplomatic Conference did not adopt any resolution.

<sup>231</sup> As was pointed out in footnote 227, the question of whether or not these provisions can be regarded as self-executing will be examined in greater detail in the following sections.

III.1(a), unless that State operates, or has authorized the operation, of a nuclear installation not situated within the territory of any other Contracting Party to the Convention on Supplementary Compensation.

As far as the provisions of the Annex are concerned, it must be pointed out that the courts of a non-nuclear State will only have jurisdiction under the Convention on Supplementary Compensation in the event of an incident involving nuclear material in the course of transport and causing nuclear damage for which the operator of a nuclear installation situated in the territory of another Contracting Party is liable; given the free-standing character of the Convention on Supplementary Compensation, that operator may be liable under the law of the Installation State incorporating or implementing the Vienna Convention, the Paris Convention or the Annex itself. Consequently, the question of whether or not a non-nuclear State, like any other Annex State, is to apply the self-executing provisions of the Annex, either by allowing for their direct application within its municipal legal order or by adopting specific implementing legislation, depends on the answer to the question of which is the applicable base convention and, consequently, the applicable law, in cases where the State whose courts have jurisdiction is different from the Installation State. This question will be addressed in Section III.10(a) of this Commentary. It can be anticipated here that, if the applicable convention is the one in force for the State whose courts have jurisdiction, as opposed to the one in force for the Installation State, then a non-nuclear Annex State would have to apply all of the self-executing provisions of the Annex.

As for those Annex provisions which are not self-executing, it must be pointed out that only in a very few instances does the Annex impose on Contracting Parties specific obligations which are clearly not self-executing and which need to be implemented in their domestic legal order. In all such instances, obligations are exclusively imposed on those Contracting Parties which can be considered as “Installation States” under the definition referred to above.<sup>232</sup> In cases where the courts of a non-nuclear Contracting Party have jurisdiction under Article XIII of the Convention, these courts would, of course, be expected to give effect to the law of the Installation State implementing these provisions.

In most cases, the non-self-executing provisions of the Annex merely give the Contracting Parties the faculty to adopt specific provisions in their domestic legislation, which, if in fact adopted, would complement, and sometimes derogate from,<sup>233</sup> the self-executing provisions of the Annex; in such cases, there is no need for a Contracting Party, nuclear or non-nuclear, to pass specific legislation if it does not wish to have such provisions, or if it already has them, in its domestic law.

It must be pointed out, in this respect also, that some of the Annex’s provisions exclusively give this faculty to the “Installation State”, its “legislation” or its “law”,<sup>234</sup> in cases where the Installation State has in fact exercised this faculty, the courts of a non-nuclear State having jurisdiction under Article XIII of the Convention would again be expected to give effect to the law of that State.<sup>235</sup> In other cases, however, a general reference is made to a “Contracting Party”,<sup>236</sup> to “national law”<sup>237</sup> or

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<sup>232</sup> Reference can be made, in particular, to Article 1.1(d), whereby “operator”, in relation to a nuclear installation, means the person “designated or recognized by the Installation State as the operator of that installation” and to Article 5, whereby the Installation State is to specify the amount, type and terms of the insurance or other financial security which the operator is required to have and maintain.

<sup>233</sup> In some instances, the Annex, just like the Vienna Convention and the Paris Convention, states that a specific rule applies unless otherwise provided by the applicable national law (e.g. Article 3.5(b), 7(c), and 9). In these instances, national law is allowed to derogate from an otherwise applicable rule.

<sup>234</sup> See, in particular: Article 1.1(b) and 1.2; Article 3.2 and 3.5(b); Article 4.1 and 4.2; Article 5.1(a) and 5.1 (b); Article 7.1 and 7.4; Article 9.1.

<sup>235</sup> With respect to the maximum amount of the operator’s liability, see explicitly Article 4.3 and Article 6.1.

<sup>236</sup> See, in particular, Article 6.2.

to “the law of the competent court”,<sup>238</sup> thus giving each Annex State, including a non-nuclear State, the faculty to complement, or derogate from, the Annex’s provisions;<sup>239</sup> in these cases, it is for each Contracting Party, nuclear or non-nuclear, to decide whether or not it is in its interest to exercise this faculty.

## 5. The scope of application of the Convention

### (a) Supplementary compensation and rights under general international law

Article XV states that the Convention on Supplementary Compensation “shall not affect the rights and obligations of a Contracting Party under the general rules of public international law”.<sup>240</sup> This provision is based on the amended Article XVIII in the 1997 Vienna Convention, which, as was pointed out in Section II.2 of this Commentary, leaves the issues of State liability for nuclear damage outside the scope of the Convention. Of course, both the 1997 Vienna Convention and the Convention on Supplementary Compensation do recognize that the Installation State is obliged to ensure compensation of nuclear damage up to a certain amount by providing public funds, either as cover of the operator’s liability or as supplementary compensation, to the extent that the operator’s liability is fixed at a lower level and/or is not entirely covered by insurance or other financial security. But the question of whether or not the Installation State has additional obligations under the general rules of international law is left entirely open by both the 1997 Vienna Convention and the Convention on Supplementary Compensation.

### (b) Installations covered

The Convention on Supplementary Compensation is not intended to apply to nuclear damage caused by incidents in, or in connection with, military installations. Article II.2 makes it very clear that the Convention exclusively applies to “nuclear damage for which an operator of a nuclear installation used for peaceful purposes situated in the territory of a Contracting Party is liable”.

Moreover, in view of the free-standing character of the Convention, Article II.1 also makes it clear that the operator may be liable under domestic law which “implements” either the Paris Convention or the Vienna Convention or “complies with” the provisions of the Annex. The Convention does not itself specify which installations are covered by the regime of supplementary compensation; whether or not an installation is covered depends entirely on the scope of the applicable civil liability convention or, in the case of an “Annex operator”, on the scope of the Annex.

In respect of the scope of the Vienna Convention, reference can be made to Section II.2(b) of this Commentary.<sup>241</sup> As for the scope of the Annex provisions, it was pointed out in Section III.3(b) of this Commentary that the list of nuclear installations covered is based on the corresponding list in the unamended 1963 Vienna Convention. Article 1.1(b) of the Annex defines “nuclear installation” as including: (i) any nuclear reactor other than one with which a means of sea or air transport is equipped

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<sup>237</sup> See, in particular, Article 3.6, 7(c) and 9; Article 9.4; Article 10.

<sup>238</sup> See, in particular, Article 9.3; Article 11.

<sup>239</sup> On the ambiguities created by inconsistent references to “national law” or to “the law of the competent court” see Section III.10(b) of this Commentary.

<sup>240</sup> A provision to that effect did not appear in either the “collective State contributions draft” or the “umbrella draft” (see document IWG/4/INF.4, pp. 9 ff and 39 ff). It first appeared as Article X of the “merged draft” (see document SCNL/12/INF.6, p. 67). A corresponding Article was also inserted in the “September draft” on the basis of a proposal by Italy (see document SCNL/13/INF.3, pp. 12 and 35).

<sup>241</sup> In respect of the Paris Convention, see Article 1(a)(ii), which, however, will be amended by the 2004 Protocol.

for use as a source of power, whether for propulsion thereof or for any other purpose; (ii) any factory using nuclear fuel for the production of nuclear material, or any factory for the processing of nuclear material, including any factory for the re-processing of irradiated nuclear fuel; and (iii) any facility where nuclear material is stored, other than storage incidental to carriage”.<sup>242</sup>

Like the amended 1997 Vienna Convention and the Paris Convention<sup>243</sup>, Article 1.2(a) of the Annex envisages the possibility to exclude low-risk installations; more particularly, as in the 1997 Vienna Convention, that possibility is given to the Installation State, but only if criteria for such exclusion have been established by the Board of Governors of the IAEA.<sup>244</sup> On the other hand, unlike the Paris Convention<sup>245</sup> and the amended 1997 Vienna Convention, the Annex does not envisage the possibility for a competent international body to decide the inclusion of additional types of installations.<sup>246</sup>

### (c) “Geographical scope”

The Convention on Supplementary Compensation says nothing as to the **place of a nuclear incident**; in this respect also, its scope of application entirely depends on the scope of the applicable civil liability convention or, in the case of an “Annex operator”, on the scope of the Annex. Thus, there can be no doubt that the Convention applies if the incident causing damage occurs in an installation situated in the territory of a Contracting Party, irrespective of whether the operator is liable under the Vienna Convention, the Paris Convention or the Annex. However, doubts may arise if the incident occurs in the course of transport of nuclear material; depending on the scope of the applicable nuclear liability regime, the Convention may or may not apply.

As was pointed out in Section II.2(c) of this Commentary, the Vienna Convention applies to nuclear incidents occurring outside the territory of Contracting Parties, provided that the operator of a nuclear installation situated in such territory is liable under the Convention.<sup>247</sup> The same can be said in

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<sup>242</sup> Article 1.1(b) envisages the possibility for the Installation State to determine that several nuclear installations of one operator which are located at the same site shall be considered as a single nuclear installation.

<sup>243</sup> See Article 1(b) of the Paris Convention.

<sup>244</sup> Article 2.2(b) relates to the exclusion of small quantities of nuclear material and is based, in its turn, on a corresponding provision in both the unamended and the amended version of the Vienna Convention

<sup>245</sup> See Article 1(a)(ii) of the Paris Convention.

<sup>246</sup> The “merged draft” had a definition of nuclear installation, based on the original US proposal, which allowed the inclusion of “any other facility designated by a Contracting Party as a nuclear installation” (see document SCNL/12/INF.6, p. 47). When the “September draft” became the basis of negotiations within the Standing Committee, a proposal to replace the definition therein contained with the definition in the “merged draft” did not receive “sufficient support”; it was eventually decided to insert in the Annex those provisions from the proposed amendments to the Vienna Convention which allow for the exclusion of low-risk installations, but not those which allow for the inclusion of additional types of installations (see document SCNL/13/INF.3, p. 13).

<sup>247</sup> This can happen, first of all, when nuclear material is sent from the operator of an installation situated in the territory of a State Party to the operator of an installation situated in the territory of another State Party; under Article II.1(b)(i)-(ii) and (c)(i)-(ii) of the Vienna Convention, either the sending operator or the receiving operator is held liable in that case. Moreover, the Vienna Convention also applies when nuclear material is sent from the operator of an installation situated in territory of a State Party to a person within the territory of a non-party State, or in the opposite situation where a person within a non-party State sends nuclear material to the operator of an installation situated in a State Party; under Article II.(b)(iv) and (c)(iv) of the Vienna Convention, the operator remains liable, in the first instance, until the material has been unloaded from the means of transport by which it arrived in the territory of the non-party State, whereas, in the second instance, he becomes liable as soon as the material has been loaded for transport.



respect of the national law implementing the Annex to the Convention on Supplementary Compensation.<sup>248</sup> On the other hand, it was pointed out in Section I.2 of this Commentary that the Paris Convention expressly states that it does not apply to nuclear incidents occurring in the territory of non-Contracting States, unless otherwise provided by the law of the Installation State; this means that the operator is liable under the Paris Convention if an incident occurs on the high seas, or in other maritime areas which cannot be considered as part of a non-Contracting State's territory, but he may not be liable if the incident occurs in the territory, or in the territorial sea, of a non-Contracting State. However, already on 24 April 1971, the Steering Committee of the Paris Convention recommended to the Contracting Parties to extend by national legislation the scope of application of the Convention in order to cover damage suffered in a Contracting Party, or on the high seas on board a ship registered in such a Party, "even if the incident causing the damage has occurred in a non-Contracting State".<sup>249</sup>

This raises the related question of the **place where the nuclear damage is suffered**. As will be explained later in greater detail, the Convention on Supplementary Compensation creates an obligation on the part of all the Contracting Parties to make public funds available in order to compensate damage exceeding a given amount which the Installation State must make available at the national level. As far as the national compensation amount is concerned, Article III.2(a) of the Convention allows the law of the Installation State, subject to obligations of that State under other conventions on nuclear liability, to exclude damage suffered in a non-Contracting State.

Thus, the legislation of a State party to the Convention on Supplementary Compensation only may exclude damage suffered in all non-Contracting States. On the other hand, the legislation of a State which is a Party to both the Convention on Supplementary Compensation and the Paris Convention may not exclude damage suffered in the territory of States party to the Paris Convention only; in addition, if that State is a Party to the 1988 Joint Protocol also, it cannot exclude damage suffered in the territory of States party to both the Vienna Convention and the Joint Protocol.<sup>250</sup> Mutatis mutandis, the same holds true for the legislation of a State which is a Party to both the Convention on Supplementary Compensation and the unamended Vienna Convention. On the other hand, the legislation of a State which is a Party to both the Convention on Supplementary Compensation and the 1997 Vienna Convention has to cover damage wherever suffered, but may exclude damage suffered in the territory, or maritime zones, of nuclear States party to neither the Vienna Convention nor to the Convention on Supplementary Compensation, unless these States afford reciprocal benefits,<sup>251</sup> of course, if that State is also a Party to the 1988 Joint Protocol, it may not

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<sup>248</sup> Article 3.1 of the Annex contains provisions identical with those of Article II.1 of the Vienna Convention. However, for the purposes of the Annex, all States party to the Convention on Supplementary Compensation are to be considered as Contracting Parties. The operator of an "Annex State" may, therefore, be liable under national legislation where the nuclear incident occurs in the course of transport of nuclear material to or from an installation situated in the territory of another State party to the Convention on Supplementary Compensation (irrespective of whether that State is a party to the Vienna Convention, a party to the Paris Convention or another party to the Annex). Moreover, he may also be liable if the incident occurs in the course of transport of material to or from an installation situated in the territory of a non-party State (irrespective of whether that State is a party to the Vienna Convention, a party to the Paris Convention or a State party to no international nuclear liability convention).

