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**ECONOMIC COMMISSION FOR EUROPE**

**MEETING OF THE PARTIES TO THE  
CONVENTION ON THE PROTECTION AND USE  
OF TRANSBOUNDARY WATERCOURSES AND  
INTERNATIONAL LAKES**

**CONFERENCE OF THE PARTIES TO THE  
CONVENTION ON THE TRANSBOUNDARY EFFECTS  
OF INDUSTRIAL ACCIDENTS**

**Intergovernmental Working Group on Civil