EXPLANATORY REPORT

ON THE DRAFT ARTICLES FOR A CONVENTION
ON CIVIL LIABILITY FOR DAMAGE CAUSED DURING
CARRIAGE OF DANGEROUS GOODS BY ROAD, RAIL AND
INLAND NAVIGATION VESSELS

prepared by the Unidroit Secretariat

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by Malcolm EVANS, Secretary-General of Unidroit

I

BACKGROUND TO THE DRAFT ARTICLES

1. — The origins of the work on the draft Convention within Unidroit date back to 1972 when the Government of the Netherlands requested that an item concerning the feasibility of preparing an international Convention relating to civil liability for damage caused as a consequence of the carriage of hazardous cargoes be included in the Work Programme of the Institute. The subject was in 1974 duly entered in the Work Programme (1) for the triennium 1975 to 1977 but without priority, in view on the one hand of the fact that the Programme was already overloaded and on the other of a parallel initiative of the Netherlands Government within the Economic Commission for Europe (ECE) which led to the transmission to the member States of that organisation of a questionnaire concerning a number of aspects of the legal rules pertaining to civil liability for damage caused during the carriage of hazardous substances by road (2).

2. — The results of this enquiry were analysed by the Netherlands Government (3) and submitted in 1974 to the Working Party on Road Transport of the ECE’s Inland Transport Committee. This body noted that whereas the document prepared by the Netherlands Government was concerned only with the carriage of hazardous substances by road, similar problems existed in connection with other modes of transport and it was agreed that the document should also be transmitted to the members of the Working Parties on Rail and on Inland Water Transport respectively. This move did not however lead to an intermodal approach and at

(2) ECE document TRANS/SCI/R.18, Annex.
(3) ECE document TRANS/SCI/R.18.
its 35th session, held in February 1976, the Inland Transport Committee decided to ask Unidroit to undertake a preliminary study regarding the possibility of preparing a draft convention on third party liability for damage caused during the carriage of hazardous substances by road which would aim at establishing "a uniform international application of the principle of third party responsibility (whether limited or not) of the carrier and possibly the appropriate procedures for obtaining compensation" (4).

3. — This request was communicated to the Secretary-General of Unidroit by the Executive Secretary of the Economic Commission for Europe by letter dated 26 April 1976 and, following preliminary discussion of the matter by the Governing Council of the Institute, the Secretariat commissioned a study on the subject in 1978 from a consultant expert, Dr Donald Hill of Queen's University, Belfast, whose untimely death in March 1979 prevented the study being submitted to the Governing Council at its 58th session in September 1979 as had originally been anticipated. In these circumstances it was agreed by the Council that the study should be carried out by the Unidroit Secretariat itself and its scope was extended, in accordance with the wishes of the Governments of France and the Netherlands, to cover damage caused during the carriage of hazardous substances by rail and by inland waterway(5).

4. — In conformity with a decision taken by the Governing Council at its 59th session in May 1980(6), the study was submitted for consideration to a committee of governmental experts which met in Rome from 16 to 19 March 1981 under the chairmanship of Mr Robert Cleton (Netherlands). Notwithstanding the reservations of some governmental representatives and observers of professional organisations who doubted whether a case had been made out for the preparation of an international instrument in this connection, a large majority of governmental delegations was of the opinion that the work of the committee should continue. In their view the risks associated with the carriage over land of hazardous substances were sufficient to indicate the need for some attempt at international unification of the law governing liability and compensation for damage caused during such transport. Admittedly, there were complex problems to be solved and the difficulties ought not to be underestimated, but they considered that it was only by further discussion and analysis of these problems that it would be possible to determine the feasibility of preparing a convention in this field and to assess the chances of such an instrument being accepted by Governments. In these circumstances, the committee agreed to resume consideration of the subject at a second session if the authorisation to hold such a meeting were forthcoming from the

(4)  ECE documents TRANS 18, paragraph 90 and TRANS/SC1/284, paragraphs 64 and 65.
Unidroit Governing Council (7), with a view to which session the Chairman agreed to prepare a set of preliminary draft articles, where appropriate indicating alternative solutions, on the clear understanding however that the content of such articles was intended to focus attention on problem areas rather than to foreclose discussion on any particular point.

5. — These draft articles were the subject of discussion and revision at six further sessions of the Committee of Governmental Experts for the preparation of uniform rules relating to liability and compensation for damage caused during the carriage over land of hazardous substances (8), hereafter referred to as “the committee”. In all, representatives of thirty-six member States of Unidroit, four non-member States, eight intergovernmental organisations, twelve non-governmental international organisations and four national professional associations participated in the work of the committee (9) which, at the closing meeting of its seventh session, approved the text of the Draft Articles for a Convention on Civil Liability for Damage caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels (10).

6. — Following a request by the Executive Secretary of the United Nations Economic Commission for Europe, the Governing Council of Unidroit authorised the Secretariat to transmit the text of the draft articles to that organisation for finalisation.

II

GENERAL CONSIDERATIONS

1. The need for an international convention

7. — At the outset of its study of the feasibility of preparing an international convention relating to liability and compensation for damage caused during the

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(7) This authorisation was given by the Governing Council at its 60th session in April 1981, see p. 24 of the Report on the session.

(8) The reports on the sessions are to be found in the following documents: 2nd session (1 to 4 February 1982) — Study LV — Doc. 15; 3rd session (18 to 22 October 1982) — Study LV — Doc. 27; 4th session (21 to 25 March 1983) — Study LV — Doc. 37; 5th session (3 to 7 October 1983) — Study LV — Doc. 45; 6th session (22 to 26 October 1984) — Study LV — Doc. 58; 7th session (21 to 29 May 1986) — Study LV — Doc. 79. In addition, an informal working group of technical and legal experts met from 7 to 9 March 1984 (Study LV — Doc. 49) while an Ad Hoc Joint Meeting of Transport Experts and Unidroit Experts was convened by the Economic Commission for Europe in Geneva from 19 to 21 November 1986 (Study LV — Doc. 64).

(9) For the full list of participants, see APPENDIX III.

(10) For the text, see APPENDIX I.
carriage over land of hazardous substances (11) the Unidroit Secretariat expressed
the opinion that before embarking on such an exercise it would be necessary to
consider the extent to which a genuine need for such an instrument existed and
in this connection it suggested that certain basic assumptions needed to be verified,
namely:

(i) that the increasing carriage of dangerous goods (12) creates a new and
ever greater risk of injury to persons and of damage to property and to
the environment;

(ii) that damage on such a massive scale as that which occurred in the Los
Alfaqués catastrophe in July 1978 is likely to occur in the future, not-
withstanding the taking of the most stringent precautions;

(iii) that the mechanism at present existing in most States to deal with claims
arising from such massive damage is not capable of ensuring adequate
compensation for victims, and

(iv) that any international instrument seeking to guarantee compensation to
victims would function effectively and that the financial burdens im-
posed by it could be met (13).

The Secretariat moreover suggested that if any of these assumptions could be suc-
cessfully challenged then the case for drawing up an international instrument
relating to liability and compensation for damage caused during the carriage of
dangerous goods over land would be seriously weakened.

8. — In these circumstances, the committee addressed itself at the beginning of
its first session to the need for an international convention in this field, considering
assumptions (i) and (ii) together. One view expressed was that neither assumption
was well-founded. While it was true that new substances were being manufactured
and transported, the carriage of dangerous goods by road and rail did not consti-
tute a new risk. Such goods had been transported since the last century and legis-
lation in a number of countries governing explosives and petroleum products had
existed for many years. It was important to bear in mind that the risk of damage
being caused as a result of the increasing carriage of dangerous goods was offset by
the introduction of stringent safety requirements and the incidence of accidents
involving such carriage did not suggest that the public at large was exposed to new
risks of such proportions as to justify an international convention being prepared
in this connection. The Los Alfaqués accident had been the result of the conjunc-
tion of tragically calamitous circumstances and there was no ground for believing
that a disaster of that kind was likely to occur again. Indeed, it was suggested that

(11) In the course of the committee’s work it was decided to replace the term “hazardous
substances” by “dangerous goods”.
(12) Cf. UN/Doc. A/Conf. 89/G.A. of 20 March 1978 in which it is stated that 50% of all
goods carried worldwide are to be considered as dangerous.
(13) Study LV — Doc. 1, pp. 4 and 5.
if a statistical study were undertaken the results would probably indicate that most major accidents on land traffic systems were unrelated to dangerous goods. Admittedly, accidents involving such goods would take place from time to time but in each case lessons were learnt and the likelihood of further such occurrences would be reduced.

9. — A large majority of governmental representatives were however unable to share this optimistic view, recalling that many incidents involving the transport of dangerous goods had occurred on the territory of their countries and that in a number of cases it had been purely by chance, for example the event happening outside urban areas, that the casualties and damage had not been much greater. It was also suggested that the recent rapid process of industrialisation and the growth of the chemical industry had led to an ever-increasing need to transport highly unstable substances from the place of production to that where they would be used and this development, together with the growth of large conurbations, had to be seen as creating a new risk. Indeed it was further argued that an accident such as that which had occurred at Los Alfaqués would have been much less likely to take place fifty years ago, not only because of the infrequency with which dangerous goods were transported then, but also because the second contributory cause of the disaster, the proximity of a camping site containing hundreds of tourists, was itself a phenomenon of modern society. It was not therefore legitimate to suppose that chance factors would continue to operate in such a way as to render it probable that the severest precautions taken in connection with the carriage of dangerous goods would prevent a recurrence of the Los Alfaqués incident and in consequence a majority of the committee believed that assumptions (i) and (ii) could be accepted.

10. — With regard to assumption (iii), the committee noted that both the Netherlands enquiry and the Secretariat study had indicated that only fragmentary legislation existed at national level specifically devoted to liability for damage caused by the carriage of dangerous goods. For the most part therefore damage was compensated in each country in accordance with the general rules governing extra-contractual liability which varied widely, some States applying a more or less strict liability regime while others based liability on negligence to be proved by the victim or on the doctrine of presumed fault. With the exception of road traffic, compulsory insurance was not normally required for the carriage of dangerous goods over land and here again special rules governing the insurance of the transport of such goods were to be found in only a small number of jurisdictions.

11. — In this connection, one governmental representative, under the law of whose country the question was approached on the basis of liability for negligence, stated that the system worked quite satisfactorily and that he had not heard suggestions to the effect that the present mechanism for compensating victims was considered to be inadequate. The two principal points at issue would
therefore seem to be the adequacy of jurisdictional rules, where again he had not
noted dissatisfaction with the existing situation, and the provision of compulsory
insurance. If then the question boiled down to one of compulsory insurance, it
would be necessary to conduct an exhaustive enquiry into the arrangements
already made with respect to the carriage of dangerous goods and the available
capacity of the insurance market. Only when this information had been obtained
could there be a meaningful discussion of the insurance aspects of the problem.
The view was also expressed that for insurers to evaluate the consequences of any
change in existing liability regimes or insurance arrangements, it would be neces-
sary to clarify the concept of "massive damage", while it would likewise be es-
sential to have some idea of the maximum compensation figures the committee
had in mind in respect of a single occurrence. In addition, it was stated that en-
quiries among the large chemical manufacturers in Western Europe concerning
their current practice with regard to insurance had suggested that they were in all
cases covered against damage to third parties arising out of the nature of the
product transported and that, although practice varied from one country to
another, it so far seemed that there was a suitable mechanism permitting adequate
recovery.

12. — A number of governmental representatives however stated that they were
not convinced that the law at present in force in their own countries was adequate
to deal with cases of very considerable damage being caused during the carriage
of dangerous goods. In particular it was suggested that a strict liability regime
would be more appropriate in this connection than one based on the notion of
fault and that efforts to reach uniformity at international level with regard to such
questions as the person to be held liable and the liability regime to be applied
would be of the utmost importance if it were thought necessary or desirable to
establish a generalised compulsory insurance scheme which would operate in the
most economical way possible. With regard to the question of what was meant by
the term "massive damage", referred to in assumption (iii), it may be recalled
that the expression originated in the context of the work of the Intergovern-
mental Maritime Consultative Organization (IMCO), now the International Mar-
time Organization (IMO), on the Draft Articles for a Convention on Liability
and Compensation in connexion with the Carriage of Hazardous and Noxious
Substances by Sea (hereafter referred to as the "HNS draft") and that although it
had no precise connotation what had been understood in connection with its use
à propos of the HNS draft had been damage well in excess of the limits laid down
by the 1976 Convention on Limitation of Liability for Maritime Claims (hereafter
referred to as the "LLMC Convention"). What was intended was to convey the
idea that certain substances with inherently dangerous properties could give rise
to damage of exceptional gravity as a result of fire or explosion, or through pol-
lution, which would not normally be expected to occur if the incident causing the
damage involved a vehicle or vessel carrying substances which did not have such
inherently dangerous characteristics. Again, a "normal" road accident could result
in serious injury or damage to property, but the death toll at Los Alfaqués for
example would scarcely have run into hundreds had a private motor car left the road and crashed into the camping site. The principal aim of a convention laying down a special regime in respect of liability for damage caused during the carriage of dangerous goods over land would therefore be to ensure an adequate system of compensation for victims.

13. — From the outset therefore of the committee’s work a substantial majority of governmental delegations considered that there existed objective grounds for believing that an international convention whose primary objective would be the guaranteeing of adequate compensation to innocent victims of damage caused during the inland carriage of dangerous goods was desirable. The questions raised in assumption (iv) of whether such a convention could function effectively and of whether the financial burdens imposed by it could be met were seen as requiring further study in the light of the content of the instrument, especially in regard to the principal problem areas of liability and insurance. Although some important matters, such as the limitation amounts to be adopted and the method of calculating those amounts, were not resolved by the committee, the former in particular being traditionally reserved for the final stage of negotiations, the feeling of most delegations at the end of the committee’s seventh and final session was that the draft rules approved by it provided a sound basis for the elaboration of an effective instrument which could be expected to work satisfactorily in practice.

2. The philosophy and structure of the draft Convention

14. — Although Part III of this explanatory report contains a detailed commentary on the draft articles, it may be useful to make some preliminary observations of a more general character which will serve as an introduction to the draft Convention as a whole and at the same time avoid needless repetition of certain fundamental arguments which constantly recurred during the discussions of the committee throughout its seven sessions.

15. — For the convenience of exposition, the draft Convention may be divided into five groups of articles namely:

(i) Definitions and scope of application,
(ii) Liability provisions,
(iii) Compulsory insurance,
(iv) Claims and actions,
(v) Reservation clauses.

(i) Definitions and scope of application (Articles 1 to 4)

16. — While the principal aim of the draft Convention is to ensure the provision of adequate and speedy compensation for victims, another major objective is to
facilitate international carriage of dangerous goods by providing a uniform international compensation scheme in order to avoid carriers in each country being faced with different liability regimes and different regulations on liability insurance with respect to the transport of dangerous goods. Such a scheme should give a clear perception to the operators concerned of the extent to which they will be affected by the future instrument. Great care has therefore been exercised in determining its scope of application.

17. — In the first place the draft Convention is, as its title clearly indicates, intended to govern civil liability only for damage caused during the carriage, of dangerous goods. It would not therefore apply to incidents such as those which occurred at Seveso in Northern Italy in 1976 and at Bhopal in 1984 although at the outset of the committee’s work two governmental delegations proposed that its terms of reference be extended to cover the question of civil liability for damage connected with the carrying out of dangerous activities in general (14). It was, in particular, suggested that a fragmentation of the rules governing civil liability was undesirable and that the connection between damage caused in the course of carriage of dangerous goods and damage occurring during other activities such as the production process was sufficiently close to justify a broader approach, possibly permitting the issues to be dealt with in the same instrument. A majority of delegations was however opposed to such an extension of the scope of application of the draft Convention, not only because the very concept of “dangerous activities” was so vague that it would be difficult both legally and materially to delimit the scope of the rules, but also because it was arguable whether in practice the type of incident envisaged would have the same international repercussions justifying the preparation of international uniform rules as would incidents occurring during the carriage of dangerous goods.

18. — Given then this restriction of the scope of application of the future instrument to operations of carriage, the next point to be settled was that of what was to be understood by the term carriage. Although the draft articles contain no definition of carriage as such, the thinking of the majority of the committee is reflected in Article 2 (2) which provides that “carriage . . . includes the period from the beginning of the operations of loading the goods onto the vehicle for carriage until the end of the operations of unloading the goods”. Although this provision was the subject of criticism by certain participants, partly on the ground that they considered operations of loading and unloading to fall outside the concept of carriage stricto sensu and partly because it was deemed unfair to impose liability upon the carrier for operations over which he might have exercised no control, the general feeling was that damage occurring during loading and unloading of dan-

(14) This item was included in the Work Programme of the Institute by the Governing Council at its 56th session in May 1977 (see p. 44 of the Report on the session).
gerous goods should fall within the scope of the future Convention. The authors of the draft have therefore included in Article 6 special liability provisions with respect to damage occurring during loading and unloading operations. In this connection also attention should be drawn to Article 3 (2). In this paragraph, which has been placed in square brackets, the application of the Convention has been excluded with respect to damage sustained on private grounds arising out of transport performed on those grounds. This exception includes loading and unloading operations which take often place on private premises (15).

19. — The Convention specifies the three modes of carriage to which it could apply, namely carriage by road, rail and inland navigation vessels. No serious consideration was given to embracing carriage of dangerous goods by air, in respect of which the provisions of the 1952 Convention on Damage caused by Foreign Aircraft to Third Parties on the Surface might apply, or carriage by sea, given the existence of the maritime law conventions of 1969 and 1971 relating to civil liability for oil pollution damage and to the work on the HNS draft which has for the time being been suspended within IMO. A suggestion was however made in the early stages of the committee's work that thought might be given to the inclusion within the scope of application of the draft articles of the carriage of dangerous goods by pipeline. A number of arguments were adduced against such an inclusion, the principal one being that there was not a sufficiently close connection between pipelines and other modes of inland transport to justify an extension of the proposed scope of application of the Convention. In the first place, carriage by pipeline may, unlike the other modes of transportation, be described as static and falls in between the traditional notion of transport and that of industrial activity. Secondly, it was by no means self-evident that the pipeline operator, as opposed to the manufacturer or shipper of the dangerous goods, should be held liable in the event of damage being suffered by third parties, a consideration which might suggest the establishment of a special regime for pipelines in the future Convention, in which event it would seem more appropriate to deal with pipelines in a separate instrument, while finally the view was expressed that if the prospective Convention were to apply to the carriage of dangerous goods by pipeline, then a case would have to be made out for excluding the transmission of electricity. In these circumstances the committee decided that it would not be appropriate to include the transport of dangerous goods by pipelines within the scope of the future Convention.

20. — One last point concerning the concept of carriage which was the subject of discussion within the committee related to the question of whether the scope of application of the draft articles should be limited to damage occurring during the course of international carriage. In this connection some participants suggested that such a restriction, which was to be found in a number of international conventions concerning the contract of carriage and in conventions and arrangements establishing technical prescriptions for the carriage of dangerous goods, could render the

(15) See below, paragraphs 72, 73 and 78.
future instrument more attractive to prospective Contracting Parties which might not wish to apply its provisions to purely internal situations, especially if their national legal systems did not recognize the principle of limited liability. Such a solution was however unacceptable to a majority of governmental delegations which considered it to be neither desirable nor practicable. While it might be quite justifiable in the context of administrative arrangements or in contractual situations, it seemed to be out of place in an international convention dealing with compensation of innocent victims to whom the question of whether the vehicle or vessel transporting the dangerous goods causing the damage was involved in domestic or international carriage was a matter of indifference. Difficulties were also seen in cases of transfrontier damage, in particular pollution caused during domestic carriage, and in those where an incident involved two vehicles, one performing international carriage and the other purely domestic operations. Even stronger objections were raised against a suggestion that the international character of the incident causing the damage could be defined by reference to the nationality of the victims for apart from the question of whether the fact that damage was suffered by one foreign tourist would be sufficient to bring victims from the local population within the ambit of the future Convention, it would be impossible to operate a scheme of compulsory insurance under such conditions as the nationality of the victims could not be known in advance of the incident. In these circumstances it was agreed not to include in the draft Convention a restriction of its scope of application to damage arising out of carriage involving an international element although it was recognized that a reservation clause seeking to achieve that result might be proposed at a later stage of the negotiations in another forum (16).

21. — As to the two remaining questions of especial importance dealt with in Articles 1 to 4 of the draft Convention, namely the list of dangerous goods to which the future instrument should apply and the damage which should be compensated thereunder, these raise particularly complex technical problems which may best be considered in the commentary on Article 1 (9) and (10), Article

(16) In this connection reference may be made to two amendments unsuccessfully tabled by one delegation at the seventh session of the committee and couched in the following language:

"2ter Any Contracting State may, at the time of signature, ratification, acceptance, approval or accession, reserve the right not to apply this Convention to carriage by one or two of the three individual modes of transport.

2quater Any Contracting State may, at the time of signature, ratification, acceptance approval or accession, reserve the right not to apply this Convention to carriage on the transport network or a part of the transport network on its territory where the network or the relevant part of it is not directly connected with the transport network of any other Contracting State, or is not immediately adjacent to the territory of any other Contracting State."

Although the first proposal goes beyond a simple reservation clause excluding domestic carriage from the scope of application of the draft Convention, it was in large part directed to the specific problem of the purely internal character of inland navigation transport in the United Kingdom.
2 (1) and Article 4. By way of general introduction however it may be recalled in respect of the list of dangerous goods that there was a widespread feeling within the committee that an abstract definition of dangerous goods would render it impossible on the one hand for the persons who might be held liable under the Convention to know in which cases they would be required to take out insurance and on the other for courts to determine when the Convention would apply. It was therefore agreed that reference should be made to an existing list or lists of substances contained in the administrative conventions or recommendations, although views differed as to which list should be taken as a basis for that to be annexed to the future Convention and as to how extensive that list should be. It was in any event recognized that further technical advice would be needed in establishing the list, the comprehensiveness of which might have certain repercussions on the liability provisions and on those relating to compulsory insurance (17).

22. With regard to the nature of the damage to be compensated under the future instrument, provision is made for recovery in respect of loss of life, personal injury, loss of or damage to property, loss or damage by contamination of the environment and the costs of preventive measures, subject however to certain restrictions and exclusions where the loss or damage relates to vehicles, or property on board such vehicles, in the same train as the vehicle carrying the dangerous goods or to goods on board that vehicle (Article 1(10)), and to claims where the victim stands in a contractual relationship to the person liable under the draft Convention (Article 2 (1)). Finally the geographical scope of application of the draft articles is limited under Article 4 to damage sustained in the territory of a Contracting State and caused by an incident occurring in a Contracting State, as well as to preventive measures, wherever taken, to prevent or minimise such damage.

(ii) Liability provisions (Articles 5 to 12)

23. Discussion within the committee on these provisions centred around four distinct but inter-related problems, namely the nature of the liability regime, the person or persons to be held liable, the defences available to such person or persons and the extent to which a limitation on liability should be introduced.

24. As to the first question, some support was expressed for a liability regime based on fault. It was suggested that most incidents occurring during the carriage of dangerous goods result not from technical failings but from human error and that a positive attitude to the observance of security precautions is best inculcated by a system of liability for negligence. The imposition of a strict liability regime could, it was argued, result in a relaxation of safety standards and might also lead to the awarding of lower compensation by courts than would be the case if fault were proved. A large majority of governmental delegations however insisted on the need for the introduction of a system of strict liability without which the future Convention would fail in its principal aim of providing adequate compensa-

(17) See below, paragraphs 53 to 59.
tion for victims. In their opinion a liability system based on fault would represent nothing more than an acceptance of the lowest common denominator to be found in existing legal systems and the adoption of such a solution would deprive the Convention of its interest for their Governments. They also stressed that the imposition of a strict liability system was not intended to attach any moral blame to the person to be held liable but simply to ensure speedy relief for victims, for even a regime based on presumed fault could give rise to lengthy litigation which would of necessity result in increased insurance costs.

25. — Granted therefore that the liability system to be retained in the future Convention should reflect the nature of the special risk involved in the transport of dangerous goods, the committee addressed itself to the defences which should be available to the person or persons upon whom liability would be imposed. Widely differing opinions were expressed in this connection and the original version of the draft made provision only for the traditional defences to be found in similar international conventions, namely that which may loosely be described as force majeure (Article 5 (4) (a)), that the damage was wholly caused by an act or omission of a third party done with the intent to cause damage (Article 5 (4) (b)) and that the damage resulted wholly or partially either from an act or omission done with the intent to cause damage by the person who suffers the damage or from the negligence of that person (Article 5 (5)). In the opinion of certain governmental representatives and observers from professional organisations participating in the work of the committee, as well as of many delegations to the ECE Inland Transport Committee, these defences, some of which were moreover considered to be unduly narrow in scope, would be quite insufficient if, as was quite possible, the draft articles approved by the committee were to introduce a system of channelling of liability to the carrier. In consequence two additional grounds of exoneration were introduced, the first operating in the event of the consignor or any other person failing to meet his obligation to inform the carrier of the dangerous nature of the goods in circumstances where the latter neither knew nor ought to have known of their nature (Article 5 (4) (c)), and the second where the carrier can prove that the dangerous goods were loaded or unloaded from the vehicle solely under the responsibility of another person, provided that the carrier discloses the identity of such person, in which case the carrier is relieved of his liability for damage caused by such goods during the period of loading or unloading (Article 6 (1)) (18).

26. — Turning to the third of the four principal problem areas relating to the liability provisions of the draft articles, namely the person or persons to be held liable, it must from the outset be stated that this was the single most controversial issue with which the committee had to deal. Basically, it was faced with two options, namely a regime channelling liability to a single operator or the introduction of some form of joint or superimposed liability.