<sup>249</sup> See: OECD, NEA, *Paris Convention. Decisions, Recommendations, Interpretations*, Paris, 1990, p. 9

<sup>250</sup> As was pointed out in Section I.5 of this Commentary, the 1988 Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention provides that an operator liable under both the Paris Convention and the Joint Protocol is liable in accordance with the Paris Convention for damage suffered both in the territory of Contracting Parties thereto and in the territory of Contracting Parties to both the Vienna Convention and the Joint Protocol. Conversely, if an incident occurs for which an operator is liable under both the Vienna Convention and the Joint Protocol, there shall be reciprocity.

<sup>251</sup> See Section II.2(c) of this Commentary.

exclude damage suffered in the territory, or maritime zones, of States party to both the Paris Convention and the Joint Protocol.<sup>252</sup> It seems clear, in any case, that damage suffered on the high seas, or within other maritime areas which cannot be considered as part of a non-Contracting State's territory, will always be covered.

As for the “geographical scope” of the additional funds to be provided by all the Contracting Parties, in cases where the damage exceeds the national compensation amount, Article V makes it clear that those additional funds will not be used to cover damage suffered in the territory of non-Contracting States.<sup>253</sup> Moreover, as was alluded to earlier and will be explained later in greater detail, those funds will be used, in part, to compensate damage suffered both inside and outside the territory of the Installation State and, in part, to compensate transboundary damage only.<sup>254</sup>

Leaving aside, for the time being, the question of transboundary damage, the supplementary funds envisaged in the Convention are to be used to compensate: (a) all damage suffered “in the territory of a Contracting Party”, including its territorial sea; (b) damage suffered by nationals of the Contracting Parties, or on board or by ships or aircraft registered in such Parties, “in or above maritime areas beyond the territorial sea of a Contracting Party”, but “excluding damage suffered in or above the territorial sea of a State not Party” to the Convention,<sup>255</sup> (c) damage suffered “in or above the exclusive economic zone of a Contracting Party or on the continental shelf of a Contracting Party in connection with the exploitation or exploration of the natural resources of that exclusive economic zone or continental shelf”,<sup>256</sup>

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<sup>252</sup> On the question of which is the applicable civil liability convention in cases where the State whose courts have jurisdiction is not the Installation State, see Section III.10(a) of this Commentary.

<sup>253</sup> The “collective State contribution draft” (Article 3) had two alternatives, one of which was based on the idea that supplementary compensation should have the same “geographical scope” as the applicable civil liability regime; on the other hand, the “umbrella draft” (Articles I(o) and VI) was based on the idea that supplementary compensation should be reserved to transboundary damage suffered in the Contracting Parties (see document SCNL/IWG/4/INF.4, pp. 11–13 and 41). The “merged draft” (Article VIII.6) provided that “supplementary funding shall be used only for nuclear damage in Participating Parties” (see document SCNL/12/INF.6, p. 59). In the “September draft” (Article III) two alternatives were again present, the second of which was based on the idea that supplementary compensation should have the same “geographical scope” as the applicable civil liability regime (see document SCNL/13/INF. 3, pp 20–22). However, the second alternative was deleted at the fifteenth session; moreover, a decision was taken at the same time to move the provision to another position in the draft and make other drafting changes intended to “make clear that the geographical scope should only apply to the distribution of compensation provided by the international fund” (see document SCNL/15/INF.5, pp. 14, and 45–46).

<sup>254</sup> See Section III.7 of this Commentary.

<sup>255</sup> The “September draft” (Article III, Alternative 1) merely referred, in this respect, to damage suffered “in or above the exclusive economic zone of a Contracting party”. The present wording was adopted at the fifteenth session, on the basis of a proposal by an informal working group on “geographical scope”, in order to extend coverage “to damage suffered on board a ship or aircraft registered in a Contracting State, or by a national of a Contracting State, in the Exclusive Economic Zone of a non-Contracting State” (see document SCNL/15/INF.5, p. 14). But of course — and, indeed, a fortiori — the provision also covers damage suffered on board a ship or aircraft registered in a Contracting State, or by a national of a Contracting State, on or above the high seas.

<sup>256</sup> As will be pointed out in Section III.7 of this Commentary, this provision covers damage suffered in connection with the exploration or exploitation of the natural resources of the exclusive economic zone or the continental shelf of a Contracting Party irrespective of the nationality of the claimants. Moreover, damage need not be suffered on board or by a ship or aircraft registered in a Contracting Party; indeed, damage may be suffered, for example, on or by artificial islands, installations or structures constructed within a Contracting Party's EEZ or on its continental shelf. On the concepts of exclusive economic zone

It may be necessary to point out that the Convention does not preclude any Party from establishing a further layer of compensation in addition to the national compensation amount to be provided by the Installation State and to the amount resulting from the funds to be provided by all the Contracting Parties together. This is made clear by Article XII.2. In that case, the Convention leaves that State free to determine how the additional funds are to be used in respect of the place where damage is suffered. However, Article XII.2 provides that coverage of damage suffered in a non-nuclear State party to the Convention cannot be excluded on the sole basis of lack of reciprocity.

**(d) The definition of nuclear damage**

Finally, as far as the definition of nuclear damage is concerned, Article I(f) of the Convention on Supplementary Compensation provides a harmonized definition identical to the one adopted in the 1997 Protocol to Amend the Vienna Convention. This definition has been examined in some detail in Section II.3 of this Commentary and there seems to be no need here to restate what has been said in that context.<sup>257</sup> It seems sufficient to recall that the definition represents a difficult compromise and to briefly summarize the contents of that compromise.

Article I(f) adds to (i) loss of life and personal injury and to (ii) loss of, or damage to, property a series of other heads of damage each of which, in principle, should be compensated, but only “to the extent determined by the law of the competent court”. These additional heads of damage consist in: (iii) economic loss arising from loss of life or personal injury and from loss of or damage to property; (iv) the costs of measures of reinstatement of impaired environment; (v) loss of income deriving from an economic interest in any use or enjoyment of the environment; (vi) the costs of preventive measures. In addition, Article I(f)(vii) refers to “any other economic loss”, but such further loss is only covered “if permitted by the general law on civil liability of the competent court”.

It seems clear that this definition is not entirely self-executing and requires implementing legislation, in so far as the law of a Contracting Party does not already provide for compensation of the various categories of damage enumerated in Article I(f)(iii) to (vi). As was pointed out in Section III.4 of this Commentary, all the Contracting Parties to the Convention on Supplementary Compensation will have to implement the new definition, irrespective of whether or not they are also party to the Vienna Convention or to the Paris Convention, and irrespective of whether or not any amendment thereto is in force for them.<sup>258</sup> Moreover, the new definition will have to be applied irrespective of whether damage is to be compensated on the basis of the national compensation amount to be

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and continental shelf, and on the respective extension of such zones, see the footnotes to Section II.2(c) of this Commentary.

<sup>257</sup> It was pointed out in that context that the definition of nuclear damage which was eventually inserted in the Protocol to Amend the Vienna Convention actually originated from the negotiations relating to the Convention on Supplementary Compensation.

<sup>258</sup> In the original “September draft”, the definition of nuclear damage had in fact been inserted (in square brackets) both in the main body of the Convention and in the Annex, “on the assumption that the requirements for participation in this Convention for States not Party to the Vienna Convention or the Paris Convention should not be more stringent than for States Parties to those Conventions which may participate in the supplementary funding convention with the definition of nuclear damage in their national law based on definitions in the existing basic Conventions” (see document SCNL/13/INF.3, pp. 18 and 43). But several delegations made clear that they preferred the inclusion of the definition in the main body of the Convention, and the deletion of the definition in the Annex was decided at the sixteenth session (see document SCNL/16/INF.3, p. 21).

provided by the Installation State or of the additional public funds to be made available by all the Contracting Parties.<sup>259</sup>

As for the residual head of damage enumerated under Article I(f)(vii), the Convention allows for the coverage of so-called “pure economic loss” even if it does not derive from an economic interest in the use or enjoyment of the environment, but only if permitted by “the general law on civil liability of the competent court”. This residual head of damage is not covered by the new definition of “nuclear damage” adopted in the 2004 Protocol to Amend the Paris Convention, a definition which is otherwise almost identical to the one contained in both the Protocol to Amend the Vienna Convention and the Convention on Supplementary Compensation. According to the Explanatory Report attached to the 2004 Protocol, the Paris Convention States “were simply not convinced” that the residual head of damage enumerated under Article I(f)(vii) of the Convention on Supplementary Compensation “was not already covered by other heads of damage included in the definition”.<sup>260</sup> However that may be, a State party to the Paris Convention wishing to join the Convention on Supplementary Compensation would have to make sure that this residual category of economic loss can be compensated in the event of a nuclear incident if its own general law on civil liability allows for the compensation of this category of economic loss in case of damage other than nuclear damage.<sup>261</sup>

## 6. The amounts of compensation under the Convention

Under Article III of the Convention, compensation in respect of nuclear damage per nuclear incident must be ensured, up to a certain amount, at the national level by the operator liable, through insurance or other financial security, or by the Installation State (see Section III.6(a) of this Commentary); beyond that amount, supplementary compensation is to be provided for by all the Contracting Parties through public funds to be made available in accordance with a specified formula

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<sup>259</sup> The definition of “nuclear damage” is given in Article I(f) “for the purposes” of the Convention. Under Article III.1 of the Convention, each Contracting Party is obliged to compensate “nuclear damage” (a) by ensuring the availability of the specified national compensation amount, and (b) by making available additional public funds, together with all the other Contracting Parties, if the damage caused by the nuclear incident exceeds that national compensation amount. It seems, therefore, beyond dispute that, in the absence of any special provisions in Article III, the definition of “nuclear damage” in Article I(f) applies “for the purposes” of Article III.1(a) and (b).

<sup>260</sup> Paragraph 12. A possible example of damage that could be recovered under this head was made in Section II.3(b) of this Commentary. It may be worth adding, in this respect, that, under the “grandfather clause” (Article 2.2(a) of the Annex to the CSC), the United States of America is allowed to apply an even wider definition of nuclear damage than the one given in Article I(f); in fact, the United States is allowed to apply a definition “that covers loss or damage set forth in Article I(f) of this Convention and any other loss or damage ..., provided that such application does not affect the undertaking by that Contracting Party pursuant to Article III of this Convention”, i.e. the undertaking to contribute to supplementary compensation of damage in excess of the national compensation amount.

<sup>261</sup> The issue of discrepancies between new definitions of nuclear damage in the revised Paris and Vienna Conventions and the Convention on Supplementary Compensation was discussed by INLEX at its fourth meeting (7-11 February 2005). As was pointed out in Section II.3(b) of this Commentary, there are in fact two such discrepancies. The first is the inclusion in the revised Paris Convention of the word “direct” to qualify the economic interest that may be adversely affected by an impairment of the environment. The second is the lack of reference to the residual category of economic loss which was referred to in the text above. On both issues, the Group concluded that the revised Paris Convention makes an attempt to narrow the discretion of the competent court (see footnotes 109 and 112, respectively). The Group further recognized that “the language of the revised Vienna Convention and the CSC, with the omission of ‘direct’ and the additional head of damage, is broader and allows more scope for the forms of ‘economic loss’ intended to be encompassed to be captured”. Finally, the Group noted that, “if a revised Paris Convention country joined the global regime established by the CSC, it would be obliged to follow the definition of nuclear damage in the CSC” (p. 3 of the Chairman’s Report).

(see Section III.6(b) of this Commentary). Under Article III.4, interest and costs awarded by a court in actions for compensation of nuclear damage are payable in addition to both the national compensation amount and the total amount resulting from the contributions of the Contracting Parties. It is, however, specified that such interest and costs shall be proportionate to the actual contributions made, respectively, by the operator liable, the Installation State and the Contracting Parties together.

**(a) The national compensation amount**

Under Article III.1(a)(i), the Installation State is to ensure the availability of 300 million SDRs or a greater amount that it may have specified to the Depositary prior to the nuclear incident. This national compensation amount corresponds to the minimum amount envisaged in the 1997 Protocol to Amend the Vienna Convention.

On the other hand, as was pointed out in Section II.4(a) of this Commentary, the 1997 Protocol envisages a transitional amount of 100 million SDRs which the Installation State may establish for a period of 15 years from the date of entry into force of the Protocol, i.e. until 4 October 2018. The Convention on Supplementary Compensation also provides for a **transitional amount**. However, the transitional amount envisaged in the Convention is of 150 million SDRs, and the Installation State may only establish that transitional amount for a period of 10 years from the date of opening for signature of the Convention. Thus, on 30 September 2007 that option will no longer be available to a State wishing to ratify, or accede to, the Convention.

It is important to point out that the Convention does not itself specify on what basis the Installation State has to ensure the availability of the national compensation amount. That State will, therefore, be free to establish the limit of the operator's liability at 300 million SDRs or to establish a lower (or higher) limit; moreover, it will be free to determine the extent to which the operator is required to maintain insurance or other financial security in order to cover his liability. Of course, if the Installation State is a Party to the Vienna Convention or to the Paris Convention, its choices in respect of the limit of the operator's liability and of the financial security required will have to be made in accordance with the provisions of the applicable convention.<sup>262</sup>

If, on the other hand, the Installation State is a Party to the Convention on Supplementary Compensation only, Article 4.1 of the Annex gives it a choice similar to that given to the Contracting Parties to the 1997 Vienna Convention, i.e. it can either limit the operator's liability to not less than 300 million SDRs or limit that liability to not less than 150 million SDRs, provided that it makes public funds available in excess of that amount up to 300 million SDRs.<sup>263</sup> Under Article 5.1 of the Annex, the Installation State is to specify the amount, type and terms of the insurance or other financial security which the operator is required to have and maintain.<sup>264</sup>

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<sup>262</sup> With respect to the Vienna Convention, see Sections I.3(c) and II.4 of this Commentary. As for the Paris Convention, see Articles 7 and 10 thereof.

