

UNITED NATIONS ACTIVITIES

Basel Convention

No Agreement on Draft Protocol

At their meeting in April, the Working Group of legal and technical experts to the *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, failed yet again to reach agreement after six years of negotiations on the protocol so that it could be presented for approval to the December 1999 meeting of the Fifth Conference of the Parties to the Convention. The April meeting was the last scheduled meeting of the experts before COP-5 in Basel, which will mark the tenth anniversary of the adoption of the Convention.

The aim of the protocol is to establish a means for assigning liability for incidents of chemical and other hazardous waste spills, whether accidental or otherwise, which involve cross-border shipments of waste. Parties are mandated under Article 12 of the Basel Convention to "cooperate with a view to adopting, as soon as practicable, a protocol setting out appropriate rules and procedures in the field of liability and compensation," for damage arising from movement of waste covered under the Convention.

Agreement has been secured in a number of key provisions in the draft protocol, including the type of damage to be compensated when a spill occurs and the time period under which claims for compensation can be made.

Negotiators are also expected to agree that liability for waste shipments should extend from the point at which waste is loaded for transport until disposal is completed at the final destination point and that liability shall be covered by insurance, bonds, or other financial guarantees.

Differences remain, however, on how to assign strict liability for waste shipments, whether to set a financial cap on liability claims, and whether to establish an international trust fund to cover clean-up costs and compensation for waste spills where the liable party is unknown or unable to cover the costs.

Other difficulties still to be overcome include whether the protocol should cover waste shipments to countries that are not party to the protocol and whether the protocol should apply to shipments involving waste placed on national lists as well as waste specifically listed under the Basel Convention.

The United States (who is not a party to the Basel Convention, although it has been taking an active part in the experts meetings as an observer), Australia, Canada and New Zealand, have been accused by environmental groups of seeking to limit severely the protocol's scope of application and of resisting calls from developing countries for the establishment of the international trust

fund. They also accused these countries of seeking an exemption for existing international waste trade agreements such as the Organisation for Economic Cooperation and Development's (OECD) "red-amber-green" waste accord, which could undermine the effectiveness of the protocol.

Iwona Rummel-Bulska, Executive Secretary for the Basel Convention, said a special meeting of the legal experts is likely to be organised in September 1999 to complete the drafting work.

Representatives from environmental organisations have expressed their approval that the draft text includes a number of positive elements such as provisions on strict liability, as opposed to fault-based liability alone, and the obligation of liable parties to cover environmental remediation costs. However, they see the fact that the text fails to address "after-care" issues such as the proper maintenance of waste disposal sites and fails to ensure that liability for shipments will be assigned to the actual generators of waste as a major setback. They argue that generators should always be liable, as they are the central players and should have cradle-to-grave responsibility for their waste.

Representatives from industry also expressed concerns about the draft text. One said that his industry feared a repeat of the Superfund experience in the United States and getting caught up in an international liability scheme for their waste, which is essentially non-hazardous. An alternative put forward for assigning liability was "operational control liability," where there is more incentive to take due care during shipment.

Criticism from the side of the Insurers concerned the inclusion of both strict liability and fault-based liability provisions in the draft text, as well as the long-term period allowed for claiming compensation from waste spills. The inclusion of both strict and fault-based liability means that the number of potentially liable parties would increase; and it was stated that if insurers have to cover the liability of a whole range of people, their capacity gets used up and the amount of insurance available is much lower.

The text also allows claimants to seek compensation up to 10 years after a spill takes place and up to five years after damage from a spill becomes known to them. The insurance industry claims that this poses a problem in terms of assessing long-term risk, as in other international agreements a claim must be made from the time the damage becomes known. □