(18) See, however, the alternative text of Article 6 providing for joint and several liability.
27. — Various possibilities were considered with regard to the system of channeling, which a majority of representatives favoured as one benefitting the victim and at the same time keeping down insurance premiums and in consequence the ultimate cost of goods. The channeling of liability to the owner of the goods was rejected from the very outset of the committee's work, it being pointed out that ownership of the goods might change more than once during carriage and that it might be unclear who was indeed the owner of the goods at the time of the incident causing the damage. Another candidate for liability was the producer, who might in any event be liable under national law or in accordance with one of the international instruments dealing with products liability which may be expected to enter into force within the next few years. Objections to this solution were however raised on the ground that the producer has no control over the goods during carriage, which might moreover take place many years after their manufacture, and that it seemed unreasonable to require insurance to be maintained by the producer for lengthy periods in respect of damage caused during carriage.

28. — The possibility of channeling liability under the future Convention to the shipper was also considered but dismissed as impracticable for a number of reasons. In the first place it was observed that such a solution would require insurance to be taken out and a certificate produced in respect of each and every consignment. It was moreover quite possible that more than one shipper would have consigned dangerous goods for carriage in the same vehicle, and the questions naturally arose of whether each shipper would have to take out insurance in respect of his goods up to the limitation amount which the Convention was expected to establish and how it could be decided in a given case which goods had actually been the cause of the damage. There might, it was further argued, also be considerable difficulty in identifying the shipper.

29. — In the light of the foregoing considerations, those who favoured a system of channeling of liability under the future Convention considered the only practicable solution to be that of imposing liability upon the carrier who was, after all, the person in control of the movement of the goods, who was the operator most easily identifiable by victims and who could take out insurance on an annual basis. Channelling of liability to the carrier was, it was therefore argued, the most economical means of ensuring that innocent third parties would be guaranteed compensation while the carrier would for his part be entitled to bring a recourse action against any other person who might be held liable for the damage under the applicable national law.

30. — A number of governmental delegations and observers from both governmental and non-governmental international organisations represented on the committee, as well as a substantial body of opinion within the Inland Transport Committee of the ECE, considered the proposed solution to be both unfair and economically prejudicial to the transport industry as a whole. It was in the first
place suggested that damage arising out of incidents involving the carriage of
dangerous goods would most often occur as a result not of the negligence of the
carrier or his employees but of the inherently dangerous character of the goods or
of their defective loading by the shipper or unloading by the consignee, operations
over which the carrier often exercised no control. Moreover, the imposition of lia-
bility under the prospective Convention upon the carrier alone, coupled with the
obligation to take out expensive insurance cover, which would force him substan-
tially to increase his freight charges, would cause severe distortions in competition
not only between, but also within, the three modes of inland transport and could
drive large numbers of small road hauliers and inland navigation carriers out of
business. Even allowing for the availability to the carrier of recourse actions, the
success of such legal proceedings would often be doubtful as the carrier would
normally have to prove the fault of the other party whereas he would himself be
strictly liable under the future Convention. Bearing in mind these arguments,
together with the consideration that the carriage of dangerous goods constituted
only one link in the chain from the manufacturer to the ultimate consumer, it
seemed only reasonable to contemplate some form of joint liability.

31. — In this connection, the committee considered two possible solutions, the
first of which was based on one of the alternatives contained in the HNS draft
which had made provision for a first layer of liability to be imposed upon the ship-
owner and a second on the shipper (19). Although some interest was shown in such
a solution during the early stages of the committee’s work, the failure of the HNS
draft to be adopted at the IMO Diplomatic Conference in 1984, partly on account
of the complicated nature of the proposed regime, indicated that there was no
prospect of its obtaining any significant degree of support and attention was
therefore concentrated on a proposal by the delegation of Switzerland to introduce
a regime founded on the joint and several liability of the carrier and the shipper.
This proposal took as a basic assumption the existence of two distinct risks, that
of transport and that of the inherent danger in the substances themselves, which
was present whatever precautions were taken. Both the carrier and the shipper, it
was argued, created specific risks with attendant liabilities which could be covered
by insurance. These liabilities were complementary and there were no valid grounds
for viewing the liability of the shipper as being in some way subsidiary to that of
the carrier, an approach which had lain at the heart of the two-tier system adopted
in the IMO Legal Committee. These considerations led the Swiss delegation to ad-
vocate a system of joint and several liability of the shipper and the carrier, based
on the taking out of compulsory insurance by each of them, which would, in its
opinion, be more advantageous to the victim who would be able to bring an action
under the Convention against both the carrier and the shipper on the basis of
strict liability, while at the same time the proposal made detailed provision for the
regulation of the internal relations between the carrier and the shipper. It had yet
to be demonstrated that such a system was any more complicated to operate than

(19) For the text of the HNS draft, see Study LV — Doc. 17.
one based on sole carrier liability for, if the shipper were known, no problem would arise, and if he were not immediately identifiable then the carrier would in almost all cases be in a position to identify him subsequently. Equally, the Swiss delegation insisted that it was far from established that a system of joint and several carrier/shipper liability would entail an increase in, let alone a duplication of, insurance costs as had been suggested in some quarters for if the availability of recourse to the carrier in accordance with the provisions of national law were to have any meaning, it must presuppose the taking out of insurance by the other operators concerned, including the shipper.

32. — A number of arguments were however advanced against the Swiss proposal, the first being that joint and several liability was an unusual legal formula. It was moreover observed that its introduction in the field of the transport of dangerous goods could not but lead to an increase in insurance costs if the shipper were to be required to take out insurance in respect of a liability, namely that for damage occasioned during the carriage of dangerous goods, which was not at present incumbent upon him. In connection with the question of double insurance a suggestion was made that the obligation to take out insurance might be imposed exclusively upon the shipper, who should deliver an insurance certificate to the carrier, thus permitting liability under the prospective Convention to be placed exclusively upon the carrier. Some doubts were however expressed as to the practicability of such a solution which, it was moreover indicated, might not be in the best interests of the carrier, for if the choice were to be left open to him he could decide on a commercial basis whether it was to his advantage to accept an insurance certificate provided by the shipper and to charge a lower freight rate or alternatively to charge higher freight and to purchase the insurance himself. The opponents of the proposed system of joint and several liability also considered that it was open to similar objections to those already levelled against the channelling of liability to the shipper, while the extension of the defences available to the carrier which had been agreed seemed to reduce the force in the arguments in favour of the regime proposed by the Swiss delegation.

33. — It was however recognised that one of the principal criticisms made in the Inland Transport Committee of the ECE with regard to the UNIDROIT draft had been the absence of any alternative to the solution of channelling liability under the draft Convention to the carrier. Given therefore the support for the proposal by the delegation of Switzerland, at least in its general outlines, expressed by several governmental delegations and by a number of observers, it was decided that the proposal should be annexed to the final explanatory report on the draft articles so as to permit further study (20).

(20) The draft articles proposed by the Swiss delegation are annexed hereto as APPENDIX II. Since a number of differences exist with regard to the defences for which provision is made under that proposal as compared with the basic text and given the lack of time available to the committee at its final session to consider them in detail, it was agreed that the proposal as a whole should be submitted in the form of a Swiss proposal rather than as an alternative text endorsed by the committee.
34. — The majority of governmental delegations which remained convinced that primary liability under the future Convention should be imposed upon the carrier believed that the inclusion of the additional defences available to him mentioned in paragraph 25 above could result in gaps being created in the overall liability system with a consequent reduction in the protection accorded to victims. It is for this reason that Article 6 (liability for loading and unloading operations) and Article 7 (liability of the consignor), the latter being maintained in square brackets in consideration of the hesitations regarding the need for, or desirability of, the provision expressed by a number of governmental representatives, make provision for liability under the Convention of persons other than the carrier in certain circumstances where the carrier himself is, or may be, relieved of liability.

35. — With regard to the fourth main aspect of the liability provisions, namely that of whether the carrier and other persons liable under the future Convention should be entitled to limit their liability, some governmental representatives argued against the principle of limitation, recalling that the concept of unlimited liability existed as a general principle in most legal systems and that this had not prevented the operation of a system of compulsory insurance, in particular in respect of damage caused by motor vehicles, in their own countries. If nevertheless a majority of delegations were to favour the introduction of a system of limited liability they would, at least until such time as the exact limits were known, be obliged to call for the inclusion of a reservation clause permitting Contracting States to impose higher limits or no limits at all, especially in connection with claims arising out of loss of life or personal injury.

36. — Other representatives however favoured the introduction of a system of limitation for which precedents were to be found in the existing international civil liability conventions where it had been seen as a quid pro quo for the imposition of a strict liability regime coupled with compulsory insurance. They furthermore recalled that the future Convention was intended to provide compensation for victims in cases where the potential damage could be of exceptional gravity so that it was doubtful whether insurance cover could be obtained at reasonable cost, or indeed at all, in the absence of any limitation of liability. In consequence, Article 9 of the draft establishes the principle of limitation, subject to the possibility of the limits being broken in the circumstances described in Article 10 (1) and to the reservation clause contained in Article A (a).

37. — In completing this general introduction to the liability provisions, reference must be made to a suggestion made during the course of the committee’s deliberations that a supplementary fund be set up, either by States or by commercial interests, to provide compensation in excess of the limits which will be established under Article 9. As regards the possibility of such a fund being financed by Governments, the view was widely expressed that the assumption of such a responsibility would be extremely unlikely in the present economic climate al-
though it was probable that Governments would in any event be called upon to intervene financially in some cases, for example where the compensation available under the insurance taken to cover the cost of preventive or clean-up measures was insufficient. As to the possibility of a fund being constituted by the commercial interests, principally the chemical industry, reference was made to the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, supplementary to the 1969 International Convention on Civil Liability for Oil Pollution Damage, hereafter referred to respectively as the “Fund Convention” and the “CLC Convention”. In this connection it was recalled that the CLC Convention lays down certain limits on the compensation payable by the shipowner while the Fund Convention makes provision for the establishment of a fund to which the importers of oil contribute in accordance with the quantities imported by them for the purpose of providing compensation in cases where no liability for damage arises under the CLC or where the damage caused is in excess of that which the owner is financially capable of meeting or of the limitation figures established by that Convention. It was however considered that it would be impracticable, if not impossible, to institute such a system in the framework of the future Convention on account of the variety of substances, the different risks, the large number of shippers involved and the different industries concerned.

(iii) Compulsory insurance (Articles 13 to 17)

38. — From the very beginning of the committee’s work it became apparent that a large majority of delegations considered that the future Convention could only achieve its aim of ensuring adequate protection of victims if the liability regime established by it were to be coupled with a system of compulsory insurance or alternative financial security. Some concern was expressed in certain quarters at the effect which the introduction of such a system might have on the premiums at present paid by carriers of dangerous goods (21) and although the representatives of the insurance profession were unable to assess precisely its impact they believed that the mere fact of a change in the liability regime, combined with the increased claims consciousness which could be expected to result from the adoption of a strict liability regime, would, at least initially, cause a rise in premiums which might however be reassessed subsequently in the light of claims experience. Much, of course, would depend upon the limits of liability ultimately to be adopted, the degree of difficulty with which they could be broken and the amount of premium income generated, which would itself be affected by the number of substances to which the future instrument would apply as well as their frequency of carriage. There did not, however, appear to be any grounds for supposing that insurers would not be able to handle the regime which the draft articles in their present form contemplated.

(21) An obligation which would also be imposed on shippers if the Swiss proposals in APPENDIX II were to be adopted.
39. — Since the provisions on compulsory insurance are of an essentially technical character it would seem wise not to enter into too detailed a discussion of them at the present juncture. It should however be pointed out that Article 15 makes provision for a direct action to be brought against the insurer or other person providing financial security for the carrier’s liability in respect of claims for compensation under Articles 5 and 6 while Article 16 allows in certain cases for a dispensation from the obligation to maintain insurance or other financial security. It should moreover be recalled that on various occasions reference was made to the possibility of the compulsory insurance requirements under the draft Convention being incompatible with the principle of freedom of navigation on the Rhine enshrined in the Mannheim Act of 1868 although as yet no common stand on this issue has been taken by governmental representatives either in the committee itself or in the Central Commission for the Navigation of the Rhine (22).

(iv) Claims and actions (Articles 18 to 20)

40. — Articles 18, 19 and 20 are concerned respectively with the questions of time-bar, jurisdiction and recognition, and enforcement. As regards Article 18, a view was expressed that it would be preferable to include no such provisions so as to avoid the continuous fragmentation of rules of law relating to limitation of actions while it was also suggested that matters such as jurisdiction, recognition and enforcement of judgments were better regulated in multilateral conventions or bilateral treaties. A majority of representatives however recalled that the recent practice in international conventions of the kind under elaboration had been to include procedural provisions, thereby recognizing the fact that the situations contemplated often present international characteristics in respect of which it is desirable to achieve uniform solutions in the interest of the security not only of victims but also of the operators who may be held liable under those conventions.

41. — While the detailed rules established in Articles 18 to 20 will be discussed below in the article by article commentary, it may be mentioned that a proposal was made to include a further provision relating to the export of currency in the light of the difficulties sometimes experienced by successful claimants in securing the satisfaction of judgments against defendants from countries which apply severe currency controls. The general feeling was however that the inclusion in the draft

(22) In this connection attention may be drawn to the following text, submitted at the seventh session of the committee:

“A Contracting State may, at the time of the deposit of its instrument of ratification or accession or at any time thereafter, declare that it will not apply this Convention to waterways governed by the revised Convention of 17 October 1868 on the Navigation of the Rhine or by the Convention of 27 October 1956 concerning the Canalisation of the Moselle.”

The sponsors of the text however made it clear that it was not their intention that it be discussed at the session but simply to indicate that such a proposal might be tabled formally during the next phase of the work on the draft articles.
of such a provision, even if worded in terms as general as those of Article 22 of the 1973 Convention on the Recognition and Enforcement of Decisions relating to Maintenance Obligations (23), could engender delicate political problems which might create an obstacle for some States to accept the future Convention and the proposal was accordingly rejected.

(v) *Final clauses (Articles A to D)*

42. – As a matter of principle the committee considered it advisable not to prepare a preamble or a set of final clauses to accompany the draft articles since it was of the opinion that they should be drawn up so as to conform with the customary practice in the international organisation which would finalise the future Convention or by the final clauses committee if the draft were ultimately to be adopted at a diplomatic Conference. There were however a number of provisions touching on the substance of the draft articles which would normally find their place in the final clauses of an international instrument in respect of which it was agreed that it would be desirable already at this stage to offer a draft for future consideration. Since discussion of the content of those provisions will be deferred until the commentary on them and on the draft articles to which they relate, it may be sufficient in this general introduction to recall in the first place that Article A contains reservation clauses regarding Articles 9, 5 (5) and 14 of the draft Convention, Article B provides for notification by the depositary to all signatory and Contracting States of declarations made by Contracting States under Article A while Articles C and D establish accelerated procedures for the amendment respectively of the limitation amounts and of the list of substances to which the future Convention will apply.

43. – Finally, it may be recalled that the earlier versions of the draft articles contained a supersession clause worded as follows:

“This Convention shall supersede any convention in force or open for signature, ratification or accession at the date on which the convention is opened for signature, but only to the extent that such conventions would be in conflict with it; however, nothing in this Article shall affect the obligations of Contracting States to non-Contracting States arising under such conventions.”

It was however pointed out in connection with this article that it did little more than reaffirm a rule of customary international law which was moreover embodied in the Vienna Convention on the Law of Treaties and in these circumstances the committee agreed to its deletion.

(23) That provision reads as follows:

“A Contracting State, under whose law the transfer of funds is restricted, shall accord the highest priority to the transfer of funds payable as maintenance or to cover costs and expenses in respect of any claim under this Convention.”
III

COMMENTARY ON THE DRAFT ARTICLES

Title

44. — On a number of occasions during the deliberations of the committee, the title of the draft Convention was criticized on the ground that it was illogical to refer to two modes of transport, road and rail, and then to “inland navigation vessels” rather than to the mode of transport, namely “inland navigation”. It was indeed suggested that the scope of application of the future Convention should be determined in relation to the last-named mode of transport by reference not to the test of whether the ship carrying the dangerous goods was an inland navigation vessel but rather to that of whether the damage occurred in inland waters. It was however replied that the HNS draft had been intended to apply to damage caused in the territory of a Contracting State whenever the dangerous goods were carried as cargo on board “any sea-going vessel” or “any seaborne craft of any type whatever” so that it would have applied to damage caused by goods carried on board such a vessel or craft navigating in inland waters. Admittedly, work had been suspended on the HNS draft but if it were to be revived, and the same scope of application maintained, then it would be desirable to avoid any conflict between the two instruments. Conversely, however, since the HNS draft had not purported to regulate damage caused in the territorial waters of Contracting States by inland navigation vessels, there seemed to be no objection to the draft Convention’s scope of application extending to such situations.

Article 1

45. — This article contains definitions of thirteen terms which recur throughout the draft Convention, the first six of which may be seen as pairs, relating as they do to the three modes of transport to which the future instrument is intended to apply. Paragraphs 1, 3 and 5, which define “carriage by inland navigation vessel”, “carriage by road” and “carriage by rail” of dangerous goods by reference respectively to carriage on board a ship, a road vehicle and a railway wagon, call for no comment. What are of more importance are the substantive definitions of “ship”, “road vehicle” and “railway wagon” in paragraphs 2, 4 and 5bis.

46. — Rather than provide a definition of “inland navigation vessel” in paragraph 2, the committee preferred to employ the term “ship” which designates “any vessel or craft, not being a sea-going ship or sea-borne craft of any type whatsoever”. This is in effect a negative definition excluding as it does all vessels and craft falling within the definition of a ship under Article 1 (1) of the CLC Convention and Article 1 (1) of the HNS draft. At the final session of the committee, the question was raised as to whether the definition of “ship” included air-
cushion vehicles. One view was that this had not been the intention of the authors of the draft but that it might be necessary to clarify the matter for, notwithstanding the efforts of Unidroit in the late nineteen-seventies, no international regime specifically applicable to air-cushion vehicles had been developed. In consequence the question of whether such vehicles fell within the definition of “ship” under paragraph 2 or indeed under the more general definition of “vehicle” under paragraph 6 would depend largely upon the environment in which they operated. If, for example, a hovercraft operated on inland waterways, it might be regarded as a “ship” for the purposes of Article 1 (2). If, on the other hand, it operated at sea then it might be considered to be a “sea-going ship” or “sea-borne craft” and therefore caught by the exclusion in Article 1 (2). The view was however expressed that this was not necessarily an interpretation which would be followed by courts in all States and given the late stage at which the matter had been raised it was agreed that it could be the subject of further consideration during the next phase of the work on the draft Convention.

47. — While the definition of “road vehicle” under paragraph 4 is self-explanatory (24), that of “railway wagon” under paragraph 5bis calls for some explanation. Originally, it was not deemed necessary to provide any definition of “railway wagon” but the point was made that it might be somewhat restrictive in that it did not cover vehicles such as rail motor-coach units and railcars equipped to transport packaged substances as well as persons. Although some representatives felt that the expression “railway wagon” was sufficiently clear, and that it would in any case be perfectly adequate if the future Convention were to apply only to substances carried in bulk or to those capable of causing catastrophic damage, it was nevertheless agreed to maintain the definition of “railway wagon” pending a decision as to whether the scope of the instrument should be restricted to the carriage of dangerous goods in bulk, in the event of which the provision could be deleted.

48. — For the sake of economy of language elsewhere in the draft articles, paragraph 6 defines a vehicle as a “ship”, “road vehicle” or “railway wagon” while the definition of “person” in paragraph 7, which corresponds to that in Article 1 (2) of the CLC Convention, is of relevance principally to Article 1 (11) of the draft Convention to the extent that preventive measures may be taken by a State or other body such as a municipality.

49. — The definition of “carrier” was the subject of lengthy debate within the committee. Leaving aside for the moment the railway carrier, the principal question was whether road and inland navigation carriers should be defined by reference to ownership of the vehicle or to its operation. Although some support was expressed for the former solution, a majority of representatives considered that it would be preferable to impose liability upon the performing carrier. It was in particular recalled that while inland navigation vessels and road vehicles were

(24) See however paragraphs 50 and 51 below.
usually, although not always, registered in the name of the owner who would thus be readily identifiable by the victim, road vehicles were often hired out or leased to operators, and inland navigation vessels the subject of bareboat charters. It did not appear to be practicable to impose upon the owner of a vehicle or vessel the obligation to take out insurance in respect of the carriage of dangerous goods when he might be totally unaware of the purpose to which such vehicle or vessel was to be put by the operator. Moreover, the operator could easily be identified by claimants and it seemed unreasonable to require victims to enquire into the perhaps complex contractual relationships between the owner and the operator of the vehicle with a view to ascertaining the person against whom they should bring action under the Convention. In these circumstances it was agreed to follow the precedent contained in Article 3 (b) of the European Convention on Civil Liability for Damage caused by Motor Vehicles of 1973, and sub-paragraph (a) of Article 1 (8) accordingly defines the carrier by road and by inland navigation vessel as “the person who controls the use of the vehicle on board which the dangerous goods are carried”. The provision likewise follows Article 3 (b) of the above-mentioned European Convention by establishing the presumption that the person controlling the use of the vehicle is the person in whose name it is registered in a public register or, in the absence of such registration, the owner of the vehicle. This presumption is, however, rebutted if that person can prove that the use of the vehicle was controlled by another person, for example a lessee or a bareboat charterer, whom he must however identify or, if he fails to identify that person, by proving that another person has taken control of the vehicle without his consent and in such circumstances that he could not reasonably have prevented its use by that person (25).

50. — One further difficulty faced by the committee in connection with the definition of road and inland navigation carriers was that of determining which carrier should be liable when one vehicle is being drawn by another, for example a semi-trailer by a truck, or a barge with no motive power being pushed on an inland waterway. Different opinions were expressed on this point, some representatives and observers considering that the “carrier” for the purposes of paragraph 8 (a) should, in the case of trucking, be the person controlling the use of the truck since it is he who controls the movement of the two vehicles, the semi-trailer being in effect inert. The aim of the Convention, it was argued, was to regulate the mo-

(25) The language of the last part of the first sentence is taken over from Article 5 (1) (c) of the 1980 Unidroit draft Convention on Civil Liability for Damage caused by Small Craft where it was cast in the form of a defence. A suggestion that a similar approach be adopted in the draft Convention and that the language be transferred to Article 5 (4) was rejected, principally on the ground that it would have the effect of requiring a carrier to take out insurance in cases in which he was not at present liable under the draft Convention for, in the circumstances contemplated by sub-paragraph (a), a person who has been deprived of control of the vehicle would not be deemed to be a “carrier” for the purposes of the Convention.
ovement of dangerous goods, and to the extent that the only difference between a semi-trailer and a container loaded onto a lorry is that the former possesses wheels, it would be illogical and unreasonable to impose liability on the owner or operator of the semi-trailer. Another view however was that it was that person who should be deemed to be the carrier for the purposes of the Convention. In the first place it was suggested that since it was such owner or operator who would decide what dangerous goods might be carried on it, and where it should be loaded and unloaded, it was he who exercised control over the semi-trailer. Moreover, it was pointed out that from a practical point of view imposition of liability on the trucker could cause serious difficulties in relation to the liability and insurance regimes under the prospective Convention in cases where the semi-trailer was disconnected from the lorry. Who would, for instance, be liable for an incident involving a disconnected semi-trailer parked pending its attachment to another lorry or awaiting shipment by a sea-going ship or inland navigation vessel? Again, would the attachment to a second lorry mean that the insurance taken out by the first trucker would cease to cover the carriage so that the second trucker would also be required to take out insurance in respect of his leg of the transport? Such a solution would be costly in insurance terms as also would be one imposing joint and several liability on both the owner or operator of the lorry and the owner or operator of the semi-trailer. With a view therefore to reducing insurance costs to a minimum and to ensuring a readily identifiable person against whom victims could claim recovery, it was proposed that the owner or operator of the semi-trailer be deemed to be the carrier for the purposes of Article 1 (8)(a).

51. — Some supporters of this view also drew attention to the fact that this solution was moreover consistent with that adopted in regard to “piggy-back” transport dealt with in Article 2 (3)26. Other members of the committee however saw a certain inconsistency, not in the solutions adopted in the two situations but in the underlying philosophy, for if one of the arguments invoked in favour of imposing liability on the owner or operator of the semi-trailer was that the trucker might haul the semi-trailer for only a short distance, then that same reasoning could be applied with a view to maintaining that the owner of a road vehicle should not be liable under Article 2 (3) in cases where, after a short journey by road, it was loaded onto a ferry or railway wagon for a much longer leg of the transport. In connection with the relationship between the problem arising under Article 1 (8) (a) and that of “piggy-back” transport the point was also made that from a practical angle it was not unreasonable to impose liability under Article 2 (3) on, for example, a road carrier whose vehicle was subsequently loaded onto a ferryboat because he would in any case have to take out insurance to cover that leg of that journey where carriage took place by road. The situation was entirely different however when an inert vehicle, such as a semi-trailer, was drawn by

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(26) See below, paragraphs 74 to 76.
another vehicle and was by its very nature incapable of independent movement. To hold the owner or operator of such a vehicle liable under the prospective Convention would, it was suggested, risk creating precisely the same kinds of difficulties as those which had faced the authors of the HNS draft when they had sought to impose liability on the shipper. In view of the failure to reach agreement on this point the committee decided to include as the last sentence of paragraph 8 (a) a text indicating both solutions so that a final decision may be taken on the matter during the next phase of the work.