<sup>263</sup> Under Article 4.2 of the Annex: "Notwithstanding paragraph 1, the Installation State, having regard to the nature of the nuclear installation or the nuclear substances involved and to the likely consequences of an incident originating therefrom, may establish a lower amount of liability of the operator, provided that in no event shall any amount so established be less than 5 million SDRs, and provided that the Installation State ensures that public funds shall be made available up to the amount established pursuant to paragraph 1". This provision is based on an identical provision in Article V.2 of the 1997 Vienna Convention. On the special situation of the United States under the "grandfather clause", see Section III.3(c) of this Commentary.

<sup>264</sup> Article 5.1 of the Annex is identical to Article VI.1 of the 1997 Vienna Convention and has identical provisions relating to the case where the liability of the operator is unlimited. On this issue, see Section II.4(c) of this Commentary.

In any case, if the operator's liability is limited to an amount lower than the national compensation amount, and/or if the yield of insurance or other financial security is inadequate to satisfy claims for compensation, the Installation State will have to make public funds available in order to ensure the payment of such claims, up to the limit of the national compensation amount. Therefore, depending on the choice made by the Installation State, public funds may have to be made available as cover of the operator's liability or as supplementary compensation for damage exceeding the limit of that liability. Moreover, Article XII.3 makes it clear that the Convention does not preclude the Installation State from entering into regional or other agreements with other States in order to contribute to the availability of the national compensation amount, provided that this does not involve further obligations under the Convention for the other Contracting Parties.<sup>265</sup>

**(b) The international funds for supplementary compensation**

If the national compensation amount is inadequate to ensure the payment of all claims for compensation for nuclear damage, the Convention envisages a system of supplementary compensation whereby all the Contracting Parties are obliged to make additional public funds available, in accordance with a formula for the calculation of contributions which is specified in Article IV. Article III.3 makes it clear, however, that if the nuclear damage to be compensated does not require the total amount resulting from the application of that formula, the contributions required on the part of the Contracting Parties "will be reduced proportionally".

Under Article IV.1 of the Convention, the **formula for the calculation of contributions** on the part of each Contracting Party consists of two counts.<sup>266</sup> The first count is based on its "installed nuclear capacity" (1 unit for each MW of thermal power multiplied by 300 SDRs),<sup>267</sup> whereas the second count is based on its United Nations rate of assessment. Thus "nuclear" States will have to contribute on the basis of both counts, whereas "non-nuclear" States will have to contribute on the basis of their UN rate of assessment only.<sup>268</sup> Moreover, only an amount equal to 10% of the sum of

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<sup>265</sup> This is not the place to discuss the compatibility between the 1963 Brussels Convention Supplementary to the Paris Convention and the Convention on Supplementary Compensation. However, it may be interesting to point out that the 2004 Protocol to Amend the Brussels Convention will insert in the Convention a new provision (Article 14*d*) permitting a Contracting Party to use the funds from the third tier under the Convention (i.e. the international funds to be made available by all the Contracting Parties together) in order to satisfy its obligations under another international agreement in the field of supplementary compensation for nuclear damage, provided that all Contracting Parties have joined the same agreement. The Explanatory Report attached to the 2004 Protocol explains that the "other international agreement" to which implicit reference is made is the Convention on Supplementary Compensation, "although the Article does not exclude other agreements" (paragraph 60, footnote 25).

<sup>266</sup> The formula for contributions emerged at the sixteenth session of the Standing Committee on the basis of the Chairman's *Note containing Elements for Finalizing the Preparation of the Draft Supplementary Funding Convention* (document SCNL/16/INF.3, Annex I). A sample calculation of contributions paper had already been prepared by the IAEA Secretariat for the fourteenth session (document SCNL/14/INF.4) and had been updated for the fifteenth session (see document SCNL/15/INF.3).

<sup>267</sup> Article I(j) defines "installed nuclear capacity" as being "for each Contracting Party the total of the number of units given by the formula set out in Article IV.2"; the same provision defines "thermal power" as "the maximum thermal power authorized by the competent national authorities".

<sup>268</sup> The issue of whether or not "non-nuclear" States should be asked to contribute to supplementary compensation was the subject of debates within the Standing Committee. Even as late as the Diplomatic Conference, a proposal was put forward by New Zealand (document NL/DC/L.9) whereby "States with no nuclear reactors" would not have been required to make contributions under Article IV. The proposal did not meet with consensus and New Zealand called for a roll-call vote on its proposal; the proposal was rejected at the fourth plenary meeting by 19 votes to 18 with 21 abstentions (see document NL/DC/SR.4, pp. 5-7).

contributions calculated on the basis of the installed nuclear capacity of nuclear States will be allocated among all the Contracting Parties on the basis of their UN rate of assessment. Finally, “non-nuclear” States on the minimum UN rate of assessment will not be required to make any contribution.<sup>269</sup>

It seems necessary to point out that, under Article IV.2, only “nuclear reactors”,<sup>270</sup> as opposed to all “nuclear installations”, are to be taken into account in order to calculate a Party’s contribution on the basis of its installed nuclear capacity.<sup>271</sup> Therefore, States having no nuclear reactors in their territory will contribute on the same basis as non-nuclear States, even if they have nuclear installations other than reactors.<sup>272</sup> Moreover, under Article IV.3, a nuclear reactor shall be taken into account from the date when the nuclear fuel elements have been first loaded therein and until all fuel elements have been removed permanently from the reactor core and have been stored safely in accordance with approved procedures.

For the purpose of calculating contributions, Article VIII requires the Depositary of the Convention to maintain an up-to-date **list of nuclear reactors** which is to be circulated annually to all the Contracting Parties. The list is to be established on the basis of information provided by each Contracting Party, but such information may be challenged by any other Contracting Party; any unresolved differences are to be settled in accordance with the dispute settlement procedure laid down in Article XVI of the Convention.<sup>273</sup>

It follows from what has been said so far that the Convention is not intended to establish a fixed amount of supplementary compensation and that the total amount of such compensation will depend on the number of States - more specifically, on the number of States with nuclear reactors - which are party to the Convention at the time of the nuclear incident.<sup>274</sup> It seems necessary to point out in this respect that, under Article XX, the Convention will enter into force three months after it has been ratified, or acceded to, by at least 5 States with a minimum of 400,000 units of installed nuclear capacity.<sup>275</sup>

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<sup>269</sup> See Article IV.1(b).

<sup>270</sup> Article I(d) defines “nuclear reactor” as “any structure containing nuclear fuel in such an arrangement that a self-sustaining chain progress of nuclear fission can occur therein without an additional source of neutrons”. The definition is taken from the identical definition in Article I.1(i) of the Vienna Convention.

<sup>271</sup> There is, therefore, no correspondence between the installations covered by the nuclear liability regime in the Vienna Convention, the Paris Convention or the Annex and the installations considered by the Convention on Supplementary Compensation for the purpose of calculating a nuclear State’s contribution to such supplementary compensation. During discussions on this issue within the Standing Committee, some delegations wanted to take into account reprocessing plants in addition to reactors, but this proposal did not receive sufficient support (see document SCNL/16/INF.3, pp. 6–7).

<sup>272</sup> At present, no such State seems to exist, but some such States may exist in the future.

<sup>273</sup> See Section III.11 of this Commentary.

<sup>274</sup> When presenting the formula for contributions envisaged in his *Note containing Elements for Finalizing the Preparation of the Draft Supplementary Funding Convention* (document SCNL/16/INF.3, Annex I), the Chairman of the Standing Committee explained that “the figures of 350 SDR for Article IV.1(a)(i) and 10% for (ii) were arrived at on the understanding that a fund of at least 300 million SDRs was desired”, taking into account the “cap” (which will be referred to later in the text) as well as “a realistic number of initial adherences to the Convention”. However, a number of delegations thought that the figures were too high and “figures of 300 SDRs and 10% were felt more acceptable”; consequently, the Chairman decided to amend his original proposal (see document SCNL/16/INF.3, pp. 5–6).

<sup>275</sup> The requirements for the entry into force of the Convention were extensively debated within the Standing Committee. There seems to be no need here to resume that debate in any great detail. It seems

After the entry into force of the Convention, and until the Convention is ratified by a high number of nuclear States, the formula for calculating contributions might have created a situation where one or a few States with a high nuclear capacity would be called upon to provide an excessively large portion of the supplementary compensation amount. In order to avoid this, Article IV.1(c) envisages a percentage limitation for the contribution of an individual State. This “cap” amounts to the UN rate of assessment expressed as a percentage plus eight percentage points. It will start to phase out when the total installed nuclear capacity of the Contracting Parties reaches the level of 625,000 units. The cap does not, however, apply to the calculation of the contribution due on the part of the Installation State of the operator liable.<sup>276</sup>

## 7. The non-discrimination principle and the treatment of transboundary damage

The allocation of the supplementary funds to be provided by all the Contracting Parties was a subject of considerable controversy and intensive negotiations within the Standing Committee. As was alluded to earlier, the original idea was that such funds should only be used in order to compensate so-called “transboundary damage”, i.e. damage suffered outside the territory of the Installation State.<sup>277</sup> This idea looked attractive to a number of States both nuclear and non-nuclear; however, some nuclear States were firmly against it, mainly because, in their view, it would contradict one of the basic principles of the international nuclear liability regime, i.e. the principle of non-discrimination.<sup>278</sup> A compromise solution was eventually reached whereby the supplementary funds should be used, in part, to compensate transboundary damage only and, in part, to compensate damage suffered both inside and outside the territory of the Installation State.<sup>279</sup>

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sufficient to recall that at the very last session of the Standing Committee “a number of delegations indicated that their previously stated concerns that the figure of 400,000 units of installed capacity for entry-into-force ... was too low, remained” (see document SCNL/17.II/INF.7, p. 5). Even at the Diplomatic Conference a proposal put forward by Germany (document NL/DC/L.3/Rev.1) would have required ratification or accession on the part of at least 5 States with a combined minimum of at least 400,000 units of installed capacity, but with at least 10,000 units of installed capacity each. The German proposal was based on the idea that participation of “major nuclear States” was necessary in order to ensure the “global character” of the Convention.

<sup>276</sup> The “cap” was also the object of extensive debates within the Standing Committee. The issue of “capping” was one of two issues on which the Standing Committee was unable to reach consensus at the seventeenth session; as a result, it was decided to resume the session in order to reach consensus on a text to be submitted to the Diplomatic Conference. Four options were discussed during Part II of the seventeenth session and one text was eventually approved for submission to the Diplomatic Conference (see documents SCNL/17/INF.4, p. 7; SCNL/17.II/INF.7, pp. 50). This text corresponded to the present text of Article IV.1(c), except that it made no reference to the exception relating to the contribution due on the part of the Installation State. This restriction was introduced at the Diplomatic Conference on the basis of a proposal by Belgium, Ireland, Lithuania, Luxembourg and Portugal (document NL/DC/L.22).

<sup>277</sup> See Section III.2 of this Commentary. The idea of envisaging “a source of funds exclusively for transboundary damage not compensated under the applicable civil liability system” was first put forward in a US non-paper (document SCNL/8/6) presented at the eighth session of the Standing Committee (see document SCNL/8/INF.4, pp.104–108). It was later reflected in the “umbrella draft” (Article V) presented by the United States at the fourth meeting of the Intersessional Working Group (see document SCNL/IWG.4/INF.4, p. 45).

<sup>278</sup> See, for example, documents SCNL/10/INF.4, pp. 3 and 10.

<sup>279</sup> This compromise solution emerged on the basis of a proposal by Denmark and Sweden which was presented at an informal drafting meeting in May 1995 and then at the twelfth session of the Drafting Committee (document SCNL/12/3, in SCNL/12/INF.6, pp. 72–73). The proposal envisaged a fund which would be split initially into two equal parts reserved for transboundary and domestic damage respectively; however, in respect of claims made after 10 years from the date of the nuclear incident, unused money



Before examining the treatment of transboundary damage under the Convention, a few remarks seem, therefore, in order in respect of the **non-discrimination principle**. As was pointed out when the “geographical scope” provisions in the Protocol to Amend the Vienna Convention were examined in Sections II.2(c) and 8 of this Commentary, the scope of compensation of nuclear damage in respect of the place where that damage is suffered has no direct bearing on the nationality of persons claiming compensation, and has to be understood in the light of the principle of non-discrimination. The same holds true as far as the Convention on Supplementary Compensation is concerned.

In fact, Article III.2 makes it clear that, as a rule, both the national compensation amount and the supplementary funds to be made available under the Convention are to be distributed “equitably without discrimination on the basis of nationality, domicile or residence”. Therefore, provided that damage is suffered within the “geographical scope” of the Convention, compensation can be obtained by nationals of non-Contracting States also; conversely, if damage is suffered outside that “geographical scope”, compensation cannot even be obtained by nationals of the Contracting Parties.

As far as the national compensation amount is concerned, it was pointed out in Section III.5(c) of this Commentary that, under Article III.2(a), the law of the Installation State may, subject to obligations of that State under other conventions on nuclear liability, exclude damage suffered in a non-Contracting State. In view of the non-discrimination principle which is embodied in the first part of this provision, the law of the Installation State exercising that option could not, at the same time, cover damage therein suffered by the nationals of Contracting Parties<sup>280</sup> or, a fortiori, by the nationals of that State only.

As for the additional funds to be made available by the Contracting Parties, however, the non-discrimination principle does suffer exceptions; in fact, Article III.2(b) expressly subjects the principle to the provisions of Articles V and XI.1(b).