52. — In connection with the definition of the rail carrier, the committee considered that it would not be appropriate to impose liability under the future Convention on the owners of the railway wagons themselves, principally for the reasons that the owner of a wagon would have no control over the carriage operations unless he were at the same time the operator of the line on which those operations were performed, and that wagons belonging to many different owners might be involved in the same incident. The most practical solution, and this is the one contained in sub-paragraph (b), seemed therefore to be one which would consider as the carrier for the purposes of the Convention the person or persons operating the railway line on which the incident occurred and to provide in the case of joint operations for each of the joint operators to be considered as carriers (27).

53. — Paragraph 9 of Article 1 concerns one of the fundamental aspects of the future Convention, namely the dangerous goods to which it will apply (28). From the outset of its work the committee appreciated that this was an extremely complex problem raising legal, political and technical issues. For the reason already mentioned (29), it rejected the notion of including a general definition of dangerous goods in the draft Convention and agreed to the annexing thereto of a list of substances or classes of substances drawn from existing lists. While it was recognized that incidents could occur in connection with the carriage of essentially “harmless” substances such as milk or olive oil which might cause substantial pollution damage, it was felt that such damage would only be sustained in extreme cases and

(27) In cases of joint operation, the carriers are, in accordance with the provisions of Article 5 (3), jointly and severally liable for damage caused by dangerous goods on board the vehicle.

(28) In connection with this matter, the reader is referred in particular to the following documents: Compilation of materials relating to the question of which dangerous goods should be covered by the future Convention (Study LV — Doc. 48); Report on the meeting of the informal working group of technical and legal experts (Study LV — Doc. 49); Replies of Governments and of international organisations to the questionnaire concerning the list of substances to be annexed to the prospective Convention (Study LV — Doc. 63 and Add. 1 and 2 thereto); AP-PENDICES A, B and C to the draft Convention.

(29) See paragraph 21 above.
that any general extension of the scope of application to cover substances not included in the lists attached to existing administrative agreements or recommendations regulating the carriage of dangerous goods would transform the future Convention into a general third party liability convention which had most certainly not been the original intention of its authors. What therefore should be sought were certain criteria permitting the identification of those substances which, notwithstanding the imposition of the most stringent security precautions, were nevertheless capable of causing damage of exceptional gravity either because those precautions were not observed or on account of an incident rendering the precautions ineffective. To this end, questionnaires were addressed to the competent technical bodies within the United Nations, and also to Governments, seeking advice on a number of matters while a working group of technical and legal experts set up by the committee during its fifth session also considered the problem from a number of angles. At this meeting certain questions were considered, such as the quantities in which dangerous goods are carried, and whether in bulk or in packaged form, the frequency of carriage and the risk presented in the event of the safety measures taken to neutralise the inherently dangerous properties of the goods during carriage failing to prevent damage in the event of an incident.

54. — Broadly speaking, two different approaches emerged regarding the list to be annexed to the future Convention. The first, originally submitted by the Netherlands delegation in Study LV - Doc. 55 (30), proposed a fairly lengthy list of substances based on the 1957 European Agreement concerning the International Carriage of Dangerous Goods by Road (hereafter referred to as the “ADR Agreement”), in favour of which solution it was argued that such a list would permit a broader base for the compulsory insurance regime contemplated by the future Convention with a consequential beneficial effect on the cost of premiums. In addition, it was suggested that the ADR list was well known to road carriers and that the lists applied in European railway transport of dangerous goods (RID) and with regard to the carriage of such goods on the Rhine (ADN (R)) could, while not being identical with the ADR list, easily be adapted to conform to it. Although support was expressed in the committee for such a solution, some representatives who were in agreement with taking the ADR list as a basis for that to be annexed to the future Convention noted that the proposal submitted by the Netherlands Government envisaged the inclusion of certain substances for the purpose of the application of the liability provisions and their exclusion, when carried in quantities below those stipulated in ADR, in relation to the compulsory insurance scheme, which they saw as a complicating factor, and it was suggested that if the risk of grave damage was so small as not to justify the application of the provisions on compulsory insurance, then the same argument could come into play in respect of the liability provisions. The view was also expressed that the list based on ADR could be still further shortened so as to include only substances with particularly

(30) See APPENDIX A.
dangerous properties carried in full loads, or in some cases in bulk, which were normally transported by specialised carriers, thereby reducing the insurance burden on carriers in general.

55. — In reply to these arguments it was pointed out that while it might be justifiable, as regards certain substances presenting only a minimal risk of causing serious damage when transported in small quantities, to exempt the carrier from the payment of expensive insurance premiums since such damage could be expected to be covered by normal insurance policies in respect of third party liability, there did not seem to be any valid reason for depriving victims of the extra protection accorded by the strict liability regime for which the draft Convention made provision. Moreover the system proposed by the delegation of the Netherlands would alleviate the burden for supervisory bodies to ensure that the insurance requirements under the prospective Convention were met. It was furthermore suggested that there were substances which, when carried either in bulk or in packaged form, were quite capable of causing extremely grave damage in certain circumstances.

56. — The second approach was put forward by the delegation of the Federal Republic of Germany (31) and was based on consideration of the question of whether the prospective Convention should seek to establish a separate and comprehensive regime of liability and compulsory insurance for damage caused during the transport of dangerous goods by road, rail and inland navigation vessels, or whether its purpose should be limited to ensuring compensation for victims in cases where the dangerous inherent properties of the goods might give rise to damage of exceptional gravity and not only in extreme circumstances, in respect of which damage full and adequate compensation might not be recoverable under existing national liability and insurance regimes. In its view there would be a genuine need for a convention of the kind contemplated only if the latter concept were to be retained, with the consequence that the protection thereunder should be limited to those cases where the substance transported was capable of causing damage in excess of the compensation recoverable under existing regimes applicable to normal traffic accidents and it was for these reasons that it proposed a more restricted list than that submitted by the Netherlands delegation. The alternative list proposed would comprise all dangerous goods of packing group I as listed in Chapter 2 of the Recommendations prepared by the United Nations Committee of Experts on the Transport of Dangerous Goods, carriage of certain small quantities of which might, after due consideration, be exempt from liability or financial security, as well as all dangerous goods of packing group II as listed in Chapter 2 of the Recommendations, unless such goods were carried in quantities below certain stipulated amounts. The substances contemplated in packing group II were, it was recalled, those carried in bulk, including portable tanks and con-

(31) See APPENDIX B.
tainers, and it was in this connection suggested that the damage likely to be caused by dangerous goods was by no means proportional to the quantity carried, the risk of large scale damage being greatest when the substances constituted a substantial proportion of the load in relation to the size of the vehicle. The delegation of the Federal Republic of Germany also indicated that its preference for the United Nations Recommendations was based firstly on the fact that unlike the various European agreements and regulations they were intended for use worldwide, and secondly on the consideration that the European arrangements were in the process of being adapted with a view to their harmonisation with the United Nations Recommendations. Finally, in reply to the objection that the Recommendations were, unlike ADR, RID and ADN (R), not of a binding character, it was pointed out that whichever list was taken as a basis for that to be annexed to the future Convention it was only as a point of reference so that the mandatory character of the model was not relevant.

57. — A third solution, proposed by the French delegation, stressed the need for the list to be annexed to the future Convention to conform as far as possible with those to be found in ADR, RID and ADN(R) as it was in its opinion desirable for the liability provisions and compulsory insurance scheme envisaged by the draft Convention on the one hand, and the technical prescriptions on the other, to apply to the same lists of substances. It therefore argued in favour of three lists being annexed to the prospective Convention, taken over from ADR, RID and ADN(R) respectively, such a solution having the added advantage of simplifying the procedure for amending the list for which provision was made in Article D of the final clauses (52).

58. — While the committee was of the opinion that it had made considerable progress in connection with the establishment of the criteria which would permit the drawing up of the list of substances to be annexed to the Convention, it believed that further consideration needed to be given to the matter from the technical angle, thus permitting a political choice to be made at a later stage of the work between the general approaches reflected in the proposals submitted by the Governments of the Netherlands and of the Federal Republic of Germany (53), or indeed any other solution which could command general support.

59. — Finally in connection with Article 1(9), it should be recalled on the one hand that the reference to substances “carried as cargo” might need to be amended if the future Convention were to apply to damage caused by residues in empty but uncleared road tank vehicles, demountable tanks and tank containers, or

(52) See below, paragraphs 155 to 158.
(53) A paper indicating the principal differences between the two approaches which was prepared during the final session of the committee by a small working group of technical experts is annexed hereto as APPENDIX C.
possibly by hazardous wastes, and on the other that its precise relationship with the existing nuclear law conventions has still to be determined. In particular, the question has been raised as to whether the future instrument should apply to damage caused by radioactive substances included in the ADR list but not covered by the Paris Convention of 1960 on third party liability in the field of nuclear energy and the Vienna Convention of 1963 on civil liability for nuclear damage respectively. Although there was some difference of opinion as to whether any nuclear substances ought to appear in the list referred to in paragraph 9, it was pointed out that even if such substances were to be excluded initially, they might be introduced in the course of an amendment of the list. Similarly, a collision could occur involving the carriage by different vehicles of nuclear and dangerous non-nuclear substances and in these circumstances it was agreed that it would in any event be necessary to consider the question in more detail at a later date.

60. — The language of the four sub-paragraphs of paragraph 10 is based in part on that to be found in Article 1(6) of the HNS draft and in part on Article 1(6) of the CLC Convention as revised by Article 2 (3) of the 1984 Protocol thereto. Before proceeding to a brief commentary on the provisions of the paragraph two more general points may be mentioned. The first of these is that Article 1(10) makes no reference to “massive” or “catastrophic” damage as had been suggested by some members of the committee. Admittedly, one of the main concerns of the authors of the draft Convention was that incidents involving the carriage of dangerous goods could give rise to damage of massive proportions and this was precisely one of the reasons why Article 9 makes provision for the limitation of the carrier’s liability. Such cases would however be exceptional, and in whatever way massive damage might be quantified in monetary terms it was clear that the operation of the strict liability and compulsory insurance regimes contemplated by the draft Convention could not be dependent upon damage exceeding a certain amount.

61. — The second general problem considered by the committee was the extent to which the future Convention should allow compensation in respect of pure economic loss. On the one hand some representatives recalled that the draft Convention provided for a regime of strict liability and that pure economic loss was not a typical consequence of the type of risk under consideration. Given moreover the fact that a limitation of the carrier’s liability was also a feature of the draft Convention there was a serious risk that a large amount of the available fund for property damage could be swallowed up by claims for pure economic loss. Admittedly, the draft did not make it clear whether such loss would be compensated thereunder and the wide differences under national law were such that there could be great uncertainty and an encouragement to forum shopping if compensation for pure economic loss were not specifically excluded. Other representatives however argued strongly in favour of not excluding pure economic loss from the definition of “damage”, pointing out in particular that pollution damage is often of this
nature; similarly the loss suffered as a consequence of the evacuation of large numbers of the civil population following an incident was another example of pure economic loss and in their opinion the question at issue was not so much that of whether such loss should be regarded as damage under the future Convention but rather the extent to which it would be recoverable under national law. This was a field in respect of which caselaw was developing rapidly in many States and it was suggested that any attempt to impose uniformity by excluding recovery for such loss under the future Convention might make it difficult for some States to accept it. It was also recalled that such an exclusion would mean that separate claims in respect of pure economic loss would have to be lodged under national law in parallel to those which fell within the terms of the Convention. There was therefore a strong body of opinion within the committee opposed to any specific exclusion of pure economic loss as a head of recovery, the preference being to leave the matter to be decided in accordance with national law.

62. — An observer representing the insurance interests considered however that intentional vagueness of this kind could prove very expensive. It was extremely difficult to qualify and quantify the risk in connection with pure economic loss and it was evident that the exclusion of recovery for such loss would lead to more certainty in the calculation of premiums; if however no agreement could be reached on the matter so that it would be necessary to leave the problem to be resolved by national law, he felt it his duty to confirm that the inclusion of pure economic loss as a possible head of damage under the future Convention could, if combined with a regime of strict liability and a limitation on liability, result, as had already been suggested, in a substantial reduction of the compensation available in respect of property damage, a consideration which was also relevant in the context of recovery for disbursements made to compensate the taking of preventive measures. Notwithstanding these arguments there was no general support for a specific exclusion of pure economic loss from the definition of damage under the future Convention with the consequence that the matter remains open.

63. — Turning to the specific provisions of paragraph 10, sub-paragraph (a) refers to “loss of life or personal injury on board or outside the vehicle carrying the dangerous goods caused by those goods”. This provision should however be read in the light of Article 2 (1), relating to contractual claims, and of Article 5 (9) which excludes the application of the future Convention to the extent that its provisions are incompatible with those of the applicable law relating to workmen’s compensation or social security schemes. Subject however to these provisions, crew members or passengers standing in a contractual relationship to the carrier who suffer damage when on board the vehicle transporting the dangerous goods may be entitled to compensation under the future Convention, the issue of how far the terms “loss of life or personal injury” permit recovery for non-material damage being one reserved to national law. It was likewise recalled that the questions of who should be able to bring an action in respect of claims resulting from loss of
life and how compensation should be apportioned among the dependants of the deceased were traditionally not dealt with in private law conventions, although the Secretariat was requested to draw attention in the explanatory report on the draft Convention to Resolution (75)7 of the Council of Europe of 14 March 1975 on compensation for physical injury or death, as a model for a possible harmonised approach to some of the matters which had been raised.

64. — Sub-paragraph (b) is concerned with compensation for loss of, or damage to, property, other than contamination of the environment, and differs from sub-paragraph (a) in two respects, limiting as it does recovery under the Convention to compensation for loss or damage caused by the dangerous goods to property outside the vehicle carrying them and furthermore excluding such loss or damage to other vehicles in the same train as that vehicle or to property on board such vehicles. The reason for these exclusions is that the owners of the property on board the vehicle carrying the dangerous goods, as well as those of other vehicles in the same train as that vehicle and property on board them, will almost certainly be entitled to a contractual claim against the carrier and that the inclusion of such damage could give rise to a conflict with the provisions of other international conventions, for instance Article 28 of the Convention on the Contract for the International Carriage of Goods by Road (hereafter referred to as the “CMR Convention”) in respect of liability under which the carrier may be expected to have contracted a separate insurance policy. It should however be stressed that although an extra-contractual claim for such damage may exist under national law, no such claim is possible under the draft Convention itself with the consequence that the carrier’s limitation fund or, if he is not obliged to constitute such a fund, his insurance cover or alternative financial security will be available under Article 9 (1) (b) only to satisfy claims for property damage as defined in Article 1 (10) sub-paragraphs (b), (c) and (d).

65. — The language of sub-paragraph(c) is based on that of Article I (6) of the CLC Convention as revised by Article 2 (3) of the 1984 Protocol and although no definition of environmental impairment is provided it is important to note that compensation under the draft Convention for “impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken”, the obvious intention being to discourage as far as possible speculative claims. The term “loss of profit” gave rise however to some discussion within the committee, the question having been raised of whether it ought not be replaced by a reference to loss of income so as to cover the case of, for example, a hotelkeeper or shopkeeper whose activity is completely suspended for a certain length of time following an incident. It was in this connection recalled that the matter had been the subject of lengthy, complicated and inconclusive debate at the IMO Conference for the revision of the CLC Convention and it was suggested that further consideration of the issues involved might be deferred until a later date.
66. — Discussion within the committee of the inclusion within the definition of “damage” under sub-paragraph (d) of “the cost of preventive measures and further loss or damage caused by preventive measures” was closely bound up with the definition of “preventive measures” under paragraph 11 of Article 1 as “any reasonable measures taken by any person after an incident has occurred to prevent or minimize damage”. One view was that if the costs of such measures were to be compensated at all under the future instrument then they should be restricted to those incurred by persons other than States or local authorities who were in any event under a duty to take steps to prevent or to minimize damage caused by the type of accidents contemplated by the prospective Convention in the same way as they would be to intervene in the event of a natural disaster. It was however suggested that this argument could only apply in those cases where the carrier’s liability was incurred solely by virtue of the application of the risk principle for if he had in any way been guilty of fault then there would be no objection to a State or local authority which had taken preventive measures being put on the same footing as victims of personal injury or property damage and thus permitted to claim against the carrier’s limitation fund. Fears were moreover expressed that a broad definition of preventive measures could seriously deplete the funds available for the compensation of victims of damage, especially if the carrier were permitted to claim against his own fund in respect of the cost of such measures (34), and it was recalled that the system contained in paragraphs 10, 11 and 12 of Article 1 was based on the model to be found in the HNS draft which had been conceived with special reference to the threat of water pollution and to the rights of intervention of coastal States. At the very least, genuine third party victims suffering loss of or damage to property or damage resulting from contamination of the environment should be given privileged claims as against those lodged under sub-paragraph (d). A majority of representatives however strongly supported the principle of compensating the cost of preventive measures under the future Convention, emphasizing the importance of such compensation as an incentive to act given the very high expenses often involved in the taking of those measures. It was, moreover, observed that even if States and public authorities were to be barred from obtaining compensation under the Convention, nothing would prevent them claiming against the carrier under the applicable national law and in these circumstances the committee adopted the texts of Article 1 (10) (d) and (11) as they appear in APPENDIX I hereto.

67. — The definition of “incident” in paragraph 12 as “any occurrence or series of occurrences having the same origin, which causes damage or creates a grave and imminent threat of causing damage” follows the precedent of Article I (8) of the CLC Convention as amended by Article 2 (4) of the 1984 Protocol.

(34) See below the commentary on Article 11 (8), paragraph 115.
Article 2

Paragraph 1

68. — One of the concerns of the committee was to avoid any possible conflict with existing transport law conventions, especially those dealing with the international carriage of goods by rail and road (35), and this was one of the reasons for the exclusion from the definition of damage to property under Article 1 (10) (b) of loss of or damage to other vehicles in the same train of vehicles, or property on board such vehicles, as that carrying the dangerous goods. The effect of that provision however goes much further and excludes the application of the draft Convention to such damage even though compensation for it may be regulated by no other international instrument. It is however probable, although not necessarily the case, that the damage contemplated by the exclusion under Article 1 (10) (b) will give rise to an action ex contractu and Article 2 (1) is addressed to the question of how far the future instrument should apply only to claims where the victim has no contractual relationship with the carrier or other person to be held liable thereunder. Although it was suggested that the existence of such a relationship should, provided that conflict with existing international instruments was avoided, be no bar to recovery under the future Convention, the prevailing opinion was that the latter should not apply to any contractual claims.

69. — Wide differences of opinion however emerged as to whether, and if so to what extent, the future Convention should apply to extra-contractual claims when a contractual claim is also available to a victim in respect of damage arising out of an incident involving the carriage of dangerous goods. One proposal, based on the notion that compensation under the Convention should be restricted to claims by genuine third parties, would have excluded from its scope of application extra- contractual claims which might at the same time be founded on any contract, whether this be a contract of carriage, employment, lease or otherwise. It was argued in support of this approach that in many countries it is open to a victim to bring concurrent claims in contract and tort but that this possibility was, as a general rule, founded not on a statute but on the development of caselaw and legal writings, from which it followed that a provision in the future Convention preventing the “cumul” of contractual and extra-contractual claims would not run counter to deeply rooted principles of national law. Moreover, the proposal would also have the effect of excluding the possibility of “non genuine” concurrent claims being brought under the Convention against, for example, the performing, as opposed to the contractual, carrier or the sub-charterer of an inland navigation vessel. A

(35) In particular the CMR Convention and Appendices A and B to the 1980 Convention concerning International Carriage by Rail (hereafter referred to as the “COTIF Convention”).
majority of representatives were however of the opinion that the proposal went too far in that its effect would be to exclude the application of the Convention whenever the victim stood in a contractual relationship to any person which might give rise to a claim in respect of damage arising out of the incident, for instance where he had contracted a life insurance policy or a policy providing for maintenance in the event of invalidity. Even if restricted to contractual claims against the carrier arising out of a contract of carriage or possibly of employment the solution was deemed to be unacceptable as it would unduly restrict the scope of application of the future Convention which was, after all, intended to improve the situation of victims, and would for example exclude compensation under the Convention when a person travelling in a bus under a contract of carriage with the operator suffered injury in a collision with a lorry carrying dangerous goods.

70. — A second, less radical approach sought to restrict the application of the Convention to extra-contractual claims brought by victims standing in a contractual relationship to persons liable thereunder in cases where such victims cannot obtain full and adequate compensation for damage under the terms of the contract. It was suggested that the solution contained in Article 2 (1) as drafted failed to secure any real degree of uniformity and that it needed to be supplemented by an additional provision which, while reaffirming the principle that nothing in the Convention affects the obligations of carriers under contracts of carriage or any other contract, would at the same time make it clear that the question of whether any person is prevented wholly or partially from exercising an extra-contractual claim for compensation under the Convention is to be determined in accordance with the rules of national law or any international Convention which may be applicable to such a contract.

71. — While some support was forthcoming for this proposal, a majority within the committee considered that it would be preferable to avoid complicating the matter and suggested that as a third approach the simplest solution would lie in retaining the text contained in Article 2 (1) and leaving it to those delegations which favoured a more explicit solution of the problems associated with concurrent claims to submit their proposals during the next phase of the work, either in the form of additional provisions or in that of reservation clauses. Certain representatives expressed misgivings regarding this solution which, it was argued, might even leave open the very question which had given rise to the insertion of Article 2 (1) in the first place, namely the relationship between the future Convention and existing international instruments. Given however the lack of strong support for the inclusion of any of the alternative proposals, the committee decided that none of them should be included in the basic text as alternatives and accordingly adopted the text of Article 2 (1).

Paragraph 2

72. — As already mentioned above in paragraph 18 of this report, some mem-
bers of the committee considered that the future Convention should apply only to damage occurring during carriage operations *stricto sensu*, that is to say during a period running from the time when the operation of loading the goods onto the vehicle had been completed and that of unloading them commenced. The main argument adduced in support of this contention was that one of the principal ideas underlying the prospective Convention was that the risks inherent in dangerous goods were aggravated by their carriage, while the channelling of liability to the carrier was based on the concept of his control of the vehicle actually transporting the goods. Operations of loading and unloading were however disassociated from the movement of the goods and in the great majority of cases involving carriage by rail, and often by road, were performed on private grounds by persons who were in no way subject to the control of the carrier. To impose liability on the latter for damage caused during such operations was not consistent with the basic philosophy of the draft Convention and raised questions of economic policy which might make its acceptance difficult for certain States, as could be seen from the reactions of many members of the Inland Transport Committee in Geneva. For these reasons it was proposed that operations of loading and unloading should not fall within the scope of application of the future instrument and that damage caused during their performance should be compensated rather under the industrial enterprise insurance policy which would normally exist. It was in addition suggested that most victims of incidents occurring during operations of loading and unloading dangerous goods would moreover obtain compensation by virtue of a contract of employment entitling them to social security benefits or workmen's compensation and that the draft Convention would be greatly simplified if those operations were totally excluded from its scope of application.

73. — Although widely varying statistics were offered as to the percentage of incidents occurring in the course of the loading and unloading of dangerous goods as opposed to those occurring during carriage *stricto sensu*, and in consequence the extent to which the effective application of the future instrument would be reduced if it were not to apply to damage caused during such operations, a majority of governmental representatives argued against such an exclusion. They considered that much of the interest of the Convention would be lost if it were not to apply to damage occurring during operations of loading and unloading, which could give rise to serious damage outside the place in which they were performed. It was also recalled that much of the concern expressed by the professional organisations representing carriers would be met by the provisions of Articles 3 and 6 of the draft Convention while a further argument in favour of including such operations within its temporal scope of application was that such a solution would permit persons other than the carrier under whose control such operations were performed to be held liable thereunder.

*Paragraphs 3 and 4*

74. — These two provisions are concerned with the phenomenon of "piggy-
back” transport, that is to say situations in which one vehicle is transported for part of the journey on board another, for instance a road vehicle loaded onto a ferryboat to cross an estuary. The question arises of which carrier should be liable in the event of damage being caused in such a case by dangerous goods on board the road vehicle, the inland navigation carrier or the road carrier. A number of members of the committee considered that liability should, in the example given above, be imposed upon the inland navigation carrier since he is the performing carrier exercising control over the movement of his own vessel in an environment where certain risks which may result in an incident causing damage are totally beyond the control of the road carrier. It was also pointed out that the “piggy-back” leg of the carriage operation might constitute by far the longer part of the transport so that the goods would in effect for most of the time be under the control of the second carrier, who might indeed be a maritime or air carrier. Moreover, it was suggested that it would be arbitrary to distinguish between cases where a road vehicle was mounted on a railway wagon and those involving carriage by rail of a container without wheels which, it was generally agreed, was not a vehicle for the purposes of the prospective Convention and in which cases the railway carrier would be liable under the Convention. It was therefore contended that also in cases of “piggy-back” transport the original carrier of the goods should be placed in the same position vis-à-vis the second carrier as the shipper handing over a container for carriage vis-à-vis the first carrier, the only difference between the two types of case being that, unlike a motor vehicle, a container has no wheels.

75. — A majority however preferred the solution to be found in paragraph 3, namely that the goods should be deemed, for the purposes of “piggy-back” transport, to be carried by the vehicle on which they were originally loaded. It was, in particular, argued that liability under the draft Convention was based essentially on the theory of risk, not on fault, and that the principal objective was to ensure adequate protection for victims. If, however, liability were to be imposed upon the carrying vehicle in the case of “piggy-back” transport the consequence would be that at a given moment, which it might not be easy precisely to ascertain, the liability of the first carrier would cease and that of the second come into play, the position being reversed once again at the end of the “piggy-back” leg. It would therefore be necessary, in the example of a motor vehicle transported for a short distance by an inland navigation ferryboat, for the second carrier to take out insurance to cover his liability under the Convention since if he failed to do so, for instance because he was unaware of the dangerous nature of the goods, victims would lack that very protection which the future Convention was intended to confer on them, unless the position of the first carrier were to be equated with that of the consignor. If on the other hand the first carrier were to remain liable, the problems of double insurance and possibly of having to establish which carrier was indeed liable at the time of the incident causing the damage would be avoided. For reasons therefore of practicality it was decided to adopt the rule at present contained in Article 2 (3) which, it was recalled, would in no way prevent a carrier
obtaining recovery in a recourse action against the owner or operator of the vehicle on which the first vehicle had been loaded if he could establish the liability of that person under the rules of the applicable national law.

76. — As to the question of whether the future Convention should apply when the underlying vehicle is a sea-going ship or aircraft, it was ultimately decided after long discussion to adopt the text of paragraph 4 which excludes “piggy-back” transport in such circumstances from the scope of application. Although regret was expressed in some quarters at this decision, one of the consequences of which would be that the future instrument would not apply to damage caused during “piggy-back” transport between, for example, the United Kingdom on the one hand and mainland Europe on the other, it was pointed out that for technical reasons “piggy-back” transport involving aircraft would not occur frequently in practice, while in respect of such carriage by sea it was important to avoid any source of conflict with the existing maritime conventions governing the global limitation of shipowner liability and any HNS Convention which might be adopted in the future.

Article 3

77. — Although both paragraphs of this article are concerned with carriage performed on private grounds and are designed to introduce restrictions on the application of the future Convention in respect of damage occurring during such carriage, they differ widely in content. The purpose of paragraph 1 is to exclude totally the application of the Convention to damage arising from carriage performed in a place to which members of the public do not have access, such as a plant or factory, which are accessory to, and an integral part of, the manufacturing process or industrial activity, such as the movement of dangerous goods from one part of a factory to another by means of a crane, a fork-lift truck or a conveyor belt. The exclusion will operate irrespective of whether the damage arising from the carriage occurs within or outside the confines of the place where the carriage is performed, the assumption of the committee having been that such damage would be compensated under the general enterprise policy of the factory or plant concerned.

78. — Paragraph 2 on the other hand is directed to cases of “genuine” carriage of dangerous goods, as opposed to the ancillary operations contemplated by paragraph 1. Paragraph 2 deals with carriage performed in a place to which members of the public have no access and excludes the application of the future Convention only to damage sustained on those private grounds. The main effect of this provision is to reserve to the applicable national law compensation in such cases, the majority of which involve accidents occurring during loading or unloading of dangerous goods. Such an exclusion, it was argued, was justifiable in that victims on those premises would usually be standing in a contractual relationship to the
person responsible for the operations of loading or unloading or in any event be protected by a general enterprise policy or by the appropriate regime of social security or workmen's compensation. Normally, damage would be confined to the premises themselves but if it were to be more extensive then victims outside the premises would not be debarred from claiming compensation under the Convention. Some representatives however expressed concern at the possible scope of the provision, in particular with regard to its impact in relation to the carriage of dangerous goods by rail since, with the exception of stations, the public does not generally enjoy access to railway premises. While it might for example be justifiable to deny the benefit of the provision of the prospective Convention to persons unlawfully present on land adjacent to railway tracks they could see no reason for withholding the protection offered by it to victims on board a passenger train which collided with one transporting dangerous goods, although claims by such persons under the Convention might already be excluded as a result of the combined application of Article 2 (1) and the doctrine of the "non-cumul" of contractual and extra-contractual claims known to certain legal systems. If such a result was not intended, then the language of Article 3 (2) needed clarification, while if its main purpose was to exclude the application of the draft Convention to damage arising out of operations of loading and unloading of dangerous goods whenever, as was usually the case, such operations were performed on private grounds, then this should be stated explicitly in the draft articles so that a clear decision of principle could be taken on the question. In the light therefore of the differences of opinion concerning not only the acceptance of the policy motives underlying Article 3 (2), but also the uncertainty in the minds of certain representatives as to its interpretation, the committee decided to place it in square brackets pending further consideration.

Article 4

79. — Different approaches were developed in the course of the discussions of the committee on the geographical scope of application of the future instrument. The most generous to victims consisted in applying the Convention whenever damage was sustained in a Contracting State or whenever it was caused by an incident occurring in a Contracting State. In support of this solution it was suggested that there was no reason why a State which had incorporated the provisions of what was in effect a uniform law into its own national law should apply a double regime to compensation for damage of the type contemplated by the Convention, namely the rules of the Convention to victims on its own territory and its own rules of national law to victims on the territory of a non-Contracting State, a solution which would moreover be contrary to certain recommendations of the OECD. It was also pointed out in this context that it should not be supposed that the law of a non-Contracting State would necessarily be more favourable to victims than the system laid down by the Convention but that, if it were, then nothing would prevent a victim in a non-Contracting State bringing an action in that State.
80. — As to the case of damage suffered in a Contracting State arising out of an incident in a non-Contracting State, it was suggested that a victim in a Contracting State should be entitled to the protection of the Convention, the provisions of which had been introduced into the law of that State, wherever the incident causing the damage had occurred. The precedent was recalled of the CLC Convention which applies to pollution damage caused on the territory of a Contracting State irrespective of where the incident causing the damage occurs and it was also observed that while it was true that the provisions of the future Convention imposing an obligation to take out insurance could not be imposed on carriers operating outside the territory of Contracting States, a carrier engaged in frontier traffic might be expected to be aware of the risk of transfrontier damage and to take the necessary measures to cover his liability by obtaining adequate insurance cover; even if he failed to do so he might still have insured any liability under the provisions of his own national law or have sufficient assets to satisfy judgment in the State where the incident occurred. Finally in support of this wide geographical scope of application, the point was made that such a solution would go some way to solving private international law problems deriving from differences in the choice of law rules applicable to extra-contractual liability.

81. — Another approach consisted in limiting the scope of application to damage sustained in a Contracting State wherever the incident causing it occurred. The arguments in favour of this solution followed essentially those set out in the preceding paragraph of this report but rejected those developed in paragraph 79 inasmuch as it was considered that there was no reason why victims in non-Contracting States should benefit from the protection of the Convention and that the withholding of such protection could serve as a stimulus to such States to accept it. Precisely the opposite conclusion was reached by other representatives who recalled that the law traditionally applicable to extra-contractual claims is the lex loci delicti and they insisted that the future Convention should apply to damage wherever suffered once it was established that the incident causing it had occurred in the territory of a Contracting State. Restriction of recovery under the future Convention to such damage would, it was argued, ensure that insurance cover was available and at the same time avoid the creation of two classes of victims, namely those suffering damage in a Contracting State who would claim under the provisions of the Convention and those in non-Contracting States who would, in the event of transfrontier damage, be required to found their action on the applicable national law.

82. — However, the committee was aware of the fact that failure to reach agreement on this matter would result in leaving open a number of important questions relating in particular to the compulsory insurance scheme and to jurisdiction. Although a number of delegations would have preferred a wider scope of application, there was agreement in the committee that the Convention should contain one solution only and that a choice had to be made from among the options.
The committee decided in favour of the more restricted approach supported by the majority providing that the Convention shall apply only if the damage has been sustained in a Contracting State caused by an incident occurring in such a State. This rule is set out in *sub-paragraph (a)* of Article 4 while *sub-paragraph (b)* reflects the importance attached to the taking of preventive measures to prevent or minimise such damage by providing that the Convention shall apply wherever such measures are taken.

*Article 5*

83. — The underlying philosophy of the liability provisions of the draft Convention has already been discussed above and the reasons for the adoption of the basic principle of channelling liability to the carrier subject to certain exceptions need not be repeated here although the commentary on the nine paragraphs of Article 5 should be read in the light of paragraphs 23 to 37 of this report.

*Paragraph 1*

84. — This provision establishes the general principle of the liability of the carrier for damage caused by any dangerous goods during their carriage by road, rail and inland navigation vessel, subject to the defences available to him under Article 5 (4) and (5) and Article 6. The words “the time of the incident” refer back to the period of carriage as defined in Article 2 (2) while the words “caused by any dangerous goods” stress the link of cause and effect between the dangerous goods and the damage suffered, the committee having rejected a proposal restricting the carrier’s liability to damage caused by dangerous goods “resulting from their carriage by road, rail and inland navigation vessel” which would have introduced a causal link between the transport operations and the damage.

*Paragraph 2*

85. — This provision, the language of which is, like that of paragraph 1, based on Article III (1) of the CLC Convention, lays down the rule that in the event of an incident consisting of a series of occurrences having the same origin, liability under the Convention shall attach to the carrier at the time of the first of such occurrences.

*Paragraph 3*

86. — This paragraph is concerned with the special case of joint operation of the railway line on which an incident occurs and provides that when two or more persons are liable as carriers under the Convention they shall be jointly and severally liable.
Paragraph 4

87. — Sub-paragraphs (a) and (b) are based on the provisions of Article III (2) (a) and (b) of the CLC Convention (36). Sub-paragraph (a) is, in effect, a *force majeure* clause although a majority within the committee believed that a general reference to *force majeure* or *vis major* would be undesirable given the different meanings attached to those concepts in the various legal systems. As regards sub-paragraph (b) a number of governmental representatives and observers considered its language to be unduly restrictive and suggested that its effect was virtually to confine the defence to acts of terrorism although there could be many other situations in which the incident causing the damage might be attributed to the act or an omission of a third party “which the carrier could not avoid and the consequences of which he was unable to prevent”, a formula taken over from Article 17 of the CMR Convention. It was argued that a proposal to include this language in sub-paragraph (b) in place of the wording taken from the CLC did not constitute as far-reaching an exception to the principle of strict liability as might at first sight appear as the standard of care to be expected of the carrier in each case would always have to be judged in the light of the fact that he was transporting dangerous goods. Another proposal, contained in the Swiss alternative draft for Article 5 (3), provides for the exoneration of the shipper and the carrier when the damage is mainly caused by “the wrongful act or neglect, or act or omission of a third party, unless such wrongful act or neglect, or act or omission is negligible in comparison with the extent of the risk inherent in the dangerous goods carried” (37).

88. — A majority of governmental delegations were however unable to accept the alternative solutions proposed for Article 5 (4) (b), some of which had been taken from international instruments dealing with contractual as opposed to extra-contractual liability. In their view, what was just and equitable when determining the contractual liability of the carrier in respect of damage caused to goods transported by him would not necessarily be an appropriate yardstick when establishing a liability regime for death or personal injury suffered by innocent victims as a result of an incident involving the carriage of goods with inherently dangerous properties. Nor was there any guarantee that courts would necessarily interpret the proposed amendments in as restrictive a manner as had been suggested and the consequent uncertainty could have a serious impact on the cost of insurance premiums. If, moreover, the proposed defences were to operate so as to relieve the carrier of liability in a given case, for example a lorry driver swerving to avoid a child unexpectedly running across a road in a built-up area, the question was raised

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(36) It is not clear from the reports on the committee’s sessions whether the absence of the word “inevitable”, to be found in Article III (2) (a) of the CLC, in the original and all subsequent versions of the draft articles was intentional or simply an oversight.
(37) See APPENDIX II.
of whether it could seriously be imagined that the parents of the child would be
insured to cover the risk of damage of the catastrophic proportions which might
occur. In the light of these considerations it was decided to follow in respect of
sub-paragraph (b) the precedent established by the CLC Convention.

89. – *Sub-paragraph (c)* constitutes an innovation in the field of international
civil liability conventions, providing as it does that the carrier shall be relieved of
liability if he proves that “the consignor or other person failed to meet his obliga-
tion to inform him of the dangerous nature of the goods, and that he neither knew
nor ought to have known of their nature”. Although this defence was introduced
with a view to meeting objections to what was seen in some quarters as the undue
severity of the liability regime imposed upon the carrier by the draft articles, cer-
tain governmental representatives and observers considered that the proposed de-
fence ought to be broadened so as to relieve the carrier of liability also in those
cases where a consignor or other person fails to indicate any special precautions
which should be taken in relation to the dangerous goods, thus being in breach of
his obligations under, for instance, Article 22 (1) of CMR or marginal 10385 of
ADR. It was, in particular, argued that liability under the prospective Convention
should coincide with that for failure to respect the technical prescriptions
established by the administrative agreements and arrangements.

90. – A majority of governmental representatives however warned against
confusing the contractual rights and obligations of the parties to a contract of car-
rriage and the extra-contractual liability contemplated by the prospective Conven-
tion. They pointed out that it had to be borne in mind that the underlying aim of
the Convention is to ensure compensation for third party victims and that the
limited defence under sub-paragraph (c) had been introduced precisely to cover
those situations where a carrier, most often an occasional carrier of dangerous
goods, could not have known that he might incur liability under the Convention
and might therefore not be covered by insurance up to the limits for which it made
provision. This was the reason why, unlike sub-paragraphs (a) and (b) of paragraph
4, no element of causality need be present for the defence to operate. If the de-
fence under sub-paragraph (c) were to be widened in the manner suggested, then
language would have to be included to the effect that failure by the consignor to
inform the carrier of the precautions to be taken must be the direct cause of the
incident giving rise to the damage or that it must have aggravated the consequences
of the incident. Any broadening of the defence would moreover risk creating gaps
in the liability regime laid down by the Convention and it would then become neces-
sary to impose additional liability upon the consignor or other person who failed to
give the necessary information to the carrier concerning the precautions to be taken
and in consequence to spell out very clearly what his obligations were, although it had
at the same time to be recalled that Article 7 imposes no duty on the consignor to
take out insurance which was one of the considerations leading a number of
governmental representatives to voice hesitations regarding its retention. In these
circumstances the committee agreed to the present text of sub-paragraph (c).
Paragraph 5

91. — The language of this provision, which permits the carrier to be relieved wholly or partially of liability in respect of damage suffered by a person which itself results wholly or partially from an act or omission done with the intent to cause damage by that person or from his negligence, has been taken over from Article III (3) of the CLC Convention. Some governmental representatives however indicated that their authorities had difficulties with the provision as under their national law the victim must, to be deprived wholly or partially of compensation for damage, have acted with the intention to cause damage or been guilty of gross negligence. It was true that a provision similar to paragraph 5 was to be found in the CLC Convention but that instrument was directed principally to compensation for damage other than personal injury and, while recognizing that it might not be realistic to call for deletion of the provision, they proposed the inclusion of a reservation clause which would permit States to apply their ordinary law rather than the provisions of Article 5 (5) insofar as such law provides that compensation for loss of life or personal injury may be reduced or disallowed only in cases of intentional conduct or gross negligence by the injured person or the person entitled to compensation. This provision was accordingly introduced into Article A (38).

Paragraph 6

92. — The purpose of this provision is to avoid the possibility of an action being brought against the carrier on the basis of national law rather than in accordance with the Convention, for example with a view to obtaining compensation in excess of the maximum amounts laid down under Article 9 by proving fault of the carrier; some doubts were however expressed as to how far paragraph 6 would operate to defeat a request before a court of a Contracting State for enforcement of a judgment delivered within a non-Contracting State, which had not been based on the provisions of the Convention, in reliance on the provisions of a multilateral or bilateral treaty on recognition and enforcement of judgments. The one exception to the general principle contained in paragraph 6 relates to the case where the carrier is relieved of liability under the draft Convention in accordance with the provisions of Article 5 (4) (c) and in this connection it is provided that any liability for damage which may be incurred by the carrier according to the applicable law shall not be affected.

Paragraphs 7 and 8

93. — Based on Article 4 (2) of the 1984 Protocol to the CLC Convention, paragraph 7 carries through the principle of channelling by providing that no claim for compensation under the Convention or otherwise may be made by the persons listed in sub-paragraphs (a) to (g), without prejudice however to the carrier's pos-

(38) See below, paragraph 151.
sible right of recourse against the consignor of the goods causing the damage or against any other third party, which are protected by paragraph 8. Although some criticism was levelled against the extent to which liability is channelled under paragraph 7, and in particular at sub-paragraph (b) in relation to the exclusion of actions against pilots, the general feeling within the committee was that the list of persons mentioned in sub-paragraphs (a) to (g) should be maintained. The principal advantage of the provision was seen in its avoidance of double insurance while attention was also drawn to its social function in protecting the servants and agents of the carrier and the members of the crew, as well as the servants and agents of the persons mentioned in sub-paragraphs (b) to (f), and in providing an incentive to salvors and to persons taking preventive measures. It should moreover be borne in mind that the provision does not prevent claims being brought outside the Convention against the shipper or the producer of the dangerous goods and that in addition the persons mentioned in sub-paragraphs (a) to (g) will not be exempt from action if the damage results from "their act or omission, committed with the intent to cause such damage or recklessly and with knowledge that such damage would probably result". The committee was however unable to accept a proposal to amend paragraph 8, the effect of which would have been to prevent the carrier bringing recourse actions against all persons mentioned in paragraph 7 except those in sub-paragraph (c), as such an extension of the principle of channeling, which had moreover not been incorporated in the 1984 Protocol to the CLC Convention, would place an unjustifiable burden on carriers, risk increasing the cost of their insurance premiums and perhaps interfere with contractual agreements regarding recourse between the carrier and other persons with whose liability the prospective Convention was not concerned. It was therefore agreed to leave questions of recourse to be regulated by national law.

Paragraph 9

94. – The purpose of this provision, a precedent for which is to be found in Article 12 of the 1980 Unidroit draft Convention on Civil Liability for Damage caused by Small Craft, is to avoid any possible conflict between the provisions of the future Convention and those of the applicable law relating to workmen's compensation and social security schemes in cases, for instance, where the national scheme makes provision only for compensation up to a limit of say, 80%, of the employee's last salary. The effect of Article 5 (9) would be to maintain the limit of entitlement under the workmen's compensation or social security scheme since there seemed to be no valid reason why an exception thereto should be made in respect of injury suffered as a result of an incident involving the carriage of dangerous goods. It has moreover been suggested that the provision will usually have the effect of limiting compensation in cases where the victim is an employee of the carrier but that in those situations where the victim has no contractual relationship of employment with the carrier he may well be entitled to compensation from the defendant under the Convention in excess of that provided by the schemes referred
to in Article 5 (9) as there would be no incompatibility between his claim under the Convention and his entitlement under those schemes.

Article 6

95. — As has already been mentioned (39), the committee considered at length the question of whether the future Convention should govern liability for damage caused during operations of loading and unloading of dangerous goods, the general although not unanimously held view being that liability for damage resulting from defective stowage of the goods sustained in an incident occurring after the completion of the loading operations should be imposed on the carrier, subject to the availability of recourse against the shipper. Given, however, the decision to include in principle also damage caused during operations of loading and unloading, wide differences of opinion emerged regarding the extent to which the carrier should be held liable for such damage. One approach, which would have consisted in relieving the carrier of liability if the operations of loading and unloading were performed under the sole responsibility of another person such as a consignor, shipper or consignee, was advocated on the ground that it offered a simple solution. It would above all avoid the introduction of the complications of a joint and several liability and would permit a victim to bring an action against a shipper, consignor or consignee under the normal rules of extra-contractual liability which would in many countries not be subject to any limitation, while at the same time leaving intact the contractual relations often lying at the basis of recourse actions which the alternative solutions were considered to submit to unnecessarily detailed regulation. The proposed solution was however criticized, in the first place because the exoneration of the carrier from liability without a simultaneous imposition of liability upon another person would create a gap in the liability regime under the prospective Convention. Claimants would thus lose not only the advantages of the strict liability regime but also the benefit of a readily identifiable person offering a guarantee of adequate compensation against whom they might proceed in the event of their suffering damage. The proposal aimed therefore less at the protection of victims than at alleviating the financial burden on the carrier although in the opinion of some members of the committee the effects of the solution on the carrier's liability and insurance obligations would, outside the field of carriage by rail, be minimal since it was well known that there was almost invariably joint responsibility of the captain and the consignor for operations of loading and unloading in inland navigation while it would be no easy matter for the road carrier or his driver to prove that the operations of loading or unloading had been performed solely under the responsibility of the shipper, consignor or consignee.

(39) See above, paragraphs 72 and 73.
96. — Two other solutions were proposed, the first of which provided for the joint and several liability of the carrier and of the person under whose responsibility the goods were loaded or unloaded, accompanied by rules providing for the apportionment of liability between the carrier and such other person in their internal relations. The second constituted a combination of the two previous approaches by exonerating the carrier from liability if the operations were performed under the sole responsibility of another person and imposing a regime of joint and several liability on the carrier and the other person in the event of joint responsibility for the operations of loading and unloading, while also regulating the apportionment of liability in the mutual relations between the carrier and the other person. Although neither proposal made provision for the application of the compulsory insurance regime of the draft Convention to persons other than the carrier responsible for the loading or unloading of the dangerous goods, each of them in their final form contemplated the exclusion of the application to such persons of the provisions of Article 5 (6), with the consequence that while they would be jointly and severally liable with the carrier up to the limits established by the Convention, they would also be liable without limitation if they were to incur liability under the applicable law. The one essential difference between the two solutions lay therefore in the fact that whereas the former made provision in all cases for the joint and several liability of the carrier and the other person under whose responsibility the operations of loading or unloading were performed, the latter contemplated such joint and several liability only when those operations were carried out under the joint responsibility of the carrier and the other person, that other person alone being liable if the operations were performed solely under his responsibility and provided that the carrier was able to disclose his identity.

97. — In support of the former system, it was argued that the second alternative could have the effect of seriously impairing the protection accorded to the victim under the future Convention for there was no guarantee that the shipper, consignor or consignee who might be held liable in place of the carrier would be covered by insurance to meet the claims of victims in the event of serious damage. Moreover, victims would be faced with the problem of having to establish whether or not the operations of loading or unloading had been performed solely under the responsibility of a person other than the carrier so as to be able to identify the defendant and even if, as was suggested, a wise claimant would bring an action against both the carrier and the other person there was always the risk that one of his claims might be dismissed with costs. It was, in addition, argued that the solution offered no real advantage to the carrier since under the first alternative liability would, in cases where the carrier would be exonerated under the second, be borne solely by the person other than the carrier in their mutual relations. A majority of governmental representatives and observers however expressed a preference for the second alternative which, by making provision for the exoneration of the carrier from liability in certain cases where damage was caused during the
performance of operations of loading or unloading, not only provided an acceptable solution in relation to the particular situation of railways, where the operations were rarely performed by the carrier, but also made some attempt to satisfy the requirement of fairness in allocating liability to which reference had been made on so many occasions at the joint ECE/Unidroit meeting in November 1985 and at sessions of the Inland Transport Committee. The first alternative clearly failed to achieve this result as it imposed a joint and several liability on the carrier even when operations of loading or unloading were performed under the responsibility of another person.

98. — In the light of the foregoing, the committee decided to include what has hitherto been described as the second alternative as the basic text of Article 6, the first being retained as an alternative indicating the preference of a minority of delegations. While it should be noted that the provisions of paragraphs 2 and 3, concerned respectively with the questions of limitation of liability and compulsory insurance on the one hand, and with the internal regulation of liability as between the carrier and the other person on the other, are common to the two alternatives, the difference in approach to the regime of joint and several liability being reflected in paragraph 1, it may be useful to recall one point made at the final session of the committee relating to the first sentence of paragraph 3. In this connection it was observed that while it was logical in the alternative text to provide that, in the mutual relations between the carrier and the person under whose responsibility the goods had been loaded or unloaded, liability should be borne by that other person unless the damage was caused by the fault of the carrier or of his servants or agents, it seemed odd to apply that same presumption in the basic text to cases of joint and several liability where the carrier and the other person had been jointly responsible for the operations of loading or unloading. Although such a decision might be justified on policy grounds it was suggested that it would be desirable to consider further its implications during the next phase of the work.

Article 7

99. — As already mentioned (40), the purpose of this provision is to fill a gap in the liability regime which would be caused by the carrier’s successfully raising the defence contained in Article 5 (4) (c) and at the same time being subject to no liability under national law. In support of the introduction of Article 7, it has also been pointed out that the imposition of liability upon the consignor or other person who may have misled the carrier as to the dangerous nature of the goods is not entirely new if regard is had to the provisions of Article 22 (2) of CMR according to which the sender is “liable for all expenses, loss or damage” arising out of the handing over for carriage or the carriage of goods of a dangerous nature in cases where the sender fails to inform the carrier of the exact danger presented by the goods and, if necessary, of the precautions to be taken.

(40) See above, paragraphs 89 and 90.
100. – A number of members of the committee however were not convinced of the necessity of introducing the article as in their view the consignor would already be liable under the general principles of extra-contractual liability if damage were to result from gross negligence in failing to inform the carrier of the dangerous properties of the goods, although it was pointed out that if there were no causal link between the failure to provide information to the carrier and the damage caused, then the consignor's negligence might be relevant only in a recourse action brought against him by the carrier and not as a direct ground of liability towards third parties in the absence of express provision for strict liability being imposed on the consignor under the future Convention. A more serious objection to Article 7 was that it imposed no insurance obligations on the consignor and in these circumstances it was suggested that its inclusion, which presupposed the existence of the defence open to the carrier under Article 5 (4) (c), was of little practical advantage to victims although in reply to this argument it was observed that the consignor might reasonably be expected to have taken out insurance to cover his general enterprise liability. In view of these differences of opinion it was decided to include the text in square brackets with a view to a final decision as to its retention being taken at a later stage of the work.