Article V relates to the “geographical scope” of supplementary compensation and, as was also pointed out in Section III.5(c) of this Commentary, excludes coverage of damage suffered in the territory of non-Contracting States. In respect of the nationality of claimants, it can be specified here that, irrespective of the nationality of the persons suffering such damage, Article V envisages coverage of all damage suffered in the “territory” (including, therefore, the territorial sea) of a Contracting Party (paragraph 1(a)), as well as damage suffered in or above the EEZ or the continental shelf of a Contracting Party in connection with the exploration or exploitation of the natural resources of that EEZ or continental shelf (paragraph 1 (c)). In addition, Article V.1(b), also covers damage suffered “in or above maritime areas beyond the territorial sea of a Contracting Party” (i.e. damage suffered on the high seas or damage suffered in or above the EEZ or the continental shelf of a Contracting Party but not in connection with the exploration or exploitation of that EEZ or continental shelf). But in respect

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reserved for one part of the fund would be transferred to the other part of the fund. The Danish/Swedish proposal was then incorporated in the “September draft” (see document SCNL/13/INF.3, p. 31). However, at the thirteenth session, the Standing Committee “took note” of a report from an informal working group which envisaged a fund split in two parts one of which was to be distributed to compensate damage suffered both in and outside the Installation State, whereas the other part was reserved for compensation of transboundary damage (see document SCNL/13/INF.3, pp. 5–6). This approach was “broadly supported as a basis for the finalization of the negotiations on supplementary funding” and was at the basis of the adoption, at the sixteenth session, of the provisions which now appear in Article XI (see document SCNL/16/INF.3, pp. 6, 12, and 51). It may be interesting to mention that even at the Diplomatic Conference a proposal was put forward by Belgium (document NL/DC/L.16) in order to remove “all discrimination based on the place where the damage is suffered”; the proposal was not, however, adopted.

<sup>280</sup> This interpretation was endorsed by INLEX at its Fourth Meeting (7-11 February 2005): see pp. 10-11 of the Chairman’s Report.

of this category of damage, the nationality of claimants does have an impact on the possibility of obtaining compensation. In fact, damage is only covered if suffered: (i) by a national of a Contracting Party<sup>281</sup> or (ii) on board or by a ship or aircraft registered in a Contracting Party, irrespective of the nationality of the person suffering the damage.

As for Article XI, this relates to the **treatment of transboundary damage**, to which it is now necessary to turn. It follows from what has been said above that the national compensation amount has to be available to compensate claims suffered both in and outside the Installation State. As for the additional funds to be made available under the Convention, the compromise solution embodied in Article XI.1 is that: (a) 50% of the funds will be used to compensate damage suffered both inside and outside the territory of the Installation State, and (b) the remaining 50% will be exclusively used to compensate damage suffered outside the territory of the Installation State, to the extent that it has not already been compensated under (a).<sup>282</sup> But it must again be stressed that this provision has no direct bearing on the nationality of claimants; transboundary damage can be suffered by nationals of the Installation State, just as damage can be suffered in the territory of the Installation State by nationals of other States.

Article XI.1(c) also provides that, if the Installation State avails itself of the possibility of establishing a national compensation amount lower than 300 million SDRs, the amount of compensation available for both domestic and transboundary damage will be reduced by the percentage by which the national compensation amount is lower than 300 million SDRs and the amount reserved for the compensation of transboundary damage only will be increased by the same percentage. But it was pointed out in Section III.6(a) of this Commentary that that option will only be available to the Installation State until 29 September 2007. If, on the other hand, the Installation State has established a national compensation amount of 600 million SDRs or higher, then Article XI.2 provides that the whole amount of supplementary compensation will be available to compensate both domestic and transboundary damage.

## 8. Other issues relating to the organization of supplementary funding

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<sup>281</sup> Article V.3 specifies that: “In this article, the expression ‘a national of a Contracting Party’ shall include a Contracting Party or any of its constituent sub-divisions, or a partnership, or any public or private body whether corporate or not established in the territory of a Contracting Party”. Moreover, under Article V.2, “any signatory or acceding State may, at the time of signature of or accession to this Convention or on the deposit of its instrument of ratification, declare that for the purposes of the application of paragraph 1(b)(ii), individuals or certain categories thereof, considered under its law as having their habitual residence in its territory, are assimilated to its own nationals”.

<sup>282</sup> At the sixteenth session, discussions within the Drafting Committee made it clear that “the notion of State territory under general international law (land territory and territorial sea) would apply to delineation between domestic and transboundary damage instead of the provisions of Article VI”, *i.e.* the provisions on “geographical scope” which now appear in Article V (see document SCNL/16/INF.3, pp. 18–19). In other words, damage suffered in or above “the maritime areas beyond the territorial sea of a Contracting Party” is to be considered as transboundary damage, irrespective of whether it is suffered in or above a Contracting Party’s maritime zones, the high seas, or the maritime zones adjacent to a non Contracting State’s territorial sea. Of course, such transboundary damage will only be covered if it falls within the “geographical scope” provisions in Article V. On the other hand, it seems clear that, since damage suffered in the Installation State’s territorial sea is to be considered as domestic damage, then a fortiori damage suffered in that State’s internal waters — and, if that State is an “archipelagic State” and “archipelagic baselines” have been drawn in accordance with Article 47 of the 1982 United Nations Convention on the Law of the Sea., in its “archipelagic waters” — is to be so considered. This was actually made explicit in the “umbrella draft” (Article I.1(a), (c) and (n)); on the other hand, the “umbrella draft” also included in the concept of domestic damage the damage suffered in a Contracting Party’s exclusive economic zone.

It follows from what was said in Section III.6(b) of this Commentary that the Convention does not require the Contracting Parties to set aside funds in advance in order to compensate damage which may exceed the national compensation amount in the event of a future nuclear incident. A fortiori, the Convention does not envisage the creation of an international fund with legal personality. Rather, the Contracting Parties will be required to make the additional funds available, after a nuclear incident occurs, to the State whose courts have jurisdiction, and then only to the extent and when those additional funds are actually required.

Article VI provides that, as soon as it appears that the damage caused by a nuclear incident exceeds, or is likely to exceed, the national compensation amount established by the Installation State, the State whose courts have jurisdiction is to inform the other Contracting Parties, and all the Contracting Parties are then required to make the necessary arrangements “to settle the procedure for their relations” without delay. More specifically, Article VII provides that, following the notification of the nuclear incident, the State whose courts have jurisdiction must request the other Contracting Parties to make available the funds required under Article III.1(b), i.e. the additional funds beyond the national compensation amount, to the extent and when they are actually required, and is then exclusively competent to disburse such funds.<sup>283</sup>

In view of the fact that, as will be explained in Section III.9 of this Commentary, the State whose courts have jurisdiction may be different from the Installation State, it is difficult to understand why no specific provision was adopted in respect of the funds which the Installation State must make available in case the operator’s liability limit is lower than the national compensation amount and/or it is not entirely covered by insurance or other financial security. It is significant, in this respect, that the Protocol to Amend the Vienna Convention specifically provides for that situation. As was explained in Section II.4(b) of this Commentary, the amended Vienna Convention allows the Installation State to establish the limit of the operator’s liability to an amount lower than 300 SDRs, provided that it makes public funds available to cover damage in excess of that amount up to 300 million SDRs. For that reason, it was pointed out in Section II.10 of this Commentary that a new provision has been inserted in the Vienna Convention (Article V C.1) whereby, in cases where courts having jurisdiction are those of a Contracting Party other than the Installation State, the State whose courts have jurisdiction may advance the funds required, and the Installation State is then required to reimburse the sums paid. It may be interesting to add, in this context, that Article V C.1 of the 1997 Vienna Convention is based on Article 11(a) of the 1963 Brussels Convention, which, indeed, imposes an obligation on the jurisdiction State to advance the necessary funds.<sup>284</sup>

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<sup>283</sup> The “merged draft” (Article IX) envisaged a different, alternative solution, based on the distribution of supplemental funds on a State-to-State basis (see document SCNL/12/INF.6, p. 65). But this alternative solution was not envisaged in the “September draft” Chapter III) (see document SCNL/13/INF.3, pp. 27 ff.). At the thirteenth session of the Standing Committee, a suggestion was made to make specific provision “to enable the competent court to make interim awards of compensation”. However, this suggestion did not receive sufficient support; it was pointed out that “it belonged to the law of the competent court to provide for interim payment, which then should be paid in accordance with Article VII.1” of the Convention (see document SCNL/13/INF.3, p. 11).

<sup>284</sup> A provision based on Article 11(a) of the Brussels Convention was actually contained in the “pool draft” (Article 10) proposed by France and the United Kingdom at the sixth session of the Standing Committee (see document SCNL/6/INF.4, p. 101–102). Significantly, a corresponding provision was inserted in the “levy draft” also (Article 9.3) at the third meeting of the Intersessional Working Group (see document SCNL/IWG.3/INF.3/Rev.1, p. 13). However, no corresponding provision was inserted in the “collective State contributions draft” (Article 7), which, as was explained in Section III.2 of this Commentary, was later “merged” with the US “umbrella draft” and became the basis of further negotiations on supplementary compensation (see document SCNL/IWG.4/INF.4, p. 20).

In the absence of express provisions, Article III.1(a) of the Convention on Supplementary Compensation should be interpreted as implicitly imposing an obligation on the Installation State to make available to the system of disbursement of the Contracting Party whose courts have jurisdiction the public funds that may be necessary to compensate victims in case the liable operator is not required, or is unable, to make available the whole of the national compensation amount; this interpretation may be seen as reinforced by Article X.1, which makes it clear that the State whose courts have jurisdiction is to apply its own system of disbursement in respect of both the national compensation amount and the funds made available by the Contracting Parties together, as well as its own system of apportionment thereof.<sup>285</sup>

Finally, a few points have to be made in respect of **rights of recourse**. Article IX.1 of the Convention provides that each Contracting Party is to enact legislation in order to enable both the Installation State and the other Contracting Parties who have paid contributions for supplementary compensation to benefit from the operator's right of recourse to the extent that he has such a right under the applicable convention on nuclear liability,<sup>286</sup> and to the extent that contributions have been made by any of the Contracting Parties. Moreover, Article IX.2 allows the legislation of the Installation State to provide for the recovery of public funds made available under the Convention from the operator liable if the damage results from fault on his part. Finally, Article IX.3 allows the State whose courts have jurisdiction to exercise the rights of recourse provided for in Article IX.1 and 2 on behalf of the other Contracting Parties.

## 9. Jurisdiction under the Convention

### (a) The establishment of uniform rules for all Contracting Parties

Both the 1960 Paris Convention and the 1963 Vienna Convention provide that jurisdiction over actions under their provisions lies with the courts of the Incident State, i.e. the Contracting Party within whose territory a nuclear incident occurs. Where, however, the nuclear incident occurs outside the territory of a Contracting Party<sup>287</sup> (for example, in the course of transport of nuclear material, in the territory of a non-Contracting State), both conventions provide that jurisdiction lies with the courts of the Installation State, i.e. the Contracting Party within whose territory the nuclear installation of the operator liable is situated; the same rule applies if the place of the incident cannot be determined with

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<sup>285</sup> This interpretation was endorsed by INLEX at its Fourth Meeting (7-11 February 2005): see p. 11 of the Chairman's Report.

<sup>286</sup> As was pointed out in Section I.3(b) of this Commentary, Article X of the 1963 Vienna Convention grants the operator a right of recourse only if this is expressly provided for by a contract in writing or, where the incident resulted from an act or omission done with intent to cause damage, against the person responsible. This provision is based on a similar provision in Article 6(f) of the Paris Convention and, as was explained in Section II.4(b) of this Commentary remains unchanged in the 1997 Vienna Convention. As for the Annex to the Convention on Supplementary Compensation, Article 10 does not directly grant the operator a right of recourse and merely allows "national law" to provide for such a right, but then only in the two cases which are also envisaged in both the Vienna Convention and the Paris Convention.

<sup>287</sup> As was pointed out in Section I.2 of this Commentary, the Paris Convention only applies to incidents occurring outside the territory of a Contracting Party if the legislation of the Installation State so provides. However, it was mentioned in Section III.5(c) of this Commentary that, on 24 April 1971, the Steering Committee of the Paris Convention recommended to the Contracting Parties to extend by national legislation the scope of application of the Convention in order to cover damage suffered in a Contracting Party, or on the high seas on board a ship registered in such a Party, even if the incident causing the damage has occurred in a non-Contracting State.

certainty (for example, where the incident is due to continuous radioactive contamination in the course of transport of nuclear material).<sup>288</sup>

As far as maritime transport is concerned, the Exposé des Motifs of the Paris Convention states that the term “territory” as used in that Convention is understood to include the territorial sea, and the same understanding applies in respect of the Vienna Convention also. Thus, if the incident occurs in a Contracting Party’s territorial waters, the courts of that State will have jurisdiction; on the other hand, if the incident occurs in the territorial waters of a non-Contracting State, the courts of the Installation State will have jurisdiction. As for those maritime areas which are not subject to the coastal State’s territorial sovereignty but to more limited “sovereign rights” and/or “jurisdiction”, the term “territory” can certainly not apply to them. Consequently, if an incident occurs within one such zone, jurisdiction will lie with the courts of the Installation State, as is the case where an incident occurs on the high seas.

As was explained in Section II.9 of this Commentary, the 1997 Protocol to Amend the Vienna Convention inserts in Article XI of that Convention a new paragraph 1 bis, whereby, 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 lie only with the courts of that Party. But this provision, which takes into account recent developments in the law of the sea and is meant to meet the concerns of States off whose coasts the maritime transport of nuclear material takes place, originated in the context of negotiations within the Standing Committee relating to supplementary funding.<sup>289</sup> It will then come as no surprise that Article XIII of the Convention on Supplementary Compensation contains a corresponding provision using identical language.

The exact meaning and implications of the new provisions on jurisdiction have already been examined in detail in Section II.9 of this Commentary, and there seems no need here to restate what was said in that context. However, a few remarks are in order in respect of the specific implications of the new provisions for the Contracting Parties to the Convention on Supplementary Compensation.