Article 8

101. – This provision is taken over from Article IV of the CLC Convention. Its purpose is to impose joint and several liability on carriers in respect of damage which is not reasonably separable resulting from incidents involving two or more vehicles each of which is carrying dangerous goods, unless one or more of the carriers is relieved of liability under Article 5 (4) or (5) or Article 6. The rationale of the provision is that although such cases will be rare, it would probably be extremely difficult to attribute damage to one consignment of dangerous goods rather than to the other unless, for example, one of them were to be capable of causing only pollution damage and the other damage by explosion.

102. – Some representatives saw difficulties in connection with the relationship between Article 8 and Article 9 in the sense that if the solution ultimately to be adopted in the latter article were to be that limitation of liability should be calculated on a per incident basis then it might be argued that the joint and several liability of the carriers under Article 8 would be restricted to the overall limitation per incident under Article 9. If that were the case then Article 8 would need to be amended if the intention was to permit victims to benefit from the fact that insurance cover would have been taken out by all the carriers involved in the incident and liable under the future Convention. The view was also expressed that the same problem of interpretation would arise even if a limitation per vehicle were to be added to the basic limitation per incident. Other members of the committee however were of the opinion that the text of Article 8, when read in conjunction with Article 9, was unambiguous. The introductory language of Article 9 referred to the limitation of the liability of the carrier and if more than one carrier were to
be involved in the incident then victims would be entitled to claim against the carriers for the aggregate of their liability to the extent that the damage was not reasonably separable. The situation was therefore completely different from that contemplated by the provision relating to liability for damage suffered during operations of loading and unloading in respect of which Article 6 (2) provided that the limits of liability under the Convention would apply to the aggregate of all claims arising on any distinct occasion against the carrier and any other person responsible for those operations and that a fund constituted by the carrier or by such other person should be deemed to be constituted by both of them. The system contemplated by Articles 8 and 9 was taken over from other instruments, for example the CLC Convention, and at no time in the past had the doubts now raised been voiced. With a view however to stimulating further consideration of the matter, it was agreed to add a note to Article 8 indicating the uncertainty of various participants as to whether the combined effect of Articles 8 and 9 would, in respect of any single incident, restrict recovery by victims to the limitation amount applicable to a single carrier.

Article 9

103. — As indicated in paragraph 35 of the general considerations set out above, a number of delegations expressed serious concern at the notion of introducing a system of limitation in respect of the carrier’s liability. In addition to the arguments based on the absence of such a rule in most national legal systems it was suggested that in the field of civil liability it was only in a small number of international conventions, such as those dealing with nuclear or products liability and with pollution damage in the marine environment, that the principle of limitation had been introduced although it was much easier to understand the acceptance of the notion of limited liability in the field of contractual relations where it could be seen as a trade-off for certainty of rights and where there was a strong possibility that the parties to the contract would have taken out first party insurance cover. If therefore an operator were engaged in the exercise of a professional activity which carried with it such a high risk that he could not obtain insurance to cover the whole of his eventual liability then he should be liable with all his assets up to the extreme consequence which would be his bankruptcy. Given, however, the desire of the majority of the committee to introduce the principle of limitation into the draft Convention and the possibility for States to avail themselves of a reservation clause, the precise scope of which was seen by some as still being open to discussion pending the final decision as to the amounts to be fixed, the opponents of a limitation of carrier liability accepted the general principle contained in Article 9.

104. — Since it was the general feeling within the committee that the limitation figures should, as was traditionally the case in conventions of this kind, be determined at an advanced, if not at the final, stage of the negotiations on the content
of the future instrument as a whole, attention was concentrated in relation to paragraph 1 of Article 9 on two principal issues, firstly that of whether the limitation of liability should be calculated on a per incident basis or whether, in respect of each incident, a limitation per vehicle should also be imposed, and secondly that of the desirability of introducing distinctions in regard to the limitation amounts between the various modes of transport.

105. — In this connection some support was expressed for a uniform limitation per incident, an approach which would, if adopted, necessitate the deletion in paragraph 1 of the language in square brackets. It was suggested that it would not be a satisfactory solution to determine the total amount of compensation available to victims in any one incident by reference to the random factor of the number of vehicles involved, and in reply to the argument that the imposition of a uniform limitation amount for each incident would have the effect of introducing a discrimination against carriers of small quantities of dangerous goods as opposed to those operating vehicles transporting larger amounts, it was observed that it would not always be the case that the risk would increase in proportion to the volume of goods carried and that in any event there would be considerable scope for insurers to adjust the premiums in relation to the amounts actually carried if this was thought to be relevant to determining the risk involved. On the other hand, doubts were expressed as to the wisdom of introducing the same limitation amount per incident for all three modes of transport for, while the dimensions of road vehicles and rail wagons are roughly comparable, the volume of goods transported by an inland navigation vessel could be much greater. A uniform limit adjusted to meet the special cases of inland navigation vessels might therefore be too high for road vehicles and railway wagons and, if determined with the latter vehicles in mind, then too low for inland navigation vessels. It was therefore suggested that a different limitation amount might be fixed in respect of the latter which, following the precedent of the CLC Convention, as well as those to be found in the maritime and air law conventions, could take account of the tonnage of the vessel and possibly also of its motor power although such a solution was criticized on the ground that it could unfairly penalise inland navigation vessels which, while carrying the largest quantity of dangerous goods, enjoyed an excellent record from the point of view of the observance of safety standards. Another view was that special provision should be made for road vehicles since it was not unusual for full train loads of dangerous goods to be transported by rail and that there was a risk of carriage of such goods being concentrated in large convoys by rail and inland navigation if a limitation per incident were to be adopted. Further distortions in competition were feared between small carriers with limited earning capacity and larger enterprises which would, with a higher turnover, be in a better position to face the cost of insurance premiums, while the point was also made that if different developments were to occur in the insurance markets relating to the three modes of transport then the adoption of a uniform limitation system per incident could cause difficulties on the occasion of the revision of the limitation amounts under the proposed Article C of the final clauses.
106. — The committee recognized that a number of considerations, some of
which were still to be fully explored, would affect the decisions regarding the limi-
tation system and the amounts to be established. In particular, the question of
insurance capacity would need further study, especially with regard to inland nav-
igation, for while it was true that today some large carriers of gases and chemicals
by that mode of transport with interests also in carriage of such substances by sea
have combined their maritime and inland navigation insurance, the position was
less clear in relation to small inland navigation carriers who were at present not
subject to a regime of compulsory insurance. To forecast market capacity on the
basis of the existing volume of inland navigation insurance could however be mis-
leading as the introduction of a system of compulsory insurance for inland navi-
gation vessels might be expected to generate greater premium income and thus
increase the capacity of the market. In these circumstances it was agreed that
further detailed study of the insurance implications of the draft Convention was
necessary before any decisions could be taken regarding the mechanism of the limi-
tation system, be it per vehicle or per incident, the question of whether any distinc-
tions should be drawn between the three modes of transport and finally the fixing
of the limitation amounts in such a way as to strike a reasonable balance between
economic realities and the underlying aim of the future Convention of ensuring
adequate protection for victims. Accordingly the committee decided to retain the
bracketed language in paragraph 1 pending subsequent consideration of the issues
involved.

107. — The effect of paragraph 2, the language of which is modelled on that of
Article 6 (2) of the LLMC Convention, is to privilege claims for loss of life or per-
sonal injury by providing that the unpaid balance of claims under Article 9 (1) (a)
resulting from the exhaustion of the fund or insurance availability in respect of
such claims shall rank rateably with the claims mentioned in paragraph 1 (b) of
that article, namely those for damage as defined in sub-paragraphs (b), (c) and (d)
of Article 1 (10).

Article 10

108. — The provisions of this article which, like those of Article 11, are to a
large extent based on the corresponding provisions of the CLC and LLMC Con-
ventions, deal with a number of aspects of the limitation of the carrier’s liability
under the prospective Convention. Discussion centred on paragraph 1 and in par-
ticular on the words “or an act or omission of his servants or agents” in line 3 and
on the proviso contained in the last three lines. In the view of a number of repres-
entatives the inclusion of these words, which were not to be found in either the
1969 or 1976 Conventions mentioned above (Articles V (2) and 4 respectively),
squarely raised the question of whether or not the committee wished to endorse
the principle of limitation of liability. While it was admissible under the maritime
conventions to break the limits in the event of it being proved that damage resul-
ted from the shipowner's personal act or omission committed with the intent to cause damage or recklessly and with knowledge that such damage would probably result, an extension of the rule to cover the acts or omissions of servants and agents would constitute a significant inroad on the principle of limitation and would create an additional burden for the carrier without at the same time substantially improving the position of victims. It had furthermore to be borne in mind that since in the vast majority of cases the limits under the future Convention would be sufficient to meet the carrier's liability, the question of breaking those limits would rarely arise in practice, while in those where damage did exceed the limits it was unlikely that the carrier would have taken out additional insurance to cover liability beyond them so that the benefit to victims could well be more theoretical than real. The fact that the principle of the unbreakability of limitation amounts, except in cases where the intention or recklessness of the liable person himself could be proved, was one well known in transport law conventions would mean that to depart from it in this connection would create uncertainty for insurers and the risk of increased litigation and insurance costs as it could be anticipated that attempts would regularly be made to break the limitation amounts by alleging intentional conduct or recklessness on the part of the carrier's servants or agents. If moreover this additional exception to the principle of limitation were to be accepted, it could very well have the effect of leading some Governments to argue in favour of lower limitation figures than they might otherwise have done.

109. — A majority of representatives however favoured the retention of the words in question. It was in particular suggested that without them paragraph 1 of Article 10 would scarcely ever apply as, in the case of railway transport, there was no possibility of the operator committing a personal act of the kind contemplated, and since it was difficult to see why a road or inland navigation carrier would wish to commit such an act. This being said, it was unlikely that the provision would operate frequently, even in the case of an agent or servant of the carrier being responsible for the act or omission, so that the exception to the principle of limitation, which might nevertheless be to the advantage of the victim who could benefit from any extra insurance cover taken out by the carrier or proceed against his assets, was not as great in practice as might at first sight appear. It was moreover pointed out that similar language was to be found in a number of transport law conventions such as CMR and the Appendices to COTIF, and that its inclusion need not necessarily lead Governments to call for lower limitation amounts, while one delegation stated that if such language were not to be included then it would support the inclusion of the reservation in the final clauses permitting States to apply higher limits, or no limits at all, as regards claims in respect of loss of life or personal injury, a reservation which it would not otherwise favour.

110. — It was accordingly decided to retain the text of Article 10 (1) as it appears in APPENDIX A hereto. In connection with a query regarding the meaning
of the words “acting within the scope of his employment”, it was recalled that such language was commonly employed in international transport conventions although its interpretation would to a large extent depend upon national law and on policy considerations of the courts as to whether it was thought desirable to break the limitation amounts in a given case. By way, however, of a practical example of a servant acting outside the scope of his employment the case was cited of a bookkeeper in an enterprise with no authority to drive a vehicle taking control of it and causing an accident.

111. — While paragraphs 2 and 5 of Article 10, which respectively establish the carrier’s right of set-off against claimants and provide that questions of procedure arising under Article 10 shall be decided in accordance with the law of the Contracting State in which action is brought, are self-explanatory, some comments may be in order in connection with paragraphs 3 and 4. At an early stage of the committee’s work the original draft articles, following the precedent of Article V (3) of the CLC Convention, made it a condition for the carrier to avail himself of the limitation of liability that he constitute a fund for the total sum representing the limit of his liability with the court or other competent authority in one of the Contracting States in which action is brought in accordance with the rules on jurisdiction. The advantages of such a system in the maritime field are twofold, for victims in that it ensures the availability of compensation and for shipowners since it may serve to prevent the taking of measures such as the arrest of the ship, and there was some support for the imposition of an obligation on the carrier to constitute such a fund in all cases. It was moreover suggested that a solution leaving it open to the carrier to decide whether or not he would constitute a limitation fund could result in distortions in competition resulting from the different treatment accorded to carriers in different States.

112. — Doubts were however expressed as to the introduction of a requirement to constitute a limitation fund which could have the effect of raising insurance costs by tying up large sums in reserves in the form of cash deposits, bank guarantees or other financial securities. It was in addition recalled that the absence of provisions in the 1957 and 1976 maritime conventions on the shipowner’s global limitation of liability concerning the compulsory constitution of a fund did not seem to have given rise to difficulties and a decision was taken to make a limitation fund in principle optional, thus avoiding the need for recourse to complicated procedures in those cases where the number of victims was small and the distribution of the compensation could be handled directly by the insurer who had provided the insurance. If, on the other hand, there were to be a large number of victims, it might be assumed that the carrier would feel the necessity of constituting a fund and by way of compromise it was agreed to provide in paragraph 3 of Article 10 that a Contracting State may under its law require the constitution of a fund as a condition for the carrier’s invoking limitation of liability when an action is brought against the carrier in its courts to enforce a claim subject to limitation.
113. — Paragraph 4 provides that if limitation of liability is invoked in the absence of the constitution of a limitation fund, then the provisions of Article 11 (4) to (8) shall apply correspondingly.

Article 11

114. — The provisions of this article represent an amalgam of Articles V and VI of the CLC Convention and of Articles 11 to 14 of the LLMC Convention and from a structural point of view may be analysed as follows: paragraphs 1 to 3 (constitution by the carrier of the limitation fund); paragraphs 4 to 8 (common provisions relating to the distribution of the fund or of the sums otherwise available for the compensation of victims in the absence of the constitution of such a fund); paragraph 9 (constitution of the limitation fund by the insurer or the other person providing financial security); paragraphs 10 to 12 (bar to other actions). The provisions of Article 11 are of an essentially administrative and technical character intended to ensure the effective application of the principle of limitation of liability and the speedy distribution of the sums available for the compensation of victims, whether or not a limitation fund has been constituted, in accordance with the rules on apportionment contained in Article 9, and given that they are well known inasmuch as the CLC Convention has been in operation for many years and that the LLMC Convention will shortly enter into force, there was little discussion of Article 11 within the committee and it would not therefore seem necessary to comment upon its provisions in detail.

115. — The one exception is paragraph 8 which provides that “claims in respect of expenses reasonably incurred or sacrifices reasonably made by the carrier voluntarily to prevent or minimise damage shall rank equally with other claims against the fund”. This provision, which has been taken over from Article V (8) of the CLC Convention, was criticized by a number of delegations on the ground that by permitting the carrier to claim against the fund in respect of the cost of preventive measures taken by him, sums set aside for the satisfaction of third party claims would in effect be utilized to cover the carrier’s first party liability. Such a possibility was seen as being contrary to the general principles underlying liability insurance and as a factor which would complicate the calculation of premiums. It would moreover be prejudicial to the aim of the Convention of securing additional protection to victims since the total amount available for compensation would be reduced rateably to permit recovery by the carrier, who might even have been guilty of gross negligence, of the expenses incurred by him in taking preventive measures, in which connection it was suggested that in some legal systems the carrier would already be under a legal obligation to take preventive measures. An opposing view was that paragraph 8 constituted an incentive for the carrier to take such measures, the costs of which were moreover defined as “damage” in Article 1 (10) (d) and which would therefore be recoverable if the measures were taken by any other person. It was also pointed out that whereas the carrier would always have an interest in taking preventive measures if his liability
were unlimited he would, under a system of limited liability, have no interest to do so in the absence of a provision similar to paragraph 8. In view of the equal division of governmental representatives concerning the retention of this paragraph, it was decided to maintain it in square brackets.

Article 12

116. — This article follows the trend of all recent transport law and civil liability conventions by defining the unit of account mentioned in Article 9 for the purpose of establishing the limitation amounts by reference to the Special Drawing Right of the International Monetary Fund. The language of the provisions of Article 12, which deal inter alia with the conversion of Special Drawing Rights into national currencies and the situation of Contracting States which are not members of the International Monetary Fund, follows as closely as possible that of Article V (9) of the CLC Convention as revised by Article 6 (4) of the 1984 Protocol.

Article 13

117. — Although much of the content of this article may be traced back to the CLC Convention, its language is for the most part based on certain provisions of Article 11 A of the HNS draft. As regards paragraph 1 it will be recalled that at present only the carrier is subject to the compulsory insurance provisions of the draft Convention and it is his liability thereunder alone which must be covered by insurance or other financial security such as a bank guarantee although he may enter into contractual arrangements with another person to ensure that his liability is indeed covered up to the necessary limits. Furthermore, his obligation under paragraph 1 extends only to those cases where the dangerous goods are carried on the territory of a Contracting State, the requirement contained in earlier versions of the provision that his liability be insured if the vehicle was registered in a Contracting State or, in the absence of registration, if his principal place of business or, if he had none, his habitual residence, was situated in a Contracting State having become redundant once the geographical scope of application of the future Convention under Article 4 was restricted in such a way as to exclude damage caused by an incident occurring on the territory of non-Contracting States.

118. — In accordance with paragraph 2, the insurance or other financial security must cover the entire period of the carrier's liability under the Convention as it results from Article 2 (2) up to the limits established in Article 9 and must moreover cover "the liability of the person named in the certificate as carrier or, if that person is not the carrier as defined in Article 1, paragraph 8, of such person as does incur liability under the Convention". The principal aim of this provision is to protect the victim against a possible defence in his direct action against the insurer under Article 15 who could otherwise contend that he is not liable because
he has insured only the liability of the person named as the carrier in the certificate and not that of any other person who may be the carrier liable under the Convention. The alternative mentioned at the end of the provision is intended to cover cases where one carrier is named in the insurance policy but where it can be proved that the vehicle was at the time of the incident in fact being operated by another carrier. It is directed neither to the eventual liability of the shipper, consignor or consignee nor to the possibility of the transfer of ownership of the vehicle, which was thought to be regulated satisfactorily by Article 14 (8).

119. — Paragraph 3, which states that “any sums provided by insurance or by other financial security maintained in accordance with paragraph 1 of this article shall be available only for the satisfaction of claims under this Convention”, reaffirms the principle that the future instrument applies only to claims for damage caused by the carriage of dangerous goods.

**Article 14**

120. — This article is concerned with the certificate attesting that insurance or other financial security is in force. According to paragraph 1, that certificate “shall be issued or approved by the competent authority after determining that the relevant requirements of this Convention have been complied with”. Originally, the text provided only for issuance of the certificate by the competent authority of each Contracting State but it was pointed out that such a procedure failed to acknowledge the fact that insurance certificates are normally issued by insurance companies and not by competent State authorities. It was in consequence agreed to allow for issuance of the certificate either by a competent authority or by an insurer or other financial guarantor, subject to approval by the competent authority, for example the affixing of a stamp on the certificate. It should however be stressed that such an approval is no mere formality and that the obligation on the competent authority in each State to verify that the relevant requirements of the future Convention have been complied with has not been in any way weakened by the inclusion of the words “or approved”.

121. — Paragraph 2 establishes what may be termed the “connecting factor” between the carrier whose liability is to be covered by insurance or alternative security and the competent authority which is to issue or approve the certificate. Sub-paragraphs (a) and (b) define the link in the first place by reference to the State of registration in respect of a carrier whose vehicle is registered in a Contracting State and, in the case of a vehicle which is not registered or of the carrier being

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(41) Although the intention of the concluding language of Article 13 (2) may be to cover cases where the vehicle is hired out or leased by the person originally designated as the carrier in the policy, might it not be argued that it could also apply when that person has been deprived of control of the vehicle without his consent and, if so, how should Article 13 (2) be read in conjunction with Article 15 (2) (b)?
a carrier by rail as defined in Article 1 (8) (b), by reference to the Contracting State where the carrier has his principal place of business or, if he has none, his habitual residence. The language of these provisions takes account of the fact that whereas the definition of road and inland navigation carriers under Article 1 (8) (a) depends upon control of the use of the vehicle, which will almost always be registered, the railway carrier is identified in accordance with sub-paragraph (b) of Article 1 (8) not by reference to control of the use of the railway wagon, which in many countries will not be registered, but by his operation of the railway line on which the incident occurs.

122. — The case contemplated in the last sentence of paragraph 2 is that of a carrier who controls the use of a vehicle registered in a State other than a Contracting State or whose principal place of business or, if he has none, his habitual residence, is situated in a non-Contracting State. Since damage arising from an incident occurring on a railway line operated on the territory of a non-Contracting State does not fall within the geographical scope of application of the draft Convention, the practical effect of the provision under consideration is limited to road and inland navigation carriers from non-Contracting States who wish to transport dangerous goods on the territory of a Contracting State. In those situations such carriage will only be permitted if a certificate has been issued or approved by the competent authority of a Contracting State on the territory of which those goods are to be carried, such issuance or approval naturally depending on whether the authority is satisfied that the requirements of the Convention in this regard have been met.

123. — Paragraph 3 provides for the annexing to the future Convention of a model certificate containing a number of particulars, most of which correspond to those required by Article VII (2) of the CLC Convention and Article 11 (2) of the HNS draft, in respect of which certificate the committee agreed that it should as far as possible be integrated into existing carriage documentation so as to avoid additional administrative burdens for carriers and supervisory authorities.

124. — While paragraphs 4, 5 and 6 reflect the content of similar provisions in other international instruments and would seem to be self-explanatory, paragraph 7 was the subject of lengthy consideration by the committee. To a certain extent it is based on Article VII (7) of the CLC Convention, providing as it does on the one hand that certificates issued in a Contracting State shall be accepted in all other Contracting States for the purposes covered by the Convention, and on the other that a Contracting State may request consultations with the State which has issued the certificate if it considers that the insurer or other person providing security named in the certificate may not be financially capable of meeting his obligations under the Convention. Some governmental representatives feared that the language of the provision would oblige a Contracting State to accept a certificate issued in another Contracting State regarding carriers from, or insurance
taken out in, non-Contracting States, a principle which they were reluctant to accept, while hesitations were also expressed at the last sentence of paragraph 7 which provides that Contracting States may accept, as opposed to issuing or approving, “certificates issued by the competent authorities, or by bodies recognized by the competent authorities, of non Contracting States for the purposes of this Convention”. Although it is clear that such acceptance by one Contracting State in respect of a consignment of dangerous goods has no implications for any other Contracting States over whose territory such a consignment is intended to pass, a number of governmental representatives, while not necessarily being opposed to the provision, considered that in view of its introduction into the draft at a very late stage of the committee’s work it would be necessary for them to consult with their national authorities before accepting it and it was accordingly agreed to place it in square brackets. Finally in connection with paragraph 7, it was suggested in relation to the penultimate sentence, which requires each Contracting State to designate the authority competent to make or receive any communications relating to the compulsory insurance or any other financial security, that provision would have to be made in the final clauses regarding the notification of the competent authority of each State to the other Contracting States.

125. — In the course of the discussions on paragraph 8, a proposal was made by a representative of the insurance interests to adopt the following language, based on Article 10 (b) of the 1960 Paris Convention on Third Party Liability in the Field of Nuclear Energy: “No insurer or other financial guarantor shall suspend or cancel the insurance or other financial security provided for in Article 13, paragraph 2 in so far as such insurance or other financial security relates to the carriage of dangerous goods, during the period of the carriage in question.” The proposal was motivated by the concern of insurers in a number of countries that the carrier might, notwithstanding the cancellation or suspension of insurance, continue to conclude new contracts of carriage during the period after which notice of such cancellation or suspension had been given to the competent authorities. It was true that under Article 14 (8) as drafted cover would lapse if the certificate had been surrendered but this might not be the case and it did not seem to be in the public interest to encourage the conclusion of new contracts of carriage during the three month period to which that paragraph referred in circumstances which were wholly undesirable. Some support was expressed for the proposal on the ground that there was no reason why the insurance cover should continue once it had been cancelled or suspended other than in cases where the carriage had been begun before such cancellation or suspension, subject perhaps to the possibility for Contracting States to establish a longer period if they so wished, and it was suggested that the situation was substantially different from that of oil tankers in respect of which the three month period had been introduced in the context of the CLC Convention. On the other hand it was argued that road carriers in particular were highly mobile and that while they were in possession of
an apparently valid insurance certificate there was a danger that frontier and police authorities could be led to believe that insurance cover still existed even though the insurer had communicated notice of cancellation or suspension to the competent authorities. In these circumstances it was agreed to adopt the text of paragraph 8 as it appears in APPENDIX A hereto, while maintaining in square brackets the reference to the period of three months.

126. — Before leaving Article 14, it should be recalled that it was the subject of criticism by a number of representatives who considered that the system as a whole established by it might conflict with existing international schemes in force in a Contracting State relating to the carriage of dangerous goods on its territory and providing for mutual recognition of insurance contracts covering the liability of the road carrier under the prospective Convention such as the green card arrangement or the "automatic" system in operation among member States of the European Communities and other States which have acceded to that system. It was therefore agreed that a reservation clause should be included in Article A of the final clauses permitting Contracting States not to apply the provisions of Article 14 in the event of such schemes being applicable (42).

Article 15

127. — Although one delegation initially expressed serious misgivings at the possibility of a direct action being instituted against the insurer or other person providing financial security, principally on the procedural ground that it was in its legal system normal for the insurer's obligation to pay to arise only after judgment had been given against the defendant, it subsequently withdrew its opposition in the light of the considerable support for the introduction of the principle which, it was pointed out, had been accepted by many States in other international instruments, reference being made in particular to Article VII (8) of the CLC Convention upon which the provisions of Article 15 are to a large extent based.

128. — In connection with paragraph 1 of the article, it should in the first place be recalled that it is only against the insurer or other person providing financial security for the carrier's liability that a direct action may be instituted under the Convention. Given the specific exclusion of the application of Articles 13 to 17 of the draft Convention in respect of the liability of the shipper, consignor or consignee under Article 6 (2) (a) and Article 7, the claimant cannot bring a direct action under Article 15 against the insurer of such persons. Since, however, the present language of Article 15 (1) refers to "any claim for compensation under Articles 5 and 6", and given that Article 6 also makes provision for the shipper's liability under the draft Convention in respect of damage caused during operations of loading and unloading, it might, so as to avoid any conceivable source of am-

(42) See below, paragraph 152.
bigness, be desirable to add the words "against the carrier" after the word "claim" in the first line although such a clarification may be deemed to be unnecessary.

129. — One query was raised in regard to a problem which might arise from the possible coexistence of direct actions against two insurers, that of the insurer of the carrier's liability under the future Convention and that of the local bureau under the green card system in respect of the carrier's ordinary motor insurance. In reply it was suggested that, in some countries at least, the action under the green card system does not lie against the bureau but against the insurer, the bureau acting only as a guarantor of the insurer, while the point was also made that whereas Article 15 is directed to the question of whether an action may be brought directly before a court against the insurer, under the green card system the bureau is concerned only with the settlement of claims and that this consideration, coupled with the introduction of the new sub-paragraph (c) in Article A of the final clauses, may avoid any source of conflict between the two systems. It was however agreed that if any real difficulties did exist, then these could be examined during the next stage of the work.

130. — Paragraph 2 is concerned with two questions, firstly the application to a defendant under Article 15 of the carrier's limitation of liability under Article 9, and secondly that of the defences open to him. As to the former, sub-paragraph (a) provides that the defendant may avail himself of the limitation of liability irrespective of whether the carrier is entitled to limit his liability. This rule has been criticized on the ground that if the carrier were to take out insurance above the limits for which provision will be made in the future Convention and if, for one reason or another, those limits were broken as a result of an act or omission of the carrier or of one of his servants or agents, there seemed to be no valid reason for requiring the victim to proceed first against the insurer for the limited amount and then against the carrier for the balance covered by the additional insurance. It was therefore suggested that the sub-paragraph might be completed by language indicating that in such circumstances the insurer should be directly liable to the claimant for any such balance. In reply, it was recalled that while insurers had expressed their willingness to accept the principle of the direct action in respect of claims which did not exceed the limit of liability, they had shown reluctance as to its extension to compensation for damage exceeding the limitation amounts in those cases where additional coverage had been purchased. In practice however they might be expected to compensate damage proven up to the limits of the policy once they had begun to settle the claim although it was agreed that this was perhaps a point which might be looked into later with insurers.

131. — As regards the defences available to the defendant, sub-paragraph (b) provides that he may invoke those which the person for whose liability financial security is provided would have been entitled to invoke other than the bankruptcy or winding up of that person, an exception which is clearly of considerable
potential benefit to victims. Furthermore, the defendant may not avail himself of any other defence which he might have been entitled to invoke in proceedings brought against him by the person for whose liability he has provided security nor may he dispute any fact in the certificate issued by him although in accordance with paragraph 3 he may require that that person be joined in the proceedings against him.

132. — These provisions are taken over from Article VII (8) of the CLC Convention which contains the additional defence that the damage resulted from the wilful misconduct of the shipowner. Although there was some support for the inclusion of a similar defence in the draft Convention on the ground that insurers might not be prepared to provide cover in such cases, a large majority of representatives considered that it would be unjust to penalise victims for intentional acts of the carrier, against whom the insurer would in any event be entitled to bring a recourse action, and in these circumstances it was decided not to follow the precedent of the CLC Convention.

Article 16

133. — The question of whether, and if so to what extent, the future Convention should make provision for a dispensation from the obligation to maintain insurance or other financial security was the subject of widely differing opinions within the committee. Initially, attention was drawn on the one hand to the presence of a provision in the HNS draft establishing such a dispensation for shipowners or shippers who are Contracting States or, in cases where a Contracting State is a Federal State, a State, canton or other constituent part of such State (Article 11 B (4)), and on the other to the fact that many railway companies act as their own insurers. At a later stage it was, as has already been mentioned (49), suggested that the imposition of a system of compulsory insurance in respect of dangerous goods carried on the Rhine was in conflict with the Mannheim Act of 1868.

134. — One view was that the dispensation from the obligation to maintain insurance or alternative security should be as restricted as possible, since any breach in the requirement of compulsory insurance could reduce the protection which the draft was intended to guarantee to victims, and that it should be conceived in such a way as to avoid distortions in competition not only among the different modes of transport but also within them, between small and large enterprises on the one hand and between carriers from market and from planned economies on the other. In the opinion of some representatives the only satisfactory solution, assuming that the principle of dispensation were to be accepted, would be a State guarantee that victims would be indemnified in the event of an incident causing damage. There was however considerable scepticism as to whether States

(49) See paragraph 39 above.
would be prepared to undertake such a formal guarantee in an international Convention, let alone to accept the institution of a direct section against them. In these circumstances strong objections were voiced against a suggestion that the dispensation should extend to cover all vehicles owned by public authorities, in which connection reference had been made to the 1959 European Convention on Compulsory Insurance against Civil Liability in respect of Motor Vehicles, Annex II to which permits Contracting States “to exempt from compulsory insurance motor vehicles owned by corporate persons under public or private law able to provide sufficient financial guarantee to be their own insurer”. Such a dispensation, it was argued, could give rise to serious problems if public vehicles were to enter the territory of other Contracting States while a more narrowly drawn exception in favour of enterprises which were both State-owned and State-controlled also proved unacceptable to many members of the committee.

135. — Another suggested approach was that the criterion for the operation of the dispensation should not simply be that of the ownership of the vehicle but rather that of the purpose to which it was put. In this connection the view was expressed that any vehicle employed for government purposes should be exempted from the requirement of compulsory insurance, irrespective of whether it was owned by a Contracting State or a constituent part thereof, or whether it had been hired by the State from a private contractor, for example in the case of a civil emergency. This solution too met with serious criticism, the point being made that in cases where a government hires the services of a private carrier it may be considered to be not a carrier but a shipper and that, if the carrier were not obliged to take out insurance under the prospective Convention in respect of such carriage of dangerous goods, victims could be deprived of any protection thereunder. In these circumstances the committee recognized that, at least with respect to carriage by road and by inland navigation vessels, there was no prospect of achieving unanimity as to the scope of the dispensation and it was agreed that at the present stage of negotiations it would be necessary to accept the lowest common denominator, namely an exception in favour of carriers which are Contracting States or constituent parts of such States in respect of carriage performed on non-commercial government service, for instance by army vehicles or by vehicles involved in civil defence operations. It is this solution therefore which is contained in paragraph 1 of Article 16 with the consequence, explicitly stated in paragraph 2, that the provisions of the draft Convention relating to compulsory insurance will not apply to such vehicles. That paragraph requires however that a certificate issued by the competent authorities stating that the carrier is a Contracting State or a constituent part of such State and that its liability is covered within the limits provided by the Convention shall be produced for inspection on demand of the authorities referred to in Article 14 (4), a formulation which, while falling short of an express State guarantee, would seem to ensure the necessary degree of protection for victims. In accordance with paragraph 3 of Article 16, the certificate referred to in paragraph 2 must conform with the model prescribed by the Convention.
136. — Paragraph 4 is concerned with the particular case of carriage by rail, in respect of which the committee was informed that most railway companies, in Europe at least, are State-owned or controlled although their precise relationship to the State varies considerably in terms of their legal status. The majority of these companies act as their own insurers in the sense that either the annual State budget or that of the railway company itself makes an adequate allocation to meet claims which may be brought against the railway, although small railway carriers, which are often private concerns, usually take out insurance to cover their liability. It was in these circumstances suggested that it would be an unnecessary burden upon railway carriers in general to impose upon them the compulsory insurance provisions contained in the draft Convention and that given moreover the fact that the definition of a railway carrier under Article 1 (8) is such as to amount to a territorial definition, as opposed to that of road and inland navigation carriers who regularly cross international frontiers, the system of certificates for which paragraphs 2 and 3 of Article 16 make provision could be dispensed with in respect of carriage by rail. In consequence the text of paragraph 4 as adopted by the committee provides that, “with respect to carriage by rail: where the carrier is a Contracting State or any constituent part of such a State, or where he is a body fully owned or controlled by a Contracting State, that State may provide that the carrier shall be dispensed from the obligation to cover his liability by insurance or other financial security”.

137. — In view however of the objections to this provision raised by a number of participants in the work of the committee who saw it as discriminating against road and inland navigation carriers, as well as the differences of opinion regarding the general scope of the article, whose content was seen as a matter of legislative policy in the light of the implications for competition not only between, but also within, the different modes of transport, it was decided to place the whole of Article 16 in square brackets.

**Article 17**

138. — Although one delegation questioned the need for this article which, it was suggested, was superfluous since it was self-evident that each Contracting State should take all appropriate measures to ensure compliance with the provisions of the Convention relating to compulsory insurance and that it would be in breach of its treaty obligations if it failed to do so, a majority supported the retention of the provision which was modelled on provisions contained in the CLC Convention and which expressly laid down each State’s obligation actually to take measures and not to remain passive.
Article 18

139. — While the text of this article is based essentially on that of Article 13 of the HNS draft, the three year limitation period running as from the time at which the person suffering the damage knew or ought reasonably to have known of the damage and of the identity of the carrier (44), it also follows the precedent to be found in Article 10 (1) of the 1985 European directive on products liability. There was however some disagreement within the committee as to the establishment of a second limitation period, running from the date of the incident which has caused the damage or, if the incident consists of a series of occurrences, from that of the last of such occurrences. While some support was expressed for imposing no such limit, as is the case under the European directive referred to above, a majority of representatives favoured the introduction of a uniform rule although opinions differed as to whether the period should be six years, as provisionally retained in the HNS draft, or ten years. While the latter period was seen as providing greater protection to victims, it was suggested that difficulties could be created for insurers if the period were to be too lengthy, as they would have to maintain the necessary reserves to meet their eventual liability, and also for those responsible for the distribution of the limitation fund if claims could be brought many years after the incident. Finally, it should be noted that Article 18 lays down no rule governing the interruption or suspension of actions, which question will therefore be regulated by the applicable national law, a solution expressly adopted in Article 10 (2) of the European directive.

Article 19

140. — The language of paragraph 1 of this article is based on a combination of Article 11 (1) of the 1977 Convention on Civil Liability for Oil Pollution Damage resulting from Exploration and Exploitation of Seabed Mineral Resources and of Article 14 (1) of the HNS draft. The first sentence of the paragraph, which provides that actions for compensation under the Convention may only be brought in the courts of a Contracting State where the damage was sustained as a result of the incident or in the courts of the Contracting State where the incident occurred, establishes a general rule regarding jurisdiction. The provision is fairly restrictive since it will normally be the case that the incident and the damage will occur in a single Contracting State which will, subject to the exception under paragraph 2, in consequence enjoy exclusive jurisdiction. The possibility of forum shopping is therefore substantially reduced and although a choice of jurisdiction may be open to victims in the event of transfrontier damage the concentration of actions before a single jurisdiction is encouraged by paragraph 4, the effect of which is that once

(44) In view of the imposition of liability on the shipper under Article 6 and possibly also on the consignor or consignee under Article 7, the reference to the carrier ought probably to be replaced by one to the person liable under the Convention.
a fund has been constituted in a Contracting State the courts of that State are exclusively competent to determine matters relating to its apportionment and distribution.

141. — In the opinion however of some representatives the language of the first sentence of paragraph 1 was too restrictive, the question being raised in particular of what would be the situation of a claimant wishing to bring a direct action against an insurer from a non-Contracting State. The wording of paragraph 1 of Article 19 seemed to prevent such an action being brought before the courts of a non-Contracting State while doubts were indeed expressed as to whether that provision applied at all to direct actions against the insurer. With a view to taking care of the difficulty it was proposed either that a reference be made in paragraph 1 specifically to direct actions against insurers or that language be introduced to the effect that the paragraph should apply to any action brought under the provisions of the Convention. Alternatively, it was suggested that the last sentence of Article 14 (7) be deleted or that the scope of Article 19 (1) be widened to permit action to be brought in any Contracting State since a carrier or an insurer from a non-Contracting State might have assets in Contracting States other than those mentioned in paragraph 1. In reply, it was recalled that texts similar to that of Article 19 (1) had been included in other international conventions and doubts as to whether they applied to direct actions against the insurer, for which those conventions also made provision, had never been raised. Moreover, if such hesitations existed within the committee then the problem could arise not only in connection with the direct action against the insurer but also in relation to actions against the shipper so that a specific reference to the direct action in Article 19 (1) would not be sufficient. It was therefore suggested that the problem existed not so much with regard to the possibility of a claimant’s bringing a direct action under Article 19 against an insurer, which some representatives believed to be beyond doubt, but rather in connection with the difficulties which a claimant might face in obtaining enforcement of a judgment of a court of a Contracting State against an insurer from a non-Contracting State in that latter State. It was however pointed out that this problem could be exaggerated in that such enforcement might often be obtained under bilateral or multilateral treaties although Contracting States would in any event be wise, before approving or accepting insurance certificates from carriers from non-Contracting States, to check on the existence of such treaties on recognition and enforcement with the States concerned. Moreover, it was not true to say that Article 19 (1) prevented a claimant bringing action in a non-Contracting State against a carrier or insurer from such a State although of course he would run the risk that the courts of that State would not apply the Convention. In these circumstances it was agreed to reflect on the comments made on the provision with a view to amendments being tabled during the next stage of the work.

142. — One further point which may be made in relation to the first sentence of paragraph 1 is that action may be brought in States in which preventive
measures have been taken since the costs of such measures fall within the definition of "damage" under Article 1 (10) (d). A reference to such measures was contained in an earlier version of Article 19 (1) but was later considered unnecessary, although it should be noted that preventive measures are specifically mentioned in Article 11 (1) and with a view to ensuring consistency of language and the avoidance of any a contrario interpretation it may be desirable to harmonise the language of the two provisions.

143. — Although some doubt was expressed as to the need for the second sentence of paragraph 1, which requires the giving of reasonable notice of any action to the defendant, it was recalled that it had been taken over from existing conventions and that its purpose was on the one hand to give adequate time to insurers, where appropriate, to take the necessary steps to constitute a limitation fund and, on the other, to avoid the risk of judgments being given by default by reason of the failure of the carrier or other person liable under the Convention or the insurer to appear because of his ignorance of the claim.

144. — The intention of paragraph 2, which provides a supplementary ground of jurisdiction in situations where the carrier (45) and all the victims have their habitual residence in the territory of the same Contracting State, is to simplify proceedings, for example by avoiding claimants having to retain lawyers in another Contracting State or having to obtain enforcement before the courts of their own country of a judgment obtained against the carrier in the Contracting State where the incident occurred. The concept is based on a provision to be found in Article 4 of the 1971 Hague Convention on the Law Applicable to Traffic Accidents and although some hesitations were voiced as to the desirability of transposing a rule concerning the applicable law to an article dealing with jurisdiction a majority of representatives supported the introduction of the provision. The substantive rule set out in the first sentence of paragraph 2 is completed by a second sentence, of relevance only to carriage by road and by inland navigation vessels, according to which the State of registration of the ship or road vehicle involved in the incident shall be deemed to be that of the habitual residence of the carrier. It should be emphasized in this connection that the use of the word "deemed" is not intended to create a presumption, the aim of the provision being to establish the principle that the State of registration of the vehicle is to be regarded as the habitual residence of the carrier for the purposes of the Convention, although it was agreed that if there were in actual fact a difference between the two, then the carrier should not be allowed to invoke the rule contained in the second sentence of paragraph 2 for the purpose of avoiding jurisdiction thereunder.

145. — Paragraph 3 requires each Contracting State to ensure that its courts possess the necessary jurisdiction to entertain actions for compensation under the

(45) Quaere whether the rule should apply not only in relation to the carrier but also to any person liable under Article 7 if that provision is retained.
Convention and is, like paragraph 4 regarding competence in respect of the apportionment and distribution of the fund to which reference was made in paragraph 140 above of this report, taken over from the CLC Convention (Article IX (2) and (3) respectively).

Article 20

146. — The language of paragraph 1 (a) and (b) as well as that of paragraph 2 follows that of Article X (1) and (2) of the CLC Convention. The purpose of the provisions is on the one hand to ensure that judgments given by courts in Contracting States with jurisdiction in accordance with Article 19 which are enforceable and no longer subject to ordinary forms of review in the State of origin will in principle be recognized in any other Contracting State, and on the other to render enforceable judgments so recognized in each Contracting State as soon as the formalities required in that State have been complied with. It is further specified that such formalities shall not permit the merits of the case to be reopened.

147. — In addition to the two exceptions to the general rule already contained in the CLC Convention, namely those where the judgment has been obtained by fraud or where the defendant was not given a reasonable opportunity to present his case, a third ground of refusal of recognition is provided for in sub-paragraph (c) of Article 20 (1), namely that where “the judgment is irreconcilable with an earlier judgment given in the State where recognition is sought, or given in another Contracting State with jurisdiction in accordance with Article 19 and already recognized in the State where the recognition is sought, involving the same cause of action and between the same parties.” Some representatives initially expressed doubts as to the wisdom of extending the list of exceptions under Article 20 (1), and indeed a proposal to include a provision permitting non-recognition on grounds of public policy was rejected. Others however considered that the addition of sub-paragraph (c), the wording of which is based on that of Article 13 (2) of the 1978 Convention on the Accession of Denmark, Ireland and the United Kingdom to the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters would add to the degree of uniformity which Article 20 sought to establish and provide a further indication that the list of exceptions is intended to be exhaustive rather than illustrative.

148. — Paragraph 3 provides that the Convention “shall not restrict the application of an international instrument in force between the State of origin and the State addressed or other law of the State addressed for the purpose of obtaining recognition or enforcement of a decision or settlement”. The purpose of this paragraph is to ensure that procedures for the enforcement of judgments by the courts of a Contracting State should be as speedy and simple as possible and its language, based on that of Article 23 of the 1978 Hague Convention on the Recognition and Enforcement of Decisions relating to Maintenance Obligations,
estabishes the principle that provisions of other international instruments in force between the State of origin and the addressed State, or the law of the latter State, which would be more favourable to recognition of judgments should be given precedence over the more restrictive rules contained in Article 20. It was in particular suggested that paragraph 3 would permit recognition in those situations where the judgment in the State of origin, although enforceable, is still subject to ordinary forms of review, thus avoiding, *inter alia*, the danger of a court in a State Party to the 1968 Brussels Convention applying Article 57 thereof, which provides that "This Convention shall be without prejudice to any conventions to which the Contracting States are or will be parties, governing jurisdiction, recognition and enforcement of judgments in particular matters".

149. — Finally, it should be noted that Article 20 is concerned only with the enforcement and recognition of judgments by courts with jurisdiction under Article 19, the question of whether a judgment of a court of a non-Contracting State relating to claims falling under the prospective Convention might be recognized and enforced in a Contracting State being one which would depend on other multilateral conventions on such matters to which the States concerned might be parties or on any bilateral agreement between them.

**Article A**

150. — This article permits Contracting States to make declarations at the time of ratification, acceptance or approval of, or accession to, the future Convention embodying what are in effect reservations. *Sub-paragraph (a)* makes provision for States to enter a reservation in respect of claims for loss of life or personal injury in the sense that they may apply higher limits of liability than those specified in Article 9 or no limit at all in relation to damage arising out of an incident occurring on their territory. Some delegations indicated that while they could, if necessary, admit the inclusion of such a clause they could not agree to the extension which had been called for to compensation for property damage which would, in cases of severe damage, normally exceed that resulting from personal injury. In their view, even a limited reservation such as that contained in Article A (a) would already entail the abandonment of a certain degree of the uniformity which underlay the original conception of the draft, one of the aims of which was to facilitate international transport. A limited reservation clause of the scope contemplated could moreover already create practical difficulties, for example in the distribution of a fund against which property claims were limited and personal injury claims unlimited, while in the event of transfrontier damage jurisdictional problems and the danger of forum shopping could arise. A majority of delegations were also of the opinion that while a system of unlimited insurance cover might already operate in some countries in relation to damage resulting from death or personal injury, the extension of the proposed reservation clause to include the question of compulsory insurance would have the effect of requiring the carrier to take out supplementary
insurance in respect of the carriage of dangerous goods in the territory of certain Contracting States. In consequence the unifying purpose of the future Convention would be minimal and its interest for many States problematical. It is for these reasons that the second sentence of sub-paragraph (a) maintains the principle that the carrier may not be obliged to cover his liability by insurance or other financial security to amounts higher than those referred to in Article 13 (2) (46).

151. — *Sub-paragraph (b)* reserves the right of Contracting States to apply their ordinary law in place of the provisions of Article 5 (5) in so far as such law provides that compensation for loss of life or personal injury may be reduced or disallowed only in cases of intentional conduct or gross negligence by the injured person or persons entitled to claim compensation (47). The wording is based on that to be found in paragraph 1 of the Annex to the 1977 European Convention on Products Liability in regard to Personal Injury and Death.

152. — The aim of *sub-paragraph (c)* is to meet the difficulties experienced by some delegations referred to above in paragraph 126 of this report by permitting States not to apply the provisions of Article 14 to carriage of dangerous goods on their territory in respect of which an international scheme is in force providing for mutual recognition of insurance contracts covering the liability of the carrier under the Convention.

*Article B*

153. — The language of this purely procedural provision will in all probability need to be amended so as to accord with the practice of the international organisation under the auspices of which the future Convention will be adopted.

*Article C*

154. — Changing economic conditions have in recent years led to the revision of the limitation amounts in many transport and civil liability conventions and with a view to shortening the lengthy procedures necessary for the amendment of international conventions dealing with this question UNCITRAL has prepared a series of model clauses which might be adapted where necessary to meet this objective. One of the first examples of their application is to be found in Article 15 of the 1984 Protocol to the CLC Convention which has served as a basis for Article C of the draft Convention. The provisions of this article were not discussed in detail by the committee which was of the opinion that the matter should be considered during the final stages of the elaboration of the future instrument.

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(46) See, however, Article A of the Swiss alternative proposal in APPENDIX II.
(47) See above, paragraph 91.
Article D

155. — The purpose of this article is to institute a rapid procedure for the amendment of the list of substances to be annexed to the future Convention and was, like Article C, introduced by the drafting committee at its meeting in February 1985. It is based essentially on Article Y of the HNS draft and on the assumption that the list to be annexed to the Convention will not correspond in every detail to any existing list. Certain criticisms were however levelled at the draft provisions at the final session of the committee. It was in the first place suggested that the proposed procedure was somewhat cumbersome and that if its aim was an acceleration of the amendment procedure then this could best be achieved by making provision for the automatic incorporation into the Annex of amendments to ADR, RID and ADN(R). The author of that proposal, who had suggested that three separate lists be drawn up applying to each of the three modes of transport covered by the prospective Convention, recalled that the position under the HNS draft had been totally different in that the list attached thereto had been established ex novo, with the consequence that there were no other available lists which might serve as points of reference for automatic amendment of the list itself. The view was however expressed that although the automaticity of the solution proposed seemed attractive at first sight, given its simplicity, it might, apart from the hesitations which some States could have regarding its implications for the scope of application of the Convention, prove not to be workable in practice. While it was true that all efforts were made to harmonise amendment of the lists contained in ADR and RID, the procedures for implementing them differed and there was no guarantee of uniformity being achieved. Admittedly, this argument might be less forceful if different lists were to be drawn up for each mode of transport but the difficulty still remained that the circles of Contracting States in respect of the European agreements and regulations differed and that if the ambition of the future Convention were to be one of worldwide application then problems could arise for States which were not parties to the European instruments and which might not be prepared to accept automatic revision of the list so as to ensure uniformity with those instruments. The point was also made that the parties to the prospective Convention might wish to amend the list annexed thereto even though no corresponding changes had been made in, for example, ADR and RID and that it was therefore essential to maintain the strict independence of the status of, and procedures for amending, the liability Convention vis-à-vis the agreements laying down technical prescriptions.

156. — It was also objected to Article D that the combined effect of paragraphs 6 and 7 would be to risk the creation of different circles of States Parties to the future Convention, some of which would apply it in respect of one list of substances and others of a different list, or even lists, if a series of amendments were to be made. This would cause acute problems for carriers who might not be aware of the insurance requirements of the different Contracting States, although it was
pointed out that the difficulty would arise mainly in connection with carriers from States which had not approved an amendment to the list transporting goods to States which had approved the amendment in question rather than vice-versa, since in the latter situation the carrier would be obliged to cover his liability in respect of the substances added to the original list if he were to satisfy the requirements of the competent authority for the issuance or approval of the insurance certificate. In practice such a carrier would, if transporting goods in a Contracting State which had not approved the amendment, be liable under the Convention only in respect of the amended list and he, and in consequence his insurer, might be called upon to compensate victims in respect of damage caused by the additional substances to the extent only that he was liable under the applicable law.

157. — Further objections to the solution proposed in Article D were based on the complications which could arise from the fact that on the one hand an incident in a Contracting State applying one list might cause damage in another Contracting State where a different list was in force and that on the other a carrier might be transporting in a single consignment goods, some of which appeared in the amended list and others only in the original version of the Annex. In these circumstances a suggestion was made that Article D be modified in such a way as to correspond to the system contained in the COTIF Convention with the consequence that amendments approved by the body designated for revision of the list would enter into force after a certain period for all Contracting States unless a stipulated number of them were to signify their opposition to the amendments within a specified time. A State which could not accept the amendments would then have no alternative but to denounce the Convention. In reply, it was recalled that a similar discussion had taken place in the IMO Legal Committee in connection with the HNS draft and that a certain degree of mistrust of the development of a rapid amendment procedure had been evidenced. The suggestion that Contracting States which were unable to accept amendments to the list should be obliged to denounce the Convention was a radical one and, if such a solution was contemplated by Article C of the draft, this was because it had been felt that uniformity must be maintained in relation to the minimum limitation amounts applicable under the Convention.