First of all, as was pointed out in Section III.4 of this Commentary, Article XIII is designed to establish uniform rules on jurisdiction for all Contracting Parties, irrespective of whether the operator is liable under either the Paris Convention or the Vienna Convention or under legislation implementing the Annex.<sup>290</sup> Consequently, even the Contracting Parties to the 1960 Paris

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<sup>288</sup> See Article 13 of the Paris Convention. As for the 1963 Vienna Convention, see Section I.4 of this Commentary.

<sup>289</sup> The new provision emerged at the very end of negotiations within the Standing Committee. It was part of a “package” prepared by the Chairman of the Standing Committee which was presented at the sixteenth session (see document SCNL/16/INF.3, Annex I, p. 12). Only at the seventeenth session (Part II) was it decided to insert an identical provision in the Protocol to Amend the Vienna Convention (see document SCNL/17.II/INF.7, pp. 4 and 34).

<sup>290</sup> It may be interesting to mention, in this respect, that no provisions on jurisdiction appeared in the draft conventions on supplementary funding that were initially elaborated within the Standing Committee. Both the “levy draft” and the “pool draft” were in fact based on the idea that supplementary funding obligations would only be triggered if the courts of a Contracting Party had jurisdiction pursuant to either the Paris Convention or the Vienna Convention. The same was true for the “collective State contributions draft”. On the other hand, both the “umbrella draft” (Article V) and the “merged draft” (Article VII), in view of their free-standing character, provided for uniform rules on jurisdiction (see documents SCNL/IWG/4/INF.4, p. 44; SCNL/12/INF.6, p. 56). When the “September draft” first confined in an Annex the civil liability provisions to be complied with by the States not party to either the Paris Convention or the Vienna Convention, identical rules on jurisdiction were included both in the main body of the draft convention

Convention<sup>291</sup> or to the unamended 1963 Vienna Convention will have to abide by the new provisions if they ratify, or accede to, the Convention on Supplementary Compensation.

It is important to point out, in this respect, that these provisions can be regarded as being largely self-executing and Contracting Parties can opt for their direct application within their municipal legal order if they so wish. Of course, if a Contracting Party has not established an exclusive economic zone but wants to ensure that its courts have jurisdiction in the event of an incident occurring within an equivalent area, it will have to notify the Depositary of such area prior to the nuclear incident; moreover, the second sentence in Article XIII.2 appears to require a similar prior notification on the part of a State which has established an exclusive economic zone also.<sup>292</sup>

Secondly, as is the case in the context of the 1997 Vienna Convention, doubts may arise if an incident occurs in an area where the EEZs, or equivalent areas, of two or more Contracting Parties with opposite or adjacent coasts overlap. As was pointed out in Section II.9 of this Commentary, it may safely be assumed that, in most cases, a dispute as to competing claims deriving from the notification of overlapping EEZs (or equivalent areas) would be solved prior to a nuclear incident. In fact, as will be pointed out in Section III.11 of this Commentary, Article XVI of the Convention on Supplementary Compensation provides for a dispute settlement procedure which is based on the procedure envisaged in the 1997 Vienna Convention and which results in a binding judicial decision or arbitral award. On the other hand, such provision can be opted out of by any State wishing to ratify, or accede to, the Convention. Article XIII.4 provides that “where jurisdiction over actions concerning nuclear damage would lie with the courts of more than one Contracting Party, these Contracting Parties shall determine by agreement which Contracting Party’s courts shall have jurisdiction”; this provision may well be deemed to apply to the case where the incident occurs in a place located in overlapping EEZs (or equivalent areas). In any case, it must again be stressed that if the interested Parties reach an agreement relating to jurisdiction under Article XIII.4, such agreement would not, as such, affect the final delimitation of the exclusive economic zone; the same could be said in respect of the settlement of a dispute relating to jurisdiction through the procedure laid down in Article XVI.

#### (b) The problems created by conflicting treaty obligations

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(Article XII) and in the Annex (Article 7) (see document SCNL/13/INF.3, pp. 33 and 57). Eventually, however, the jurisdiction provisions were deleted from the Annex in order to avoid duplication.

<sup>291</sup> The 2004 Protocol to Amend the Paris Convention will introduce provisions corresponding to those in the 1997 Vienna Convention.

<sup>292</sup> It was pointed out in Section II.9 of this Commentary, that the original text of Article XIII exclusively referred to incidents occurring in the EEZ and that no prior notification of that EEZ was required; the need for prior notification was only introduced at the Diplomatic Conference, on the basis of a UK proposal (document NL/DC/L.2 and Rev.1 and 2) “intended to cover the position of States which have not declared official EEZs but do possess equivalent zones established in accordance with international law”. On the other hand, the second sentence of Article XIII.2 states that “**the preceding sentence** shall apply if that Contracting Party has notified the Depositary of **such area** prior to the nuclear incident” (emphasis added); and the preceding sentence refers both to the case where an incident occurs within the **area** of a Contracting Party’s **exclusive economic zone** and to the case where that Contracting Party has not established an EEZ and the incident occurs in an equivalent **area**.

A complex issue which may arise in the application of Article XIII of the Convention relates to the conflict of treaty obligations. This issue was extensively discussed in the last stages of negotiations within the Standing Committee and even at the Diplomatic Conference, but eventually led to a partial solution; this solution is embodied in the proviso inserted at the end of Article XIII.2 whereby, if the exercise of jurisdiction on the part of the Incident State is inconsistent with its obligations under Article XI of the Vienna Convention or Article 13 of the Paris Convention, in relation to a State not Party to the Convention on Supplementary Compensation, “jurisdiction shall be determined according to those provisions”.<sup>293</sup>

This proviso only covers the situation where an incident occurs in EEZ, or equivalent area, of a Contracting Party to the Convention on Supplementary Compensation which is also a Party to either the Paris Convention or the Vienna Convention. In such a situation, no conflict, of course, arises if the Incident State is also the Installation State, i.e. the State where the installation of the operator liable is situated; in fact, the courts of that State have jurisdiction under both the Convention on Supplementary Compensation and the applicable base convention. Similarly, no conflict arises if the Installation State is a Contracting Party to either the Paris Convention or the Vienna Convention but not to the Convention on Supplementary Compensation, since the Convention on Supplementary Compensation does not apply.<sup>294</sup>

Ultimately, therefore, the proviso exclusively applies to the situation where both the Installation State and the Incident State are party to both the Convention on Supplementary Compensation and either the Paris Convention or the Vienna Convention. In such a situation, under both the 1960 Paris Convention and the unamended 1963 Vienna Convention jurisdiction lies with the courts of the Installation State, whereas under the Convention on Supplementary Compensation jurisdiction lies with the courts of the Incident State. Of course, in relations between the Installation State and the Incident State, Article XIII.2 of the Convention on Supplementary Compensation would prevail over any inconsistent obligation deriving from an earlier treaty; on the other hand, until all other Parties to the Paris Convention or to the 1963 Vienna Convention have joined the Convention on Supplementary Compensation, both the Incident State and the Installation State would be faced with conflicting treaty obligations; they would have to decide whether to apply Article XIII.2 of the Convention on Supplementary Funding thereby violating their obligations vis-à-vis the States party to the Paris Convention, or States that are party only to the unamended Vienna Convention, or to apply Article 13 of the Paris Convention or, as the case may be, Article XI of the unamended Vienna Convention, thereby violating their obligations under the Convention on Supplementary Compensation vis-à-vis the States party to that Convention.<sup>295</sup> The proviso avoids such problems by

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<sup>293</sup> The proviso already appeared in the “package” prepared by the Chairman of the Standing Committee which was presented and which was provisionally adopted, with minor drafting changes, at the sixteenth session (see document SCNL/16/INF.3, pp. 6, 12, 23 and 53). However, the issue of “the possible risk of conflict of jurisdictions” still caused concern to some delegations at the first part of the seventeenth session, and was one of the remaining issues which caused the resuming of that session (see document SCNL/17/INF.4, pp. 7, 13–14, 20 and 57). Proposals were discussed during the second part of the seventeenth session, and some additional paragraphs were inserted in the text of Article XIII (see document SCNL/17.II/INF.7, pp. 3–4, 14–15, 17–18 and 57–58). However, these additional paragraphs were deleted at the Diplomatic Conference. Reference to these additional paragraphs will be made later in this subsection.

<sup>294</sup> See Article II.1; see also Section III.4(b) of this Commentary.

<sup>295</sup> Under Article 30.4 of the 1969 Vienna Convention on the Law of Treaties, dealing with the application of successive treaties relating to the same subject matter, in cases where the parties to the later treaty do not include all the parties to the earlier one: (a) the later treaty prevails as between States parties to both treaties, but (b) as between a State party to both treaties and a state party to only one of the treaties, “the treaty to which both States are parties governs their mutual rights and obligations”. Paragraph 5 adds that:

giving jurisdiction to the courts of the Installation State in accordance with the applicable provision in either the 1963 Vienna Convention or the 1960 Paris Convention.<sup>296</sup>

But the problems which the proviso intends to avoid appear to be only transitory, since, as far as the Contracting Parties to the Vienna Convention are concerned, they could no longer arise when all Contracting Parties to the 1963 Vienna Convention have ratified, or acceded to, the 1997 amending Protocol. In fact, as was pointed out in Section III.9(a) of this Commentary, under the 1997 Protocol jurisdiction lies with the courts of the Incident State.<sup>297</sup> Moreover, a Contracting Party to both the 1963 Vienna Convention and the 1997 Protocol could avoid such transitional problems by denouncing the 1963 Convention under Article XXV thereof; a Contracting Party to the 1997 Protocol only could also avoid such problems by declaring, under Article 19 thereof, that it does not wish to be bound by the provisions of the 1963 unamended Convention.<sup>298</sup> As for the Contracting Parties to the 1960 Paris Convention, the problems created by conflicting treaty obligations are also of a transitional nature, since the recently adopted 2004 Protocol to Amend the Paris Convention will introduce new provisions on jurisdiction based on those in both the 1997 Protocol to Amend the Vienna Convention and the Convention on Supplementary Compensation.<sup>299</sup>

On the other hand, the proviso does not cover the situation where the Incident State is an Annex State and the Installation State is a Party to either the Paris Convention or the Vienna Convention. In such a situation, there can be no doubt that, under the Convention on Supplementary Compensation, jurisdiction lies with the courts of the Incident State; however, the Installation State is still obliged to exercise jurisdiction vis-à-vis the other Parties to the Paris Convention, or the Vienna Convention, which are not (yet) party to the Convention on Supplementary Compensation. Indeed, a conflict of treaty obligations arises for the Installation State regardless of whether the incident occurs within the EEZ, or equivalent area, of an Annex State or within its territory, including its territorial sea; in fact, from the point of view of a Contracting Party to the Paris Convention or the Vienna Convention only, irrespective of any amendment that may be in force for that State, the incident has occurred outside the territory of a Contracting Party.<sup>300</sup>

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“Paragraph 4 is without prejudice ... to any question ... of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty”.

<sup>296</sup> Under Article 30.2 of the 1969 Vienna Convention on the Law of Treaties: “When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail”.

<sup>297</sup> It is significant, in this respect, that, as was pointed out in Section II.9 of this Commentary, no provision was adopted in the 1997 Protocol in order to deal with possible conflicts of treaty obligations which may arise in relations between Contracting Parties to the 1997 Protocol and Contracting Parties to the unamended 1963 Vienna Convention.

<sup>298</sup> See Section II.1 of this Commentary.

<sup>299</sup> See Article I M of the 2004 Protocol.

<sup>300</sup> It may be necessary to point out in this respect that the existence of a conflict of international treaty obligations for the Installation State does not necessarily mean that there is an actual conflict of jurisdictions in the sense that actions can be brought before the courts of both the Incident State and the Installation State. In fact, ratification of the Convention on Supplementary Compensation on the part of a Contracting Party to either the Paris or Vienna Convention may be sufficient to ensure that the rules of Article XIII of the Convention on Supplementary Compensation prevail in that State’s domestic legal order. On the basis of the principle *lex posterior derogat priori*, it could be argued that this would be the case within a legal system which provides for the incorporation of treaties. On the other hand, within a legal system which does not provide for the incorporation of treaties, the existence of an actual conflict of jurisdictions would entirely depend on the provisions of the domestic legislation implementing the Convention.



Moreover, it must also be pointed out that the proviso does not cover the situation where an incident occurs in the territory, including the territorial sea, or in the exclusive economic zone, or equivalent area, of a State not party to the Convention on Supplementary Compensation but party to either the Paris Convention or the Vienna Convention. If the Installation State is a Contracting Party to both the applicable base convention and the Convention on Supplementary Compensation, the Convention on Supplementary Compensation applies and supplementary compensation may be required for damage suffered in the Contracting Parties thereto. In such a situation, a conflict of treaty obligations arises for the Installation State, since, under the Convention on Supplementary Compensation, its courts have jurisdiction, whereas, under the applicable base convention, jurisdiction lies with the courts of the Incident State, at least in case of an incident occurring within its territory; depending on which amendment of the base Convention is in force, jurisdiction might lie with the courts of the Incident State in case of an incident occurring within its exclusive economic zone also.<sup>301</sup>

It may be interesting to recall that at the very last session of the Standing Committee a proposal had in fact emerged from a small working group which was intended to cover both situations.<sup>302</sup> Although the Standing Committee did not adopt that proposal, it did decide to address the second of the two situations outlined above, i.e. the situation where the Incident State is not a Party to the Convention on Supplementary Compensation but is a Party to the applicable base convention. More specifically, since a solution based on a general exclusion of incidents in non-Contracting States was felt to be “too drastic”, it was agreed to allow a Contracting Party to either the Paris Convention or the Vienna Convention, to enter a reservation, at the time of ratification of, or accession to, the Convention on Supplementary Compensation, that would have excluded the application of the Convention in the event of an incident in a non-Contracting State in respect of which it would have conflicting treaty obligations as the Installation State.<sup>303</sup>

However, the issue was reopened at the Diplomatic Conference on the basis of a proposal by Ireland, which pointed out that a reservation allowing the Installation State to exclude the application of the Convention in the event of an incident in a non-Contracting State would have precluded victims in a Contracting Party from obtaining any compensation. It was argued that, “while it seems logical and reasonable not to apply the SFC [i.e. the Convention on Supplementary Compensation] to an Incident State while it is a Party to a base Convention but not to the SFC, this should not however affect Third Countries who are also damaged by the same incident and who have joined the SFC”.<sup>304</sup>

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<sup>301</sup> In such a situation, it would seem that, in addition to a conflict of international treaty obligations, there would also arise an actual conflict of jurisdictions, since the courts of the Incident State not Party to the Convention on Supplementary Compensation would have jurisdiction under domestic law incorporating or implementing either the Paris Convention or the Vienna Convention, whereas the courts of the Installation State would have jurisdiction under domestic law incorporating or implementing the Convention on Supplementary Compensation.

<sup>302</sup> See document SCNL/17.II/INF. 7, p. 16

<sup>303</sup> See document SCNL/17.II/INF.7, pp. 3-4, 17-18 and 57-58. The following two paragraphs appeared, as paragraphs 5 and 6, in the text of Article XIII which the Standing Committee recommended for adoption at the Diplomatic Conference: “5. A State which is a party to the Vienna Convention or the Paris Convention (“the relevant other Convention”) may, at the time of ratifying, approving or acceding to this Convention, enter a reservation that, where it is the Installation State, this Convention shall not be applied if the Incident State: (a) is not a Contracting Party to this Convention; and (b) is a party: (i) to the relevant other Convention; or (ii) to the Joint Protocol relating to the application of the 1963 Vienna Convention and the Paris Convention of 21 September 1988, where the State making the reservation is a party to that Protocol. 6. A reservation made according to paragraph 5 may be withdrawn at any time by notification to the Depositary. Such withdrawal shall not apply to a nuclear incident occurring before withdrawal”.

<sup>304</sup> Document NL/DC/L.1.

Consequently, all reference to the possibility to enter reservations in order to avoid possible conflicts of treaty obligations was deleted from the text of Article XIII.<sup>305</sup>

There can, therefore, be no doubt that, under Article XIII.3 of the Convention on Supplementary Compensation, the courts of the Installation State will have jurisdiction if an incident occurs in a non-Contracting State even if both the Installation State and the Incident State are Parties to either the Paris Convention or the Vienna Convention, and irrespective of any conflicts of treaty obligations which may arise for the Installation State under the applicable base convention.

It must be emphasized, in this respect, that the problems caused by such conflicts should not be overestimated; in practice, such problems would only arise in the event of an incident causing damage not only in the Contracting Parties to the Convention on Supplementary Compensation, but also in the Contracting Parties to the Vienna Convention or the Paris Convention only. The same could be said in respect of an incident occurring in the territory, or within the exclusive economic zone, of an Annex State where the Installation State is a Party to either the Paris Convention or the Vienna Convention. Moreover, it must be recognized that similar conflicts may arise in the application of the 1988 Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention, to which reference was made in Section I.5 of this Commentary.<sup>306</sup>

**(c) The scope of Article XIII**

The uniform rules on jurisdiction provided for in Article XIII are meant to apply to “actions concerning nuclear damage from a nuclear incident”. As far as the national compensation amount is concerned, the scope of Article XIII appears to depend, in principle, on the provisions of the applicable base convention.<sup>307</sup> Thus, if the applicable convention is either the Vienna Convention or the Paris Convention, the scope of Article XIII will correspond to the scope of Article XI of the Vienna Convention or, respectively, Article 13 of the Paris Convention, despite the fact that both Articles are superseded by Article XIII, in so far as it contains conflicting provisions, as far as the determination of the competent forum is concerned; generally speaking, both Articles relate to all

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<sup>305</sup> At the Diplomatic Conference, a new proposal was presented by Belgium (document NL/DC/L.13) which purported to solve all problems created by conflicting treaty obligations without excluding the application of the Convention on Supplementary Compensation. The Belgian proposal aimed at replacing the last sentence in Article XIII.2 with the following text: “However, if the exercise of such jurisdiction is inconsistent with the obligations of that Party or of the Installation State in relation to a non-Contracting Party, jurisdiction shall lie only with the courts of the Installation State”. But this proposal, which was not adopted by the Conference, would not have solved all problems, since, as was pointed out above, the Installation State, if a Party to either the Paris Convention or the Vienna Convention, could be faced with conflicting treaty obligations regardless of whether the incident occurs within the territory, the territorial sea or the exclusive economic zone of an Annex State.

<sup>306</sup> The issue of “conflicting treaty obligations in respect of jurisdiction and the related issue of conflicts of jurisdiction in respect of the same nuclear incident as a result of domestic law provisions implementing different international conventions” was discussed by INLEX at its Fourth Meeting (7-11 February 2005). The Group “concluded that while Article XIII.2 of the CSC dealt with some of these situations, it did not deal with all possible cases”, and “further concluded that, until and unless all countries were members of the same legal regime, situations including conflicting treaty obligations and the possibility of more than one country’s court having jurisdiction were inevitable”. The Group “noted that the removal of this uncertainty was a reason for encouraging universal adherence to a global regime” (p. 11 of the Chairman’s Report).

<sup>307</sup> The question of which is the applicable base convention will be dealt with in Section III.10(a) of this Commentary.

actions against the operator arising out of the same nuclear incident.<sup>308</sup> If, on the other hand, the applicable convention is the Annex to the Convention on Supplementary Compensation, the scope of Article XIII depends on the relevant provisions in the Annex, whose Article 3.9 provides that, as a rule, “the right to compensation for nuclear damage may be exercised only against the operator liable”.

It was pointed out in Section III.6(a) of this Commentary that, under the Convention on Supplementary Compensation, the Installation State is free to limit the operator’s liability to a lower amount, provided that it makes public funds available up to 300 million SDRs. If, subject to the provisions of the applicable base convention or of the Annex, the Installation State avails itself of that possibility, the operator is technically not liable for damage exceeding the limit so established, and doubts may consequently arise as to whether the claimants have to bring separate proceedings, i.e. against the operator and against the Installation State, in order to obtain compensation.<sup>309</sup>

As for the additional funds to be made available by the Contracting States, similar doubts may arise unless the operator’s liability is either unlimited or fixed at an amount exceeding the national compensation amount and corresponding at least to the amount of supplementary compensation necessary or available. Moreover, as was pointed out in Section III.8 of this Commentary, these additional funds will be made available by the Contracting Parties, to the extent and when required, to the State whose courts have jurisdiction, which may be different from the Installation State. Doubts may, therefore, arise as to whether claimants must also sue that State in order to obtain compensation.

Article X.2 states that “each Contracting Party shall ensure that persons suffering damage may enforce their rights to compensation without having to bring separate proceedings according to the origin of the funds provided for such compensation”. Moreover, Article X.2 goes on to say that each Contracting Party must ensure that all “Contracting Parties may intervene in the proceedings against the operator liable”. This language may be seen as confirming that Article XIII refers, in principle, to actions brought against the operator only.<sup>310</sup>

However, it seems important to recall that both Article 6(a) of the Paris Convention and Article II.7 of the Vienna Convention provide that direct action shall lie against the insurer or other financial guarantor if “national law” or, respectively, “the law of the competent court” so provides. As for the Annex to the Convention on Supplementary Compensation, Article 3.9 uses very broad language whereby “national law may permit a direct right of action against any supplier of funds that are made available pursuant to provisions in national law to ensure compensation through the use of

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<sup>308</sup> As far as the scope of Article XI of the Vienna Convention is concerned, see Section II.10 of this Commentary. As for the scope of Article 13 of the Paris Convention, see paragraphs 54–59 of the *Exposé des Motifs* which is attached to that Convention.

<sup>309</sup> As was pointed out in that context, the Installation State’s obligation to make public funds available in excess of the operator’s liability appears to be in the nature of a mere international obligation vis-à-vis the other Contracting Parties and does not, per se, entail that the Installation State is liable under its domestic law.

<sup>310</sup> The question of who is to be sued in the event of an incident causing damage in excess of the operator’s liability limit was discussed by INLEX at its Fourth Meeting (7-11 February 2005). The Group “recognized that in some countries the establishment of a limit on the operator’s liability lower than the amount of compensation made available under the CSC might raise questions as to whom a victim would bring a claim against”, and “concluded that Article X of the CSC ... imposes an obligation on a Contracting Party to ensure that its national law resolves any such questions in a manner that does not require victims to bring separate proceedings according to the origin of the funds provided for compensation. This means that an Installation State would need to establish the appropriate mechanisms to ensure access to compensation, at the time it established a limit on operator liability lower than the compensation amount established by national law”. The Group “also noted that the same issue exists under the revised Brussels Convention” (p. 12 of the Chairman’s Report).

funds from sources other than the operator”;<sup>311</sup> this provision may be interpreted as allowing for a direct right of action against the Installation State.

But quite apart from the possibility of a direct action against the Installation State as a “supplier of funds”, either as cover of the operator’s liability or as supplementary compensation, it must be pointed out that a Contracting Party to the Convention on Supplementary Compensation may in fact be the operator of one or more nuclear installations. In the event of a nuclear incident involving its liability as operator of such an installation, there can be no doubt that that Contracting Party is to be sued for compensation of nuclear damage. It is unfortunate that, whereas both the Vienna Convention and the Paris Convention provide that, in such a situation, a Contracting Party may not invoke jurisdictional immunities which it might otherwise have under national or international law,<sup>312</sup> no corresponding provision can be found in either the Annex or the main body of the Convention on Supplementary Compensation.<sup>313</sup>

#### **(d) The need for a single competent court and the recognition of judgements**

Another point needs to be made in respect of jurisdiction under the Convention on Supplementary Compensation. Article XIII refers to “the courts” having jurisdiction; as was pointed out in Section II.10 of this Commentary, the use of the plural form is in line with the terminology usually employed in international conventions relating to civil jurisdiction, and may be seen to reflect a conceptual distinction between “jurisdiction”, which denotes the extent to which a State’s courts are entitled to exercise judicial power, and “competence”, which denotes the entitlement of a State’s court, as opposed to another court of the same State, to adjudicate a case. The term “jurisdiction” in Article XIII is clearly intended to denote the extent to which the courts of a Contracting Party are entitled to exercise judicial power in respect of “actions concerning nuclear damage”, whereas the determination of the “competent” court, or courts, is left to that State’s procedural law.

Article XIII does not expressly oblige the State whose courts have “jurisdiction” to ensure that only one of its courts is “competent” in relation to the same nuclear incident. It is important to point out, in this respect, that, although neither the 1963 Vienna Convention nor the 1960 Paris Convention make express provision to that effect, both the 1997 Protocol to Amend the Vienna Convention<sup>314</sup> and

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<sup>311</sup> As will be pointed out in Section III.10(b) of this Commentary, “national law” in the Paris Convention has the same meaning as “the law of the competent court” in the Vienna Convention, but doubts may arise as to the meaning of “national law” in the Annex.

<sup>312</sup> See Article XIV of the Vienna Convention and Article 13(e) of the Paris Convention.

<sup>313</sup> This is not the place to discuss whether or not a State operating a nuclear installation might invoke jurisdictional immunities in respect of actions for compensation brought before the courts of a foreign State. As far as international law is concerned, reference can be made, inter alia, to the 1972 Council of Europe’s European Convention on State Immunity and to the United Nations Convention on Jurisdictional Immunities of States and Their Property, opened for signature on 17 January 2005 and not yet in force. But it remains to be seen whether or not the provisions of those conventions correspond to customary international law. The question of “whether or not a State could invoke jurisdictional immunities to avoid obligations under the CSC to make public funds available” was discussed by INLEX at its Fourth Meeting (7-11 February 2005). The Group “concluded that no inference should be drawn” from the lack of provisions in the CSC corresponding to those in both the revised Vienna and Paris Conventions. However, the Group also noted “that failure to make funds available would be inconsistent with a Contracting Party’s obligations under the CSC” (p. 12 of the Chairman’s Report).

<sup>314</sup> See Section II.10 of this Commentary.

the 2004 Protocol to Amend the Paris Convention<sup>315</sup> do so. On the other hand, no corresponding provision can be found in the Annex to the Convention on Supplementary Compensation.<sup>316</sup> But in most cases it can safely be assumed that, under the procedural law of the State whose courts have “jurisdiction”, there will only be one “competent” court in relation to the same nuclear incident.<sup>317</sup>

Of course, the procedural law of the State whose courts have “jurisdiction” may provide for one or more levels of appeal from that “competent” court. Article XIII.5 makes it clear that only “a judgment that is no longer subject to ordinary forms of review”,<sup>318</sup> which is “entered by a court of a Contracting Party having jurisdiction”, shall be recognized in the territory of all the other Parties. Thus, in the context of the Convention on Supplementary Compensation also, the establishment of a single forum carries with it the need to ensure that judgements rendered in that forum will be recognized by all the other Contracting Parties.

It must be pointed out, however, that the provisions in Article XIII.5 are based on corresponding provisions in Article XII of the Vienna Convention; in other words, the recognition of judgements is subject to exceptions. Recognition can in fact be refused: (a) where the judgement was

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<sup>315</sup> See Article 13(h) of the Paris Convention as amended by the 2004 Protocol. The Explanatory Report attached to the 2004 Protocol points out that this new paragraph “will implement a 1990 NEA Steering Committee Recommendation [NE/M(90)2]” (paragraph 37).

<sup>316</sup> A provision whereby “The Contracting Party whose courts have jurisdiction shall provide a single court for proceedings concerning any one nuclear incident” could actually be found in the “September draft”. The provision was originally inserted in Article 7.4 of the Annex; when a decision was taken to insert identical provisions on jurisdiction in the main body of the draft convention also, Article XII.4 (as it was then numbered) was put in square brackets, presumably in view of the fact that neither the 1963 Vienna Convention nor the 1960 Paris Convention had a similar provision and in order to allow the Contracting Parties to those Conventions to join the Convention on Supplementary Compensation without having to change their legislation in this respect (see document SCNL/13/INF.3, p. 57). Indeed, at the fourteenth session, it was decided to delete Article XII.4, since “the requirement [of a single court] was not essential to the functioning of the supplementary funding and might contradict judicial systems of some States”; however, the provision remained in Article 7.4 of the Annex (see document SCNL/14/INF.5, pp. 30, 64–65 and 88–89). When the provisions on jurisdiction were deleted from the Annex in order to avoid duplication, in view of the fact that all Contracting Parties to the Convention on Supplementary Compensation were expected to abide by the uniform rules on jurisdiction contained in Article XIII of the Convention (main body), the requirement of a single competent court disappeared altogether.

<sup>317</sup> The question of whether or not the State whose courts have jurisdiction has to ensure that only one of its courts is competent in relation to the same nuclear incident was discussed by INLEX at its Fourth Meeting (7-11 February 2005). The Group concluded that “while the revised Vienna Convention and the revised Paris Convention (as amended by the Protocol adopted on 12 February 2004) explicitly provided that only one court shall have competency in relation to a particular nuclear incident, the Annex to the CSC contained no such provisions. Thus there could be more than one court with competency in cases where an Annex State has jurisdiction”. However, the Group also noted that, “in most instances, the provision of a single court would be the most appropriate way to provide for efficient compensation of victims” and “encouraged the CSC States to provide in their national implementing legislation for the acceptance of a single court” (pp. 12-13 of the Chairman’s Report).

<sup>318</sup> Article XII of the unrevised Vienna Convention refers to “a final judgment”. Article 13(d) of the Paris Convention refers to judgments which “have become enforceable” under the law applied by the competent court, but the Exposé des Motifs attached to the Convention appears to treat that expression as equivalent to “final judgments” (paragraph 58). Be that as it may, the “September draft” (Article XII.5) referred to “a final judgment” just as Article XII of the 1963 Vienna Convention (see document SCNL/13/INF.3, p. 34). However, as there was “a difference of opinion” regarding the meaning of the term “final judgment”, the present wording was adopted at the fourteenth session of the Standing Committee on the basis of a text prepared by the Secretariat of the IAEA “based on terminology used in other international treaties” (see document SCNL/14/INF.5, pp. 30 and 65). As was pointed out in Section II.10 of this Commentary, a corresponding amendment was approved in respect of Article XII of the Vienna Convention..

obtained by fraud; (b) where the party against whom the judgement was pronounced was not given a fair opportunity to present his case; or (c) where the judgement is contrary to the public policy of the Contracting Party within the territory of which recognition is sought, or is not in accord with fundamental standards of justice. Article 13(d) of the Paris Convention, which applies in relations between States belonging to the same region, does not contemplate such exceptions. At the Diplomatic Conference, an attempt was made by Egypt to do away with the public policy exception,<sup>319</sup> but the proposal did not meet with sufficient support.

In any case, under Article XIII.6 judgements which have been recognized under paragraph 5 will also be enforceable, as soon as the formalities required by the “law of the Contracting Party where enforcement is sought” have been complied with. Article XIII.6 also specifies that “the merits of a claim on which the judgment has been given shall not be subject to further proceedings”.

Quite apart from the recognition of judgements entered by the competent court, Article XIII.7 provides that “settlements effected in respect of the payment of compensation out of the public funds referred to in Article III.1(b) in accordance with the conditions established by national legislation shall be recognized by the other Contracting Parties”. This provision refers to settlements effected in respect of the payment of compensation out of the funds to be made available by the Contracting Parties in cases where the nuclear damage exceeds the national compensation amount; such settlements have to be recognized, just as judgements entered by the competent court in respect of such compensation have to be recognized and enforced under Article XIII.5 and 6.<sup>320</sup>

## 10. The applicable law

As was pointed out in Section III.2(a) of this Commentary, the Convention on Supplementary Compensation is open to States which are party to either the Paris Convention or the Vienna Convention as well as to States which are party to neither Convention (provided that their domestic law complies with the civil liability provisions of the Annex). Indeed, the Preamble makes it clear that one of the fundamental purposes of the Convention is to establish “a worldwide liability regime to supplement and enhance” measures provided in the Vienna Convention, the Paris Convention and “national legislation on compensation for nuclear damage consistent with the principles of these Conventions”. The Convention thus provides a treaty link for States which are party to different civil liability conventions or to no convention at all.

From this point of view, a parallel can be drawn between the new Convention and the 1988 Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention.<sup>321</sup> Of course, the 1988 Joint Protocol merely provides for a mutual extension of the operator’s liability under the Paris and Vienna systems, and is not concerned with supplementary compensation of nuclear damage. But some of the issues which may arise in the application of the 1988 Joint Protocol may also arise in the context of the application of the Convention on Supplementary Compensation, since both

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<sup>319</sup> See document NL/DC/L.7. The public policy exception is contemplated in most municipal legal systems, as well as in most international conventions relating to the recognition of judgements.

<sup>320</sup> In the “September draft” this provision originally appeared in Article VII, relating to “call for funds”. Article VII.2 required both the recognition of such settlements and the enforcement of judgements made by the competent court in respect of such compensation (see document SCNL/13/INF.3, p. 28). At the fourteenth session of the Standing Committee, it was decided to delete the second half of the provision relating to judgements “since the subject was covered by Article XII” (now Article XIII); moreover, it was further decided to move the remaining part of the provision at the end of that Article.

<sup>321</sup> See Section I.5 of this Commentary. States party to either the Vienna Convention or the Paris Convention are not required to be party to the Joint Protocol also in order to join the Convention on Supplementary Compensation.

instruments provide a treaty link between States which are party to different base Conventions. Indeed, such issues are further complicated by the fact that, whereas the 1988 Joint Protocol establishes a link between the Contracting Parties to two civil liability conventions, the Convention on Supplementary Compensation includes a third group of States (the “Annex States”).

As was pointed out in Section III.9(b) of this Commentary, one issue in respect of which a parallel can be drawn between the 1997 Convention and the 1988 Joint Protocol relates to the possible conflict of treaty obligations in respect of the exercise of jurisdiction over actions for compensation of nuclear damage. But another issue relates to the applicable law. As far as this issue is concerned two aspects have to be kept distinct, although they are intimately related; the first aspect relates to the applicable base convention (see Section III.10(a) of this Commentary), whereas the second aspect relates to the exercise of options under the applicable convention (see Section III.10(b) of this Commentary).

#### **(a) The applicable civil liability convention**

Once the State whose courts have jurisdiction has been identified, the first issue which arises for the competent court relates to the applicable civil liability regime. No special problem arises in respect of the few provisions relating to civil liability which have been inserted in the main body of the Convention on Supplementary Compensation, since those provisions, in relations between Contracting Parties to the Convention, supersede any conflicting provisions of other treaties which may be in force for the Contracting Parties. Thus, as far as the definition of nuclear damage is concerned, Article I(f) of the Convention applies equally to all Contracting Parties. Of course, it was pointed out in Section III.5(d) of this Commentary that this definition is far from being entirely self-executing and leaves a considerable degree of discretion to national law; the same holds true for Article III.1(a), which provides for a minimum national compensation amount, but leaves it to implementing legislation to determine if that amount is to be made available on the basis of the operator’s liability or of public funds. Both issues do not, however, relate to the applicable civil liability convention, but rather to the exercise of options under that convention; they will, therefore, be addressed in Section III.10(b) of this Commentary.

For all matters which are not addressed in the main body of the Convention, the question arises of which is the applicable civil liability regime, i.e. the applicable civil liability convention and, consequently, the applicable domestic law incorporating or implementing that convention. In view of the fact that the Vienna Convention, the Paris Convention and the Annex to the Convention on Supplementary Compensation are based on the same general principles of nuclear liability, this question may appear to be academic. But whereas the general principles are the same, the “legal details” may differ depending on which is the applicable convention. Moreover, some issues, such as the exclusion of liability in the event of a grave natural disaster, the length of the period of extinction for rights of compensation, or the priority in the distribution of compensation to claims relating to loss of life or personal injury, can hardly be qualified as “legal details”.<sup>322</sup>

Article XIV.1 of the Convention on Supplementary Compensation merely states that “either the Vienna Convention or the Paris Convention or the Annex to this Convention, **as appropriate**, shall apply to a nuclear incident to the exclusion of the others”(emphasis added). This provision is based on a corresponding provision in Article III.1 of the 1988 Joint Protocol.<sup>323</sup> However, unlike

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<sup>322</sup> As far as the “geographical scope” of the national compensation amount is concerned, see later in the text.

<sup>323</sup> The words “as appropriate” do not, however, appear in Article III.1 of the 1988 Joint Protocol; these words were inserted in Article XIV.1 of the Convention on Supplementary Compensation at the sixteenth session of the Drafting Committee for reasons which will be explained later.

Article III of the Joint Protocol, Article XIV gives no further indication as to which is the applicable convention. Of course, there can be no doubt that, in the event of a nuclear incident occurring in a nuclear installation, the applicable convention will be that in force for the Installation State, whose courts have jurisdiction. Article III.2 of the 1988 Joint Protocol has an express provision to this effect, but, even in the absence of such an express provision, the same holds true in the context of the Convention on Supplementary Compensation.<sup>324</sup>

On the other hand, in the event of a nuclear incident occurring outside a nuclear installation and involving nuclear material in the course of carriage, jurisdiction may lie with the courts of a State other than the Installation State and that State may be a Party to a civil liability convention different from that which is in force for the Installation State and under which the operator is liable. Article III.3 of the 1988 Joint Protocol provides that, in such a situation, the applicable convention is that to which the Installation State is a Party.<sup>325</sup> The question arises of whether the absence of a corresponding provision in Article XIV of the Convention on Supplementary Compensation implicitly indicates that a different solution was envisaged by the drafters.

It is important to recall, in this respect, that, as was alluded to in Section III.4 of this Commentary, the choice of the applicable convention has important implications for the question of which implementing legislation is required on the part of a non-nuclear State wishing to join the Convention on Supplementary Compensation. In fact, if the applicable convention is that which is in force for the Installation State, a non-nuclear Annex State would only be required to give effect to the specific choice of law rule implicitly embodied in Article XIV.1, thus allowing its courts to apply the national law of the Installation State incorporating or implementing the applicable convention.<sup>326</sup> If, on the other hand, the applicable convention is that which is in force for the State whose courts have jurisdiction, then a non-nuclear Annex State would have to implement all the self-executing provisions of the Annex in so far as these are not directly applicable within its domestic legal order.<sup>327</sup>

It must be recognized that the drafting history of Article XIV.1 is not very conclusive as to which is the “appropriate” convention.<sup>328</sup> However, there is indeed some evidence that Article XIV.1

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<sup>324</sup> A provision corresponding to Article III.2 of the Joint Protocol could in fact be found in earlier drafts of the Convention on Supplementary Compensation. In this respect, see the references made in footnote 328.

<sup>325</sup> According to several commentators of the 1988 Joint Protocol, the rationale behind this solution is the desirability to hold the operator liable under the Convention which corresponds to his national law; applying the Convention in force for the State whose courts have jurisdiction would result in the operator being liable under different Conventions depending on where the incident occurs. But it will be pointed out in the Section III.10(b) of this Commentary that, irrespective of which is the applicable base convention, several matters, including the limit of the operator’s liability and the amount, type and terms of the financial security which the operator is required to have and maintain, are left to be determined by the Installation State.

<sup>326</sup> The competent court would thus have to apply a national law different from the *lex fori*. But this is not an unusual situation in conflict of laws cases. Moreover, the application of that foreign law would be limited to those issues which are either directly governed by the applicable convention or in respect of which that Convention explicitly provides for the application of the law of the Installation State; in fact, it will be pointed out in the next sub-section that several matters are left to be governed by the “law of the competent court”, irrespective of which is the applicable base convention.

<sup>327</sup> In this case also, it must be pointed out that the applicable convention would determine which is the applicable law in respect of matters left to the discretion of domestic law; as will be pointed out in Section III.10(b) of this Commentary, some such matters are left to be determined by the Installation State, its “legislation” or its “law” irrespective of which is the applicable base convention.

<sup>328</sup> Provisions corresponding to those in Article III of the 1988 Joint Protocol were inserted (within square brackets) in the “collective State contributions draft” (Article 14) at the tenth session, on the basis of a proposal presented by the United Kingdom during the fourth meeting of the Intersessional Working Group



warrants the application of the convention in force for the State whose courts have jurisdiction — or, if that State is an Annex State, of the Annex to the Convention on Supplementary Compensation — instead of the Convention in force for the Installation State. In particular, this solution appears to be implicit in Article 2.4 of the Annex, which, as was explained in Section III.3(c) of this Commentary, requires the United States of America to apply the Annex provisions in a situation where its courts have jurisdiction but the operator is not liable under the Price–Anderson Act.<sup>329</sup>

But in at least one respect the Convention on Supplementary Compensation does explicitly indicate that the convention in force for the Installation State is the applicable convention. As was pointed out in Section III.5(c) of this Commentary, Article III.2(a) of the Convention on Supplementary Compensation allows the law of the Installation State to exclude damage suffered in non-Contracting States, but this possibility is subject to obligations of that State under “other conventions on nuclear liability”; it seems, therefore, clear that the Convention governing the exercise of options on the part of the Installation State is that in force for that State. Indeed, it would be different to conceive a different solution. Moreover, it will be pointed out in the Section III.10(b) of this Commentary that, irrespective of which is the applicable base convention, the competent court will have to give effect to the law of the Installation State in several other respects.

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(document IWG/4/5/Rev.1); the “collective State contributions draft” was in fact only open to States party to either the Vienna Convention or the Paris Convention, and it was indicated by some delegations that “while there was a need to link the basic conventions, the Joint Protocol need not be used for creating such a link between parties to the draft convention, but to different basic conventions” (see document SCNL/10/INF.4, pp. 15 and 63–64). At the eleventh session, it was agreed to maintain those provisions unchanged within square brackets “on the understanding that the issues involved would be considered at a later date” (see document SCNL/11/INF.5, p. 9). At the twelfth session, the “merged draft”, conceived as a free-standing instrument, was adopted as the basis for future discussions, and no indication was given as to the reason why no corresponding provisions were inserted in that draft (see document SCNL/12/INF.6, p. 56). But corresponding provisions were again inserted in the main body of the “September draft” (Article XIV), though again within square brackets (see document SCNL/13/INF.3, pp. 11–12 and 35). At the fourteenth session, it was agreed to remove the square brackets around those provisions (see document SCNL/14/INF.5, pp. 30 and 66). Article XIV.3 of the “September draft as revised” stated that, “in the case of a nuclear incident occurring outside a nuclear installation and involving nuclear material in the course of carriage, the applicable law shall be that of the Installation State whose operator is liable under legislation implementing either the Vienna Convention or the Paris Convention or legislation in conformity with the Annex to this Convention”. However, at the sixteenth session of the Standing Committee, the Drafting Committee decided to delete this provision, together with the provision corresponding to Article III.2 of the 1988 Joint Protocol, and to insert the words “as appropriate” in paragraph 1 (see document SCNL/16/INF.3, pp. 22 and 54–55). These decisions were taken on the basis of proposals on jurisdiction and applicable law which were prepared by a working-group co-ordinated by Mr. Rustand of Sweden (document SCNL/16/4). Unfortunately, that proposal does not state the reasons behind the deletion of the relevant paragraphs. However, it may be useful to mention that the proposal evolved from a previous Swedish proposal (document SCNL/16/1) which did make clear that, except in respect of the maximum amount of liability of the operator, the applicable law, in case of an incident occurring outside a nuclear installation and involving nuclear material in the course of carriage, was intended to be “that of the State where the incident occurs”.

<sup>329</sup> It is significant that, as was also pointed out in Section III.3(c) of this Commentary, this provision was inserted in the “grandfather clause” only at the Diplomatic Conference, i.e. after the deletion of provisions corresponding to those in Article III.2 and 3, of the 1988 Joint Protocol. The question of which is the applicable base convention and, consequently, the applicable law incorporating or implementing that convention, in a situation where the State whose courts have jurisdiction is not the Installation State was discussed by INLEX at its Fourth Meeting (7-11 February 2005). The Group endorsed the interpretation given in the text, whereby the applicable base convention is the one in force for the State whose courts have jurisdiction. More specifically, the Group concluded that “any ambiguity in paragraph 1 of Article XIV is resolved by paragraph 2 which makes it clear that the applicable law is the national law of the country with jurisdiction and that paragraph 1 can only be applied by looking to whether the applicable Vienna or Paris Conventions or the Annex to the CSC is the basis for that national law” (p. 13 of the Chairman’s Report)

**(b) The exercise of options under the applicable convention**

Once the applicable base convention is identified, that Convention, or domestic legislation implementing its provisions, will apply to all matters in respect of which uniform rules are provided. However, it has been pointed out several times that, irrespective of which is the applicable base convention, several matters are left to be determined by domestic law. It remains to be seen which is the law applicable in this respect.

Article XIV.2 of the Convention on Supplementary Compensation states that, “subject to the provisions of this Convention, the Vienna Convention or the Paris Convention, as appropriate, the applicable law is the law of the competent court”. Article I(k) defines the “law of the competent court” as “the law of the court having jurisdiction under this Convention, including any rules of such law relating to conflict of laws”. Thus, as was pointed out in respect of a corresponding definition in the Vienna Convention, the “law of the competent court” may be the *lex fori* or a foreign law made applicable under the rules of private international law of the forum.<sup>330</sup>

But Article XIV.2 appears to be nothing more than a catch-all clause, since in most cases the question of which national law governs which issue will have to be answered on the basis of specific provisions either in the Convention on Supplementary Compensation itself (main body or Annex) or in the applicable base convention. In this latter respect, Article XII.1 of the Convention on Supplementary Compensation makes it clear that “except insofar as this Convention otherwise provides, each Contracting Party may exercise the powers vested in it by virtue of the Vienna Convention or the Paris Convention, and any provisions made thereunder may be invoked against the other Contracting Parties in order that the public funds referred to in Article III.1(b) [i.e. the supplementary funds to be made available by all the Contracting Parties where the damage exceeds the national compensation amount] be made available”.<sup>331</sup>

In respect of matters which are directly addressed by provisions in the main body of the Convention on Supplementary Compensation, it was pointed out in Section III.10(a) of this Commentary that, under Article III.2(a), the law of the Installation State, subject to the provisions of the Convention(s) in force for that State, will determine the “geographical scope” of the national compensation amount. On the other hand, as far as the definition of nuclear damage is concerned, it was pointed out in Section II.3 of this Commentary that the “law of the competent court” will have to determine, *inter alia*, the extent to which damage is to be compensated under the various heads listed in Article I (f)(iii) – (vi). Moreover, the question of whether or not pure economic loss unrelated to impairment of the environment is to be compensated is left to be answered by “the general law on civil liability of the competent court”. The “law of the competent court” will also have to determine the reasonableness of both measures of reinstatement of impaired environment and preventive measures. On the other hand, both measures of reinstatement and preventive measures must have been approved

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<sup>330</sup> See Sections I.4 and II.8 of this Commentary.

<sup>331</sup> The travaux préparatoires make it clear that Article XI.1 was mainly intended to address the “geographical scope” of the national compensation amount and the causes of exoneration from liability. At the fifteenth session of the Standing Committee, during a discussion of Article XI.1, it was “agreed” that the national compensation amount “was not reserved for victims in Contracting Parties to the supplementary funding convention, but would be distributed according to the national law of the Installation State”. Furthermore, earlier drafts of Article XI included an additional paragraph (paragraph 2) which would have subjected the opposability of options exercised in respect of both “geographical scope” and causes of exoneration to the consent of the Contracting Parties to the Convention on Supplementary Compensation; however, at the fifteenth session, the “prevailing opinion” was in favour of deletion of that paragraph, “*inter alia* because it was felt that it might discourage Contracting Parties from extending coverage to non-Contracting Parties” (see: documents SCNL/13/INF.3, p. 32; SCNL/14/INF.5, pp. 29 and 63; SCNL/15/INF.5, p. 16).

by the competent authorities under the “law of the State where the measures were taken”, whereas “the law of the State where the damage is suffered” is to determine who is entitled to take measures of reinstatement.

As for matters which are addressed in the Annex to the Convention on Supplementary Compensation or in the applicable base convention, it must be pointed out, from a general point of view, that the degree of discretion given to national law is different in the three base regimes and, as far as the Vienna Convention and the Paris Convention are concerned, it also depends on which amendment is in force for a Contracting Party. Moreover, the three base regimes are not entirely consistent in the choice of the applicable national law under their provisions.

Irrespective of which is the applicable base regime, some matters are left to be determined by the Installation State; mention may be made, for example, of the designation of the operator of a nuclear installation and of the determination of the limit, if any, of the operator’s liability as well as of the limit of liability cover. But several other matters are left to be determined by the legislation of the Installation State or to be governed by its law.<sup>332</sup>

In most cases, however, the Vienna Convention leaves matters in respect of which uniform rules are not provided to be determined, or governed, by the “law of the competent court”, which, as was pointed out above, is defined in the same way as in Article I(k) of the Convention on Supplementary Compensation.<sup>333</sup> The Paris Convention leaves such matters to be determined by “national law” or “national legislation”, but then defines such law or legislation as “the national law or the national legislation of the court having jurisdiction” under that Convention,<sup>334</sup> and the Exposé des Motifs explains that the definition includes “rules of private international law, which are not affected by the Convention”.<sup>335</sup> In other words, the meaning of “national Law” and of “national legislation” under the Paris Convention is, in substance, the same as the meaning of “law of the competent court” under the Vienna Convention.<sup>336</sup>

As for the Annex, it was pointed out in Section III.4 of this Commentary that the provisions which do not make specific reference to the Installation State, its “legislation” or its “law” are not very consistent and may give rise to ambiguities. In some cases reference is made to the “law of the competent court”,<sup>337</sup> which is defined in Article I(f) of the main body of the Convention as including the rules of private international law, whereas in others reference is made to “national law”,<sup>338</sup> which is nowhere defined. The difference in terminology may give rise to doubts as to which is the applicable “national law”: whereas in one case “national law” clearly refers to the national law of the competent court,<sup>339</sup> in most other cases it might be taken to refer to the national law of the operator liable

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<sup>332</sup> As far as the Vienna Convention and the Annex to the Convention on Supplementary Compensation are concerned, see, respectively Sections I.4, and III.4 of this Commentary.

<sup>333</sup> See Section I.4 of this Commentary.

<sup>334</sup> See Article 14(b) of the Paris Convention.

<sup>335</sup> Paragraph 60.

<sup>336</sup> In this respect, however, the 2004 Protocol to Amend the Paris Convention will amend Article 14(b) by expressly excluding conflict of laws rules from the definition of “national law”. The Explanatory Report (paragraph 38) explains that “such exclusion reflects modern trends in private international law without, however, depriving the competent court of the right to determine questions of private international law which are not determined by the choice of law rules under the Convention”.

<sup>337</sup> See Article 9.3; Article 11.

<sup>338</sup> See Article 3. 6, 7(c) and 9; Article 9.4; Article 10.

<sup>339</sup> See Article 9.4.

instead.<sup>340</sup> This interpretation might be seen as reinforced by the fact that in one case the corresponding provision in the (unamended) Vienna Convention actually refers to the “law of the Installation State”.<sup>341</sup> But in all other cases, this interpretation would lead to inconsistencies with both the Vienna Convention and the Paris Convention, which refer, in respect of the same matters, to the “law of the competent court” or, respectively, to the “national law” of the competent court.<sup>342</sup> Moreover, since in other cases the Annex itself refers to the “law of the Installation State”, the question might be asked as to why a reference was made to “national law” instead.

Since the intention of the drafters was to make the provisions of the Annex consistent with the corresponding provisions in either the Vienna Convention or the Paris Convention, the best interpretation is that “national law” means the national law of the competent court. If that is the case, then it remains to be explained why reference was not consistently made to the “law of the competent court” throughout the Annex. If the difference in terminology is to be given any meaning, reference to “national law”, as opposed to the “law of the competent court” may be seen as excluding national conflict of laws rules..,

## 11. The settlement of disputes

Article XVI of the Convention on Supplementary Compensation makes provisions for the settlement of all disputes between the Contracting Parties concerning the interpretation or application of the Convention. These provisions are identical to those which have been inserted in Article XX A of the 1997 Vienna Convention and which have been briefly examined in Section II.11 of this Commentary.

Article XVI.1 states that in the event of such a dispute “the parties to the dispute shall consult with a view to the settlement of the dispute by negotiation or by any peaceful means of settling disputes acceptable to them”. Of course, the Parties’ choices in this respect may be limited by other applicable agreements. In fact, Contracting Parties to the Convention on Supplementary Compensation may be party to other bilateral or multilateral treaties on the settlement of international disputes which may apply in the event of a dispute concerning the interpretation or application of the Convention. Moreover, Contracting Parties may have declared, under the so-called “optional clause” in Article 36.2 of the Statute of the International Court of Justice, that they recognize as compulsory, in relation to any other State accepting the same obligation, the jurisdiction of the International Court of Justice. However, it is a well-known fact that under general international law there is no obligation to settle international disputes and all procedures for such settlement rest on the consent of the Parties.

Under Article XVI.2 if a dispute concerning the interpretation or application of the Convention on Supplementary Compensation is not settled within six months by negotiation, or any

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<sup>340</sup> See Article 3. 6, 7(c) and 9; Article 10.

<sup>341</sup> This appears to be the case in respect of the operator’s liability for damage caused to the means of transport upon which the nuclear material involved was at the time of the nuclear incident (see Article 3.7(c) of the Annex and Article IV.5 and 6 of the (unamended) 1963 Vienna Convention). The Paris Convention has no corresponding provision since it covers damage to the means of transport as a matter of principle, and the 1997 Protocol amends the Vienna Convention to the same effect (see Section II.3(d) of this Commentary).

<sup>342</sup> This appears to be the case in respect of: the possibility to relieve the operator from the obligation to pay compensation for damage suffered by a person who has caused or contributed to causing such damage through gross negligence or an intentional act or omission; and the existence of a direct right of action against the insurer or other provider of funds. In both instances, Article 3.6 and 9 of the Annex refers to “national law”, whereas the Vienna Convention refers to the “law of the competent court” (Articles IV and II.7), and the Paris Convention to the “national law” of the court having jurisdiction (Article 6(a)).

other peaceful means of the Parties' choice, any Party can, by way of a unilateral request, submit it to arbitration or refer it to the International Court of Justice for decision. Since arbitration, as opposed to judicial settlement, usually presupposes the establishment of an ad hoc arbitrator or arbitral tribunal, Article XVI.2 also provides that, if the Parties to the dispute cannot agree on the organization of the arbitration, each of them may request the Secretary General of the United Nations or the President of the International Court of Justice to appoint one or more arbitrators.

Ultimately, therefore, the dispute will be settled by an arbitral award or by a decision of the International Court of Justice, either of which would be binding on the Parties. However, Article XVI.3 allows each State to opt out of this compulsory dispute settlement procedure by a declaration made when ratifying, accepting, approving or acceding to the Convention.