158. — The general view in the committee was that it would be unwise at this stage to take decisions on what was essentially a political question closely related to that of the determination of the list of substances to be annexed to the prospective Convention. It was however agreed to offer an alternative solution to that provided for in Article D by placing the words following the comma in the third line of paragraph 6, as well as the whole of paragraph 7, in square brackets so as to indicate the problem. It was moreover agreed that if a solution similar to that to be found in Article C were ultimately to be adopted in connection with Article D, then the latter article would need to be aligned further with Article C, in particular by the introduction of language along the lines of that contained in paragraph 8 of Article C.
APPENDIX I

DRAFT ARTICLES FOR A CONVENTION ON CIVIL LIABILITY FOR DAMAGE CAUSED DURING CARRIAGE OF DANGEROUS GOODS BY ROAD, RAIL AND INLAND NAVIGATION VESSELS

DEFINITIONS

Article 1

For the purpose of this Convention:

1. — "Carriage by inland navigation vessel" means carriage of dangerous goods on board a ship.

2. — "Ship" means any vessel or craft, not being a sea-going ship or sea-borne craft, of any type whatsoever.

3. — "Carriage by road" means carriage of dangerous goods on board a road vehicle.

4. — "Road vehicle" means any motor vehicle, articulated vehicle, trailer or semi-trailer, as defined in Article 1 of the Convention on Road Traffic of 8 November 1968.

5. — "Carriage by rail" means carriage of dangerous goods on board a railway wagon.

6. — *Railway wagon* includes a rail motor-coach unit or railcar (1).

7. — “Vehicle” means a ship, a road vehicle or a railway wagon.

8. — “Person” means any individual or partnership or any public or private body, whether corporate or not, including a State or any of its constituent subdivisions.

8. — “Carrier” means:

(a) with respect to carriage by inland navigation vessel and by road: the person who controls the use of the vehicle on board which the dangerous goods are carried.

The person in whose name the vehicle is registered in a public register or, in the absence of such registration, the owner of the vehicle shall be presumed to control the use of the vehicle unless he proves that another person controls

(1) This provision would be unnecessary if the scope of the future Convention were to be restricted to the carriage of dangerous goods in bulk.
the use of the vehicle and he discloses the identity of that person or, if he is unable to disclose the identity of such person, he proves that such other person has taken control of the vehicle without his consent and in such circumstances that he could not reasonably have prevented such use.

Where the vehicle on board which the dangerous goods have been loaded is moved by another vehicle, the person who controls the use of [the first mentioned] [that other] vehicle shall be deemed to be the carrier (2).

(b) with respect to carriage by rail: the person or persons operating the railway line on which the incident occurred; if there is joint operation each of the joint operators shall be considered as carriers.

9. — “Dangerous goods” means any substance specified in the Annex to this Convention which is carried as cargo (3).

10. — “Damage” means:

(a) loss of life or personal injury on board or outside the vehicle carrying the dangerous goods caused by those goods;

(b) loss of or damage to property outside the vehicle carrying the dangerous goods caused by those goods, to the exclusion of any loss of or damage to other vehicles in the same train of vehicles or any loss of or damage to property on board such vehicles;

(c) loss or damage by contamination of the environment caused by the dangerous goods, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken;

(d) the costs of preventive measures and further loss or damage caused by preventive measures.

11. — “Preventive measures” means any reasonable measures taken by any person after an incident has occurred to prevent or minimise damage.

12. — “Incident” means any occurrence or series of occurrences having the same origin, which causes damage or creates a grave and imminent threat of causing damage.

(2) The committee was unable to reach agreement on this point given the late stage in its work at which the problem was raised.

(3) This provision would need to be amended if the future Convention were to apply to residues. It will in addition be necessary to consider at a later stage the relationship between the draft Convention and the existing nuclear law Conventions.
GENERAL SCOPE OF APPLICATION

Article 2

1. — This Convention shall apply to claims, other than claims arising out of any contract, for damage caused during carriage of dangerous goods by road, rail or inland navigation vessel.

2. — Carriage of dangerous goods by road, rail or inland navigation vessel includes the period from the beginning of the operations of loading the goods onto the vehicle for carriage until the end of the operations of unloading the goods.

3. — Where the vehicle on board which the dangerous goods have been loaded is carried over part of the journey by another vehicle without the goods being unloaded, such goods shall be deemed to be carried solely on board the first mentioned vehicle.

4. — This Convention shall not apply when the vehicle on board which the dangerous goods have been loaded is carried by a sea-going ship, sea-borne craft or aircraft.

Article 3

1. — This Convention shall not apply to damage arising from carriage performed entirely in a place to which members of the public do not have access, provided that such carriage is accessory to other activities and is an integral part thereof.

2. — Nor shall it apply to damage sustained in a place to which members of the public do not have access arising from carriage performed in that place.\(^{(4)}\)

GEOGRAPHICAL SCOPE OF APPLICATION

Article 4

This Convention shall apply:

(a) to damage sustained in the territory of a Contracting State and caused by an incident occurring in a Contracting State;

(b) to preventive measures, wherever taken, to prevent or minimise such damage.

\(^{(4)}\) This provision has been placed in square brackets in view of the hesitations regarding its inclusion expressed by a number of governmental representatives.
LIABILITY PROVISIONS

Article 5

Liability of the carrier

1. — Except as provided in paragraphs 4 and 5 of this article and in Article 6, the carrier at the time of an incident shall be liable for damage caused by any dangerous goods during their carriage by road, rail or inland navigation vessel.

2. — If an incident consists of a series of occurrences having the same origin, the liability shall attach to the carrier at the time of the first of such occurrences.

3. — If two or more persons referred to in Article 1, paragraph 8 (b) are liable as a carrier under this Convention, they shall be jointly and severally liable.

4. — No liability shall attach to the carrier if he proves that:
(a) the damage resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional and irresistible character; or
(b) the damage was wholly caused by an act or omission done with the intent to cause damage by a third party; or
(c) the consignor or any other person failed to meet his obligation to inform him of the dangerous nature of the goods, and that he neither knew nor ought to have known of their nature.

5. — If the carrier proves that the damage resulted wholly or partially either from an act or omission done with the intent to cause damage by the person who suffered the damage or from the negligence of that person, the carrier may be exonerated wholly or partially from his liability to such person.

6. — No claim for compensation for damage shall be made against the carrier otherwise than in accordance with this Convention provided, however, that in the case referred to in paragraph 4 (c) of this article any liability for damage which may be incurred by the carrier according to the applicable law shall not be affected.

7. — Subject to paragraph 8 of this article, no claim for compensation for damage under this Convention or otherwise may be made against:
(a) the servants or agents of the carrier or the members of the crew;
(b) the pilot of the ship or any other person who, without being a member of the crew, performs services for the ship, road vehicle or railway wagon;
(c) the owner, hirer, charterer, user, manager or operator of the ship, road vehicle or railway wagon, provided that he is not the carrier;
(d) any person performing salvage operations with the consent of the owner of the ship;

(e) any person performing salvage operations on instruction of a competent public authority;

(f) any person other than the carrier taking preventive measures for damage caused by those measures;

(g) any servants or agents of the persons mentioned under (b), (c), (d), (e) and (f),

unless the damage resulted from their personal act or omission, committed with the intent to cause such damage or recklessly and with knowledge that such damage would probably result.

8. — Nothing in this Convention shall prejudice any right of recourse of the carrier against the consignor of the goods causing the damage or against any other third party.

9. — This Convention shall not apply to the extent that its provisions are incompatible with those of the applicable law relating to workmen's compensation or social security schemes.

Article 6

Liability for loading and unloading operations

1. — If the carrier proves that the dangerous goods have been loaded or unloaded from the vehicle solely under the responsibility of a person other than the carrier, such as the consignor or the consignee, and he discloses the identity of such person, he shall be relieved of his liability for damage caused by such goods during that period of loading or unloading and such other person shall be liable for that damage under this Convention.

Where, however, the operations of loading or unloading have been carried out under the joint responsibility of the carrier and the other person referred to in this paragraph, the carrier and that other person shall be jointly and severally liable under this Convention for damage caused during the period of loading or unloading.

2. — The provisions of this Convention shall apply in respect of such other person as referred to in paragraph 1 correspondingly provided that:

(a) Article 5, paragraph 6 shall not apply in respect of claims for compensation for damage made against such other person, nor shall Articles 13 to
17 apply to the liability of that person;

(b) the limits of Article 9 shall apply to the aggregate of all claims arising on any distinct occasion against the carrier and such other person;

(c) a fund constituted by the carrier or by such other person in accordance with Article 11 shall be deemed to be constituted by both.

3. — In the relations between the carrier and any other person liable under paragraph 1 of this article, liability shall be borne by that other person unless the damage was caused by the fault of the carrier or of his servants or agents.

When both the carrier or his servants or agents and the other person have contributed to the damage by their fault, the carrier and that other person shall each bear such part of the liability as corresponds to the degree of fault attaching to each of them.

**Alternative text**

1. — When the dangerous goods are loaded on or unloaded from the vehicle under the responsibility of a person other than the carrier, such as the consignor or the consignee, the carrier and such other person shall be jointly and severally liable under this Convention for damage caused by such goods during the period or loading or unloading.

2. — (As in the basic text).

3. — (As in the basic text) (5).

[Article 7

**Liability of the consignor**

Where no liability attaches to the carrier in accordance with Article 5, paragraph 4 (c), the consignor or the other person referred to therein shall be deemed to be the carrier for the purposes of this Convention. However Article 5, paragraph 6 shall not apply in respect of claims for compensation for damage made against the consignor or the other person, nor shall Articles 13 to 17 apply to their liability under this Convention.] (6)

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(5) While a sizeable majority of governmental representatives favoured the basic text of Article 6, a minority expressed their preference for the alternative text.

(6) Retained in square brackets by the committee in consideration of the hesitations regarding the need for, or desirability of, the provision expressed by a number of governmental representatives.
Article 8

Incidents involving two or more vehicles

Whenever damage has resulted from an incident involving two or more vehicles each of which is carrying dangerous goods, all carriers, unless exonerated under Article 5, paragraphs 4 or 5 or Article 6, shall be jointly and severally liable for all such damage which is not reasonably separable (7).

LIMITATION OF LIABILITY

Article 9

1. — The liability of the carrier under this Convention for claims arising from any one incident shall be limited as follows:

(a) with respect to claims for loss of life or personal injury: [ ] units of account [for each vehicle on board of which the dangerous goods causing the damage were carried];

(b) with respect to any other claim: [ ] units of account [for each vehicle on board of which the dangerous goods causing the damage were carried]. (8)

2. — Where the amount calculated in accordance with paragraph 1 (a) of this article is insufficient to pay the claims mentioned therein in full, the amount calculated in accordance with paragraph 1 (b) shall be available for payment of the unpaid balance of claims under paragraph 1 (a). Such unpaid balance shall rank rateably with claims mentioned under paragraph 1 (b).

Article 10

1. — The carrier shall not be entitled to limit his liability under this Convention if it is proved that the damage resulted from his personal act or omission

(7) The language of this article may need to be reconsidered in view of the uncertainty of a number of governmental representatives as to whether it would, when read in conjunction with Article 9, have the effect in respect of any single incident of restricting recovery by victims to the limitation amount applicable to a single carrier.

(8) The committee did not consider itself to be in a position at this stage of intergovernmental negotiations to take a decision on the question of whether the limitation amounts should be calculated simply on a per incident basis or whether the number of vehicles involved should also be relevant. The question of whether the various modes of transport, and especially inland navigation, may require different treatment has likewise been left open.
or an act or omission of his servants or agents, committed with the intent to cause the damage or recklessly and with knowledge that such damage would probably result, provided that, in the case of such act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment.

2. Where the carrier has a claim against the claimant arising out of the same incident, their respective claims shall be set off against each other and the provisions of this Convention shall apply to the balance, if any.

3. The carrier may invoke the right to limit his liability notwithstanding that a limitation fund as mentioned in Article 11 has not been constituted. However, a Contracting State may provide in its law that, where an action is brought against the carrier in its courts to enforce a claim subject to limitation, the carrier may only invoke the right to limit his liability if a limitation fund has been constituted in accordance with the provisions of Article 11 or is constituted when the right to limit liability is invoked.

4. If limitation of liability is invoked without the constitution of a limitation fund, the provisions of Article 11, paragraphs 4 to 8 shall apply correspondingly.

5. Questions of procedure arising under the rules of this article shall be decided in accordance with the law of the Contracting State in which action is brought.

Article 11

1. The carrier may constitute a fund with the court or other competent authority of any one of the Contracting States in which an action is brought under Article 19. If such action under Article 19 has not been brought in a Contracting State, then the carrier may constitute his fund with the court or other competent authority of any one of the Contracting States in the territory of which damage has been sustained, or in respect of whose territory preventive measures to prevent or minimise such damage have been taken. The fund shall be constituted in the sum of the amounts set out in Article 9 as applicable to him, together with interest thereon from the date of the incident until the date of the constitution of the fund. Any fund thus constituted shall be available only for the payment of claims in respect of which limitation of liability may be invoked under this Convention.

2. A fund may be constituted either by depositing the sum or by producing a bank guarantee or other guarantee, acceptable under the legislation of the Contracting State where the fund is constituted, and considered to be adequate by the court or another competent authority.

3. A fund constituted by the insurer or other person providing financial security shall be deemed to be constituted by the carrier.
4. — Subject to the provisions of Article 9, paragraph 2, the fund shall be distributed among the claimants in proportion to their established claims against the fund.

5. — If, before the fund is distributed, the carrier or any person providing him with insurance or other financial security has as a result of the incident in question paid compensation for damage, such person shall, up to the amount he has paid, acquire by subrogation the rights which the person so compensated would have enjoyed under this Convention.

6. — The right of subrogation provided for in paragraph 5 of this article may also be exercised by a person other than those mentioned therein in respect of any amount of compensation for damage which he may have paid but only to the extent that such subrogation is permitted under the applicable law.

7. — Where the carrier or any other person establishes that he may be compelled to pay at a later date in whole or in part any such amount of compensation with regard to which such person would have enjoyed a right of subrogation pursuant to paragraphs 5 and 6 of this article had the compensation been paid before the fund was distributed, the court or other competent authority of the State where the fund has been constituted may order that a sufficient sum shall be provisionally set aside to enable such person at such later date to enforce his claim against the fund.

8. — Claims in respect of expenses reasonably incurred or sacrifices reasonably made by the carrier voluntarily to prevent or minimise damage shall rank equally with other claims against the fund.] (9)

9. — The insurer or other person providing financial security shall be entitled to constitute a fund in accordance with this article on the same conditions and having the same effect as if it were constituted by the carrier. Such fund may be constituted even in the event that according to Article 10, paragraph 1 the carrier shall not be entitled to limit his liability, but its constitution shall in that case not prejudice the rights of any claimant against the carrier.

10. — Where the carrier, after an incident, has constituted a fund in accordance with this article, and is entitled to limit his liability:

(a) no person having a claim for damage arising out of that incident shall be entitled to exercise any right against any other assets of the carrier in respect of such claim;

(b) the court or other competent authority of any Contracting State shall order the release of any property belonging to the carrier which has been arrested or attached in respect of a claim for damage arising out of that incident, and shall similarly release any bail or other security furnished to avoid such arrest or attachment.

(9) The committee was equally divided as to the desirability of retaining this provision.
11. — Paragraph 10 of this article shall, however, only apply if the claimant has access to the court administering the fund and if the fund is actually available and freely transferable in respect of his claim.

12. — Subject to the provisions of this article, the rules relating to the constitution and distribution of a limitation fund, and all rules of procedure in connection therewith, shall be governed by the law of the Contracting State in which the fund is constituted.

Article 12

Unit of account

1. — The "unit of account" referred to in Article 9 is the Special Drawing Right as defined by the International Monetary Fund. The amounts mentioned in Article 9 shall be converted into national currency on the basis of the value of that currency on the date of the constitution of the limitation fund or, if no fund has been constituted, on the date when payment is made or equivalent security is given. The value of the national currency, in terms of the Special Drawing Right, of a Contracting State which is a member of the International Monetary Fund shall be calculated in accordance with the method of valuation applied by the International Monetary Fund in effect on the date in question for its operations and transactions. The value of the national currency, in terms of the Special Drawing Right, of a Contracting State which is not a member of the International Monetary Fund shall be calculated in a manner determined by that State.

2. — Nevertheless a Contracting State which is not a member of the International Monetary Fund and whose law does not permit the application of the provisions of paragraph 1 of this article may, at the time of ratification, acceptance, approval or accession, or at any time thereafter, declare that the unit of account referred to in that paragraph shall be equal to 15 gold francs. The gold franc referred to in this paragraph corresponds to sixty-five and a half milligrams of gold of millesimal fineness nine hundred. The conversion of the gold franc into the national currency shall be made according to the law of the State concerned.

3. — The calculation mentioned in the last sentence of paragraph 1 of this article and the conversion mentioned in paragraph 2 shall be made in such manner as to express in the national currency of the Contracting State as far as possible the same real value for the amounts in Article 9 as would result from the application of the first three sentences of paragraph 1 of this article. Contracting States shall communicate to the depositary the manner of calculation pursuant to paragraph 1 of this article or the result of the conversion in paragraph 2 as the case may be, when depositing an instrument of ratification, acceptance, approval of, or accession to, this Convention and whenever there is a change in either.
COMPULSORY INSURANCE

Article 13

Obligation to maintain insurance or other financial security

1. — The carrier's liability shall be covered by insurance or other financial security, such as the guarantee of a bank, if the dangerous goods are carried in the territory of a Contracting State.

2. — The insurance or other financial security shall cover the entire period of the carrier's liability under this Convention in the sums fixed by applying the limits of liability prescribed in Article 9 and shall cover the liability of the person named in the certificate as carrier or, if that person is not the carrier as defined in Article 1, paragraph 8, of such person as does incur liability under this Convention.

3. — Any sums provided by insurance or by other financial security maintained in accordance with paragraph 1 of this article shall be available only for the satisfaction of claims under this Convention.

Article 14

Certificate

1. — A certificate attesting that insurance or other financial security is in force shall be issued or approved by the competent authority after determining that the relevant requirements of this Convention have been complied with.

2. — The certificate shall be issued or approved by the competent authority:

(a) of the State of registration in respect of a carrier whose vehicle is registered in a Contracting State or

(b) of the Contracting State where the carrier has his principal place of business or, if he has none, his habitual residence, if the vehicle is not registered or if the carrier falls within the definition of Article 1, paragraph 8 (b).

With respect to a carrier not mentioned under (a) or (b) of the first sentence of this paragraph the certificate shall be issued or approved by the competent authority of a Contracting State in the territory of which the dangerous goods are carried.

3. — The certificate shall be issued in the form of the annexed model and shall contain the following particulars (10):

(10) The committee agreed that the suggested model certificate should be integrated as far as possible into existing carriage documentation.
(a) the number of the certificate;
(b) the type of, and the particulars identifying, the ship or road vehicle;
(c) the name of the carrier and his principal place of business or, if he has none, his habitual residence;
(d) the type of security;
(e) the name and principal place of business of the insurer or other person providing security;
(f) the period of validity of the certificate which shall not be longer than the period of validity of the insurance or other security.

4. — The certificate shall be produced for inspection on demand of the competent authorities.

5. — The certificate shall be issued in English or in French or shall, if issued in any other language, include a translation into one at least of those languages.

6. — The State where the certificate is issued or approved shall, subject to the provisions of this Convention, determine the conditions of issue and validity of the certificate.

7. — Certificates issued in a Contracting State shall be accepted in all Contracting States for all purposes covered by this Convention. Nevertheless a Contracting State, should it consider that an insurer or other person providing security named in the certificate may not be financially capable of meeting his obligations imposed by this Convention, may at any time request consultation with the State which has issued the certificate (11).

Each Contracting State shall designate the authority competent to make or receive any communication relating to the compulsory insurance or any other financial security (12).

[Contracting States may accept certificates issued by the competent authorities, or by bodies recognized by the competent authorities, of non-Contracting States for the purposes of this Convention.] (13)

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(11) Some governmental representatives feared that the language of the provision would oblige a Contracting State to accept a certificate issued in another Contracting State regarding carriers from, or insurance taken out in, non-Contracting States, a principle which they were reluctant to accept.

(12) Provision will have to be made in the final clauses regarding the notification of the competent authorities of each State to the other Contracting States.

(13) This provision was introduced into the draft at such a late stage of the committee's deliberations that some governmental representatives, while not necessarily being opposed to it, considered that consultations with their national authorities would be necessary. It has therefore been placed in square brackets.
8. — Insurance or other financial security shall not satisfy the requirements of this Convention if it can cease, for reasons other than the expiry of the period of validity of the insurance or security specified in the certificate, before [three months] have elapsed from the date on which notice of its termination is given to the authority referred to in paragraph 2 of this article, unless the certificate has been surrendered to those authorities or a new certificate has been issued within the said period. The foregoing provisions shall similarly apply to any modification which results in the insurance or security no longer satisfying the requirements of this Convention.

Article 15

Direct action

1. — Any claim for compensation under Articles 5 and 6 may be brought directly against the insurer or other person providing financial security for the carrier’s liability.

2. — In the case referred to in paragraph 1 of this article the defendant may avail himself of:

   (a) the limit of liability under Article 9 applicable to the person for whose liability the financial security is provided, irrespective of whether such person be entitled to limit his liability, and

   (b) the defences (other than the bankruptcy or winding up of the person for whose liability financial security is provided) which that person would have been entitled to invoke.

The defendant shall not avail himself of any other defence which he might have been entitled to invoke in proceedings brought by the person for whose liability he has provided financial security against him nor may he dispute any fact indicated in the certificate issued by him.

3. — The defendant shall in any event have the right to require that the person for whose liability he has provided the financial security be joined in the proceedings.

[Article 16

Dispensation from obligation to maintain insurance or other financial security

1. — With respect to carriage by inland navigation vessel and by road: where the carrier is a Contracting State or any constituent part of such State and the carriage is performed for non-commercial governmental purposes, that State may provide that the carrier shall be dispensed from the obligation to cover his liability by insurance or other financial security.
2. — If, according to paragraph 1 of this article, insurance or other financial security is not maintained in respect of a vehicle, the provisions of this Convention relating to compulsory insurance shall not apply to such vehicle. However, a certificate issued by the competent authorities stating that the carrier is a Contracting State or a constituent part of such State and that the carrier’s liability is covered within the limits prescribed by this Convention shall be produced for inspection on demand of the authorities referred to in Article 14, paragraph 4.

3. — The certificate referred to in paragraph 2 of this article shall be in conformity with the model prescribed by this Convention.

4. — With respect to carriage by rail: where the carrier is a Contracting State or any constituent part of such a State, or where he is a body fully owned or controlled by a Contracting State, that State may provide that the carrier shall be dispensed from the obligation to cover his liability by insurance or other financial security.] (14)

**Article 17**

*Implementation of compulsory insurance*

A Contracting State shall take the appropriate legislative measures to ensure that the provisions of this Convention relating to compulsory insurance have been complied with.

**CLAIMS AND ACTIONS**

**Article 18**

Rights of compensation under this Convention shall be extinguished unless an action is brought within three years from the date at which the person suffering the damage knew or ought reasonably to have known of the damage and of the identity of the carrier. However, in no case shall an action be brought after [six] [ten] years from the date of the incident which caused the damage. Where this incident consists of a series of occurrences, the [six] [ten] years’ period shall run from the date of the last of such occurrences.

(14) The text of this article has been placed in square brackets in view of certain differences of opinion among governmental representatives on the question, which the committee considered to be one essentially of legislative policy given the implications for competition not only between but also within the different modes of transport.
Article 19

1. — Actions for compensation under any provision of this Convention may only be brought in the courts of any Contracting State where the damage was sustained as a result of the incident or in the courts of the Contracting State where the incident occurred. Reasonable notice of any such action shall be given to the defendant.

2. — However, where the carrier and all the victims have their habitual residence in the territory of the same Contracting State, actions for compensation may be brought before a court of that State.

If the ship or road vehicle involved in the incident is subject to registration, the State of registration of the ship or road vehicle shall be deemed to be that of the habitual residence of the carrier.

3. — Each Contracting State shall ensure that its courts possess the necessary jurisdiction to entertain such actions for compensation.

4. — After a fund has been constituted, the courts of the State in which the fund is constituted shall be exclusively competent to determine all matters relating to the apportionment and distribution of the fund.

Article 20

1. — Any judgment given by a court with jurisdiction in accordance with Article 19 which is enforceable in the State of origin where it is no longer subject to ordinary forms of review, shall be recognized in any Contracting State, except:

   (a) where the judgment was obtained by fraud; or

   (b) where the defendant was not given reasonable notice and a fair opportunity to present his case; or

   (c) where the judgment is irreconcilable with an earlier judgment given in the State where the recognition is sought, or given in another Contracting State with jurisdiction in accordance with Article 19 and already recognized in the State where the recognition is sought, involving the same cause of action and between the same parties.

2. — A judgment recognized under paragraph 1 of this article shall be enforceable in each Contracting State as soon as the formalities required in that State have been complied with. The formalities shall not permit the merits of the case to be re-opened.

3. — This Convention shall not restrict the application of an international instrument in force between the State of origin and the State addressed or other law of the State addressed for the purpose of obtaining recognition or enforcement of a decision or settlement.
FINAL CLAUSES (15)

RESERVATIONS

Article A

A Contracting State may at the time of ratification, acceptance, approval or accession, or at any time thereafter, declare:

(a) that in respect of claims for loss of life or personal injury, higher limits of liability than those specified in Article 9 or no limit of liability shall be applicable to damage arising out of an incident occurring in its territory. Such a declaration shall however in no way oblige the carrier to cover his liability by insurance or other financial security to amounts higher than those referred to in Article 13, paragraph 2 (16);

(b) that it reserves the right to apply its ordinary law in place of the provisions of Article 5, paragraph 5, in so far as such law provides that compensation for loss of life or personal injury may be reduced or disallowed only in cases of intentional conduct or gross negligence by the injured person or the person entitled to claim compensation;

(c) that it will not apply the provisions of Article 14 to carriage of dangerous goods in its territory in respect of which an international scheme is in force providing for mutual recognition of insurance contracts covering the liability of the carrier under this Convention.

Article B

The depositary shall notify all signatory and Contracting States of any declaration made in accordance with Article A.

AMENDMENT OF LIMITATION AMOUNTS

Article C (17)

1. — Upon the request of at least [one-quarter] of the Contracting States

(15) The final clauses of the Convention will of course be framed in such a way as to conform to the practice of the organisation within which it will be adopted in its final form. This is the case in particular in regard to provisions such as Article B.

(16) Certain delegates considered that the provision should be extended to cover damage other than loss of life or personal injury.

(17) Text based on Article 15 of the 1984 Protocol to amend the International Convention on Civil Liability for Oil Pollution Damage, 1969.
any proposal to amend the limits of liability laid down in Article 9 shall be circulated by [the depositary] to all Contracting States.

2. — Any amendment proposed and circulated as above shall be submitted to a Committee (18) composed of a representative of each Contracting State, for consideration at a date at least [six months] after the date of its circulation.

3. — Amendments shall be adopted by a [two thirds] majority of the Contracting States present and voting in the Committee on condition that at least one-half of the Contracting States shall be present at the time of voting.

4. — When acting on a proposal to amend the limits, the Committee shall take into account the experience of incidents and in particular the amount of damage resulting therefrom, changes in the monetary values and the effect of the proposed amendment on the cost of insurance.

5. — (a) No amendment of the limits of liability under this article may be considered less than [five] years from the date on which this Convention was opened for signature nor less than [five] years from the date of entry into force of a previous amendment under this article. No amendment under this article shall be considered before this Convention has entered into force.

(b) No limit may be increased so as to exceed an amount which corresponds to the limit laid down in this Convention increased by [six] per cent per year calculated on a compound basis from the date on which this Convention was opened for signature.

(c) No limit may be increased so as to exceed an amount which corresponds to the limit laid down in this Convention multiplied by [three].

6. — Any amendment adopted in accordance with paragraph 3 of this article shall be notified by the depositary to all Contracting States. The amendment shall be deemed to have been accepted at the end of a period of [eighteen months] after the date of notification, unless within that period not less than [one-quarter] of the States that were Contracting States at the time of the adoption of the amendment by the Committee have communicated to the depositary that they do not accept the amendment in which case the amendment is rejected and shall have no effect.

7. — An amendment deemed to have been accepted in accordance with paragraph 6 of this article shall enter into force [eighteen months] after its acceptance.

8. — All Contracting States shall be bound by the amendment, unless they denounce this Convention in accordance with Article . . ., paragraph . . . at least [six months] before the amendment enters into force. Such denunciation shall take effect when the amendment enters into force.

(18) Further details concerning the convening of the Committee may be developed once the depositary of the future Convention has been designated.
9. — When an amendment has been adopted by the Committee but the [eighteen month] period for its acceptance has not yet expired, a State which becomes a Contracting State during that period shall be bound by the amendment if it enters into force. A State which becomes a Contracting State after that period shall be bound by an amendment which has been accepted in accordance with paragraph 6 of this article. In the cases referred to in this paragraph a State becomes bound by an amendment when that amendment enters into force, or when this Convention enters into force for that State if later.

AMENDMENT OF THE LIST OF DANGEROUS SUBSTANCES

Article D (19)

1. — The list referred to in Article 1, paragraph 9 shall be maintained by[the depository].

2. — Any amendment to the list proposed by a Contracting State shall be submitted to the depository and circulated by it to all Contracting States at least [three months] prior to its consideration by a Committee (20) composed of a representative of each Contracting State.

3. — The depository shall convene a meeting of the Committee to consider the amendment not later than [six months] after it has circulated the amendment in accordance with paragraph 2 of this article.

4. — Amendments shall be adopted by a [two-thirds] majority of the Contracting States present and voting in the Committee on condition that at least one-half of the Contracting States shall be present at the time of voting.

5. — Any amendment adopted in accordance with paragraph 4 of this article shall be notified by the depository to all Contracting States. The amendment shall be deemed to have been accepted at the end of a period of [eighteen months] after the date of notification, unless within that period not less than [one-quarter] of the States that were Contracting States at the time of the adoption of the amendment by the Committee have communicated to the depository that they do not accept the amendment in which case the amendment is rejected and shall have no effect.

(19) The text is based on Article Y of the draft HNS Convention and on the assumption that the list to be annexed to the future Convention will not correspond in every detail to any existing list, amendment of which might automatically entail amendment of the list annexed to the Convention.

(20) See note (18).
6. — An amendment deemed to have been accepted in accordance with paragraph 5 of this article shall enter into force [eighteen months] after its acceptance for all Contracting States [], with the exception of those which before that date have made a declaration of non-acceptance of the said amendment.

7. — A Contracting State which has accepted an amendment shall, after it has entered into force, apply only the amended list except in relation to damage sustained and to preventive measures to prevent or minimise such damage taken in the territory of a State which has not accepted the amendment. A Contracting State which has not accepted an amendment is not to be considered a Contracting State in respect of any dangerous substances which by such an amendment have been included in the list[]. (21)

8. — A State acceding to this Convention shall be bound by any amendment which has been accepted in accordance with paragraph 5 of this article. When an amendment has been adopted by the Committee but has not been accepted in accordance with that paragraph, a State acceding to this Convention shall be deemed to have accepted such amendment, unless that State declares upon deposit of its instrument of accession that it does not accept it.

(21) The effect of deleting the last two lines of paragraph 6 and the whole of paragraph 7 would be to avoid differing lists of dangerous substances being in force in respect of different Contracting States at the same time. Other amendments to Article D might however be necessary to ensure a degree of parallelism with the system provided for in Article C, in particular paragraph 8 thereof.
APPENDIX A

PROPOSAL BY THE NETHERLANDS DELEGATION
IN RELATION TO THE LIST OF SUBSTANCES TO BE SPECIFIED
IN THE ANNEX TO THE DRAFT CONVENTION IN
ACCORDANCE WITH ARTICLE 1, PARAGRAPH 9

1. — In this paper due account has been given to the considerations of the informal working group of technical and legal experts which met in Rome in March 1984. During that meeting it was agreed, without prejudice to any decision regarding future work, to proceed to an examination of the various classes of the ADR (see report of the meeting: Study LV – Doc. 49, paragraph 10). As a consequence of this decision the classification of the ADR has also been chosen as a starting point for this paper. The Annex hereto includes a list of the classes and items of ADR and gives an indication of which classes and items might be included or excluded. It is hoped that this paper may contribute to further discussions on the question of the substances or categories of substances to be included in the list to be annexed to the future Convention.

2. — The revised ADR, in particular the amendments to Annexes A and B of the Agreement and the classes 3, 6.1 and 8, entered into force on 1 May 1985. The list given in the Annex to this paper is based on marginal number 10.011 (old 10.100). This marginal number specifies the limited quantities of dangerous substances in packages which may be carried in one transport unit without application of certain provisions of Annex B. In other words, quantities of dangerous substances below the given limit values are considered as not capable of causing considerable damage. These limits are well known to shippers of dangerous goods for road transport. This facilitates administration and controlability.

The list contains all dangerous substances allowed for transport. Although the present version of the draft articles does not cover the period after discharge, empty but uncleaned roadtank vehicles, demountable tanks and tankcontainers have been included provisionally, since they are deemed under ADR as still containing a considerable quantity of hazardous substances; it is proposed to exclude empty packagings from the scope of the Convention.
3. — The list in the Annex to this paper has been based on the agreement relating to road transport. For practical reasons the agreement on rail transport (RID) does not contain such a list. However, the list is not in conflict with RID.

The regulation of the transport of dangerous goods on inland waterways will be subject to a total revision. After this revision ADN(R) will be harmonised with ADR and RID; the classification and item systems will be identical. The annex to the existing agreement already contains a list similar to that included in the Annex to this paper, although the quantities mentioned are different.

4. — The description of the headings of the list in the Annex is as follows:

   first column : class number and division
   second column : item number
   third column : the minimum quantities in kilograms for the purposes of compulsory insurance or financial security
   fourth column : class and items to be excluded from the scope of the Convention.

5. — In respect of the report of the working group it should be noted that class divisions 4.2 and 4.3 are included in the list. After reconsideration the inclusion of the divisions was deemed desirable for reasons of consistency. Class division 6.2 has not been included since this division does not represent a direct, acute danger but merely a nuisance.
ANNEX

LIST OF SUBSTANCES FOR CONSIDERATION TO BE INCLUDED IN THE CONVENTION

<table>
<thead>
<tr>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
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<td>X</td>
</tr>
<tr>
<td></td>
<td>15</td>
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</tr>
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<td>2(b), 4</td>
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<tr>
<td></td>
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<td>20</td>
<td></td>
</tr>
<tr>
<td>1c</td>
<td>1(a)</td>
<td></td>
<td>X</td>
</tr>
<tr>
<td></td>
<td>8</td>
<td>100</td>
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<td></td>
<td>other articles</td>
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<td></td>
</tr>
<tr>
<td>2</td>
<td>Cyanogen chloride of 3 (ct)</td>
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</tr>
<tr>
<td></td>
<td>Phosgene of 3 (at), fluorine of 1 (at)</td>
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</tr>
<tr>
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<td>1(a), 1(b), 2(a) and 2(b)</td>
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<td>other substances</td>
<td>533</td>
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<tr>
<td></td>
<td>empty packagings under (a) and (b) (*)</td>
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<td>3</td>
<td>12, 13, 11(a) and 14(a) to 26(a)</td>
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<td></td>
<td>11(b) and 14(b) to 26(b)</td>
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</tr>
<tr>
<td></td>
<td>1 to 4, 5(a) and 6</td>
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</tr>
<tr>
<td></td>
<td>52, 34</td>
<td>1000</td>
<td></td>
</tr>
<tr>
<td></td>
<td>other substances</td>
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</tr>
<tr>
<td></td>
<td>41 (*)</td>
<td>X</td>
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</tr>
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<td>4.1</td>
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<td></td>
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</tr>
<tr>
<td></td>
<td>2(a), 11(b)</td>
<td>333</td>
<td></td>
</tr>
<tr>
<td></td>
<td>other substances</td>
<td>50</td>
<td></td>
</tr>
<tr>
<td>4.2</td>
<td>1 to 4</td>
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</tr>
<tr>
<td></td>
<td>5 to 13</td>
<td>333</td>
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</tr>
<tr>
<td></td>
<td>14 and 15 (*)</td>
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<td>4.3</td>
<td>Calcium carbide of 2(a), 2(d)</td>
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<td>other substances but 5</td>
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<td></td>
<td>5 (*)</td>
<td>X</td>
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</tr>
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<td>2</td>
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<td></td>
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<td></td>
<td>1, 3, 10</td>
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<td>other substances but 11</td>
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<tr>
<td></td>
<td>11 (*)</td>
<td>X</td>
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<td>1 to 22, 30, 31, 40</td>
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<td></td>
<td>99 (*)</td>
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<td></td>
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<td></td>
<td>other substances</td>
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</tr>
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<td></td>
<td>91 (*)</td>
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<tr>
<td>6.2</td>
<td></td>
<td></td>
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<tr>
<td>7</td>
<td>all entries, except those covered by the Conventions of Paris and Vienna</td>
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<td>8</td>
<td>Sodium sulfide of 45(b)</td>
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<td>71 (*)</td>
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<td>1(a), 2(a), 6, 8(b), 21(a), 22(b), 24</td>
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<td>25, 26(a), 36(a), 37(a), 44(a), 53(b)</td>
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<tr>
<td></td>
<td>21(b), 26(b), 33(b), 36(b), 37(b), 44(b)</td>
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<td></td>
<td>52(c), 53(c) and other substances under (a) and (b)</td>
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</tr>
<tr>
<td></td>
<td>other substances</td>
<td>500</td>
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</tr>
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</table>

(*) empty roadtank vehicles, empty demountable tanks and empty tankcontainers to be included only if uncleaned

Note: For classes other than 3, 6.1 and 8, the letters accompanying the item numbers refer to subdivisions of the items concerned.

In classes 3, 6.1 and 8 the letters (a) and (b) refer to packaging requirements according to levels of hazard (see report of the working group, paragraph 14).

An “O” in column 3 indicates that compulsory insurance is required for the carriage of any quantity of the substances concerned.
APPENDIX B

PROPOSAL BY THE DELEGATION OF THE FEDERAL REPUBLIC OF GERMANY IN RELATION TO THE LIST OF SUBSTANCES TO BE SPECIFIED IN THE ANNEX TO THE DRAFT CONVENTION IN ACCORDANCE WITH ARTICLE 1, PARAGRAPH 9 (1)

The list of substances to which the future Convention is to apply should be drawn up on the basis of the Recommendations prepared by the United Nations Committee of Experts on the Transport of Dangerous Goods (ST/SG/AC.10/1/Rev. 4):

1. — All dangerous goods of packing group I as listed in Chapter 2 of the UN Recommendations (2).

2. — All dangerous goods of packing group II as listed in Chapter 2 of the UN Recommendations unless such goods are carried in quantities below [3000] [450] litres.

(1) For the general philosophy underlying this proposal see paragraph 56 of the Explanatory Report on the draft Convention.
(2) The question of whether the carriage of certain small quantities of substances should be exempt from liability or financial security needs further consideration.
APPENDIX C

REPORT OF THE WORKING GROUP ON THE LIST OF SUBSTANCES TO BE ANNEXED TO THE DRAFT CONVENTION ON CIVIL LIABILITY FOR DAMAGE CAUSED DURING CARRIAGE OF DANGEROUS GOODS BY ROAD, RAIL AND INLAND NAVIGATION VESSELS HELD DURING THE SEVENTH SESSION OF THE COMMITTEE

In the course of the seventh session of the Unidroit committee of governmental experts two documents relating to the list of substances were tabled, i.e. Study LV — Doc. 55 prepared by the Netherlands and Study LV — Doc. 70 submitted by the Federal Republic of Germany. Since these two proposals were based on different regulations and recommendations respectively, a small working group was asked to indicate the main differences between the two sets of provisions.

The working group did not find it necessary to prepare an exhaustive comparison of the differences and similarities between the U.N. Recommendations and the European inland transport regulations. Some of the essentials are however to be found in TABLE I.

The proposals by the Netherlands and by the Federal Republic of Germany differ not only as to the “legal” basis which has been chosen, but also as to the number of substances involved. The differences between the two proposals could of course be shown by “translating” the class and packing group from the U.N. Recommendations or the class and item numbers from RID/ADR into the names of the chemicals involved. In both cases this would result in very long lists of chemical names. It was open to doubt whether such an exercise would really assist the committee in gaining an impression of the main differences between the two proposed lists.

Rather than entering into detail, the working group believed that a survey in tabular form would be more helpful in permitting the committee to obtain an overall impression of the essential differences between the two proposals (see TABLE II).

It should be noted that the Netherlands proposal is based on an ADR marginal which appears neither in RID nor in ADN(R). This does not however imply that the Netherlands proposal is in conflict with RID or ADN(R) respectively.
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<thead>
<tr>
<th>Nature</th>
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<td>Europe 34 countries RID</td>
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<td></td>
<td></td>
<td>19 countries ADR</td>
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<tr>
<td></td>
<td></td>
<td>6 countries ADN(R)</td>
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<td>Modes of transport</td>
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<td>Rail/road/inland waterway</td>
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<td>Technical scope</td>
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<td>in packaged form</td>
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<td>Conditions of transport</td>
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<tr>
<td>Division in classes</td>
<td>9 classes + 5 division of classes</td>
<td>As in U.N.</td>
</tr>
<tr>
<td>Subdivision in</td>
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<td>Only substances of the</td>
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<td>packaging groups</td>
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<tr>
<td></td>
<td>been allocated</td>
<td>liquids, toxics</td>
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<tr>
<td></td>
<td>packing groups</td>
<td>and corrosives have</td>
</tr>
<tr>
<td></td>
<td></td>
<td>allocated packing groups</td>
</tr>
<tr>
<td>Period of updating</td>
<td>The U.N. Recommendations are updated every two years by the Committee of Experts on the Transport of Dangerous Goods</td>
<td>It is intended to revise these regulations every two years, thus incorporating the latest U.N. Recommendations with a two-year time gap</td>
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## TABLE II

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<th>Basis</th>
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<td></td>
<td>U.N. Recommendations</td>
<td>RID/ADR</td>
</tr>
<tr>
<td>Classes and divisions concerned</td>
<td>All</td>
<td>All</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Substances of packing groups</td>
<td>All</td>
<td>All (2)</td>
</tr>
<tr>
<td>I</td>
<td>All (1)</td>
<td>All (2)</td>
</tr>
<tr>
<td>II</td>
<td>Exempted</td>
<td>All (2) (3)</td>
</tr>
<tr>
<td>III</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Substances for which no packing group has been assigned</td>
<td>Exempted</td>
<td>All (2)</td>
</tr>
<tr>
<td>Empty, uncleaned road tankers, demountable tanks</td>
<td>Exempted</td>
<td>All</td>
</tr>
</tbody>
</table>

(1) Quantities below [3000] [450] litres are exempted.

(2) Quantities below 5, 50, 100, 333, 1000 kg. (according to the degree of danger) have been exempted for the purpose of the compulsory insurance provisions. It has also been proposed to exempt a few substances with a very low degree of danger such as hay, straw and coal.

(3) Since the upper limit for flammability differs in the U.N. Recommendations and RID/ADR/ADN(R), the number of substances covered by class 5 packing group III is considerably larger in the European inland transport regulations than in the U.N. Recommendations. The upper flash-point for the U.N. is 60.5°C while for RID/ADR/ADN(R) it is 100°C.
APPENDIX II

ALTERNATIVE DRAFT SUBMITTED BY THE DELEGATION OF SWITZERLAND RELATING TO THE LIABILITY REGIME AND TO THE COMPULSORY INSURANCE PROVISIONS (1)

DEFINITIONS

Article 1

7bis “Shipper” means the person on whose behalf or by whom the dangerous goods are handed over to the carrier.

LIABILITY OF THE SHIPPER AND THE CARRIER

Article 5

1. — The shipper and the carrier of dangerous goods shall be jointly and severally liable for damage caused by those goods during carriage (within the meaning of Article 2, paragraph 2).

2. — The shipper and the carrier shall be exonerated from liability if they prove that the damage was [mainly] caused by:

   (a) an event of an exceptional and irresistible character such as an act of war, hostilities, civil war, insurrection, an act of terrorism or a natural catastrophe;

   [(b) the wrongful act or neglect, or act or omission of a third party, unless such wrongful act or neglect, or act or omission is negligible in comparison with the extent of the risk inherent in the dangerous goods carried;]

   [(c) the fact that the consignor, or any other person, has failed to meet his obligation to inform them of the dangerous nature of the goods and they neither knew nor ought to have known of their nature.]

3. — If the shipper and the carrier prove that the damage was caused mainly or in part by the wrongful act or neglect, or act or omission of the victim or of a person to whom they are liable, they may be exonerated wholly or partially from their liability to that person, unless such wrongful act or neglect, or act or omission is negligible in comparison with the extent of the risk inherent in the dangerous goods carried.

(1) See paragraph 33, note (20) of the Explanatory Report.
4. — In the internal relations between the shipper and the carrier, [liability for] the damage shall be equally apportioned unless special circumstances, in particular the different risks inherent in the goods carried or in the modes of transport employed, as well as the wrongful act or neglect of one or the other, of that of his agents or servants, justifies another method of apportionment.

5. — Whenever damage has resulted from an incident involving two or more vehicles each of which is carrying dangerous goods, all the shippers and carriers shall be jointly and severally liable for the whole of the damage.

6. — Paragraph 4 of this article shall apply by analogy to the internal relations between these different persons.

7. — Whenever persons other than the shipper, the carrier and their agents or servants have contributed by their wrongful act or neglect, or act or omission to the creation or the aggravation of the damage caused by the dangerous goods during carriage or during operations of loading or unloading, such persons shall likewise be held jointly and severally liable to the person who has suffered damage.

8. — In the internal relations between on the one hand the shipper and the carrier and, on the other, persons whose liability is not founded on this Convention, [liability for] the damage shall be apportioned with regard to all the circumstances.

9. — The shipper and the carrier shall have a right of recourse only against those of their agents and servants who have contributed to the creation or aggravation of the damage either intentionally or by gross negligence. The same restrictions apply to recourse against persons who have taken part in salvage operations or who have taken preventive measures.

10. — No claim for compensation for damage shall be made against the shipper or the carrier in respect of damage caused by dangerous goods during carriage (within the meaning of Article 2), otherwise than in accordance with this Convention.

11. — No claim for compensation for such damage under this Convention or otherwise, may be made against:

   (a) the servants or agents of the shipper or of the carrier,

   (b) any person who has taken part in salvage operations or who has taken preventive measures.

12. — This Convention shall not apply to the extent that its provisions are incompatible with those of the applicable national law relating to workmen’s compensation or any other social security schemes.
COMPULSORY INSURANCE

Article 13

1. – The carrier’s and shipper’s liability shall be covered by insurance or other financial security, such as the guarantee of a bank, if the dangerous goods are carried in the territory of a Contracting State.

2. – The insurance or financial security shall cover the civil liability of the shipper and of the carrier as established under this Convention.

Article 13bis

1. – The insurance or financial security shall cover the compensation payable to victims up to amounts not less than the following:

(a) in respect of loss of life or personal injury:
   for one victim ......... units of account,
   for each incident ......... units of account;

(b) in respect of other damage:
   for each incident ......... units of account.

2. – Any sums provided by insurance or by other financial security maintained in accordance with paragraph 1 of this article shall be available only for the satisfaction of claims under this Convention.

Article 14

(See the basic text)

Article 15

1. – Within the limits of the cover provided by the insurance contract or by the security, any claim for compensation based on this Convention may be brought directly against the insurer or the [other] persons providing security.

2. – With respect to the victim, the defendant may avail himself only of those defences which the person whose liability he covers would himself have been entitled to invoke [, except those based on the bankruptcy of, or winding up proceedings relating to, that person].

3. – The defendant shall in any event have the right to require that the person for whose liability he has provided the financial security be joined in the proceedings.
Article 13bis

1. — Subject to the provisions of paragraph 2 of Article 13bis the fund constituting the cover provided by the insurance contract or by the security shall be distributed among the claimants in proportion to their established claims.

2. — A judge seized of a claim for compensation based on this Convention shall, by an appropriate publication procedure, invite other victims to bring their claims before him; he shall allow them a reasonable time to do so and shall advise them that claims brought within such time shall be the first to be settled.

3. — Any insurer or [other] persons providing security who have in good faith made payment to a victim of a sum greater than that to which he was entitled because they were unaware of the existence of other claims, shall be freed from their obligations in respect of the other victims up to the amount paid.

Article 13ter

1. — Any insurer or [other] persons providing security shall have a right of recourse against the shipper and the carrier to the extent that they are authorised to refuse or to reduce the benefits in accordance with the contract or the applicable national law.

2. — The right of recourse of the insurer or of [other] persons providing security against any liable person other than the shipper and the carrier whose liability they cover, shall be determined by the rules governing the apportionment of liability in internal relations in the event of several persons being liable (Article 5, paragraphs 4 and 8). However, recourse against the servants or agents of the shipper and of the carrier is subject to the condition that they intentionally contributed to the creation of, or aggravated, the damage.

3. — Any recourse by the insurer or [other] persons providing the security is moreover subject to the condition that it causes no prejudice to a victim who is not completely covered by the benefits under the insurance or the security.

Article 16

(See the basic text)

Article 17

(See the basic text)
Article A

A Contracting State may at the time of ratification, acceptance, approval or accession, or at any time thereafter, declare:

[(a) that it will fix the minimum limits of the insurance cover or of the security at a higher level than that provided for in Article 13bis of this Convention;]

(b) (See the basic text);

(c) (See the basic text).
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OF UNIFORM RULES RELATING TO LIABILITY AND COMPENSATION
FOR DAMAGE CAUSED DURING THE CARRIAGE OVER LAND OF
HAZARDOUS SUBSTANCES

COMITE D’EXPERTS GOUVERNEMENTAUX CHARGE D’ELABORER
DES REGLES UNIFORMES SUR LA RESPONSABILITE ET
L’INDEMNISATION POUR LES DOMMAGES CAUSES AU COURS
DU TRANSPORT TERRESTRE DE SUBSTANCES DANGEREUSES

The Committee held seven sessions in Rome

1. From 16 to 19 March 1981
2. From 1 to 4 February 1982
3. From 18 to 22 October 1982
4. From 21 to 25 March 1983
5. From 3 to 7 October 1983
6. From 22 to 26 October 1984
7. From 21 to 29 May 1986

Le Comité a tenu sept sessions à Rome

1. Du 16 au 19 mars 1981
2. Du 1er au 4 février 1982
3. Du 18 au 22 octobre 1982
5. Du 3 au 7 octobre 1983
6. Du 22 au 26 octobre 1984
7. Du 21 au 29 mai 1986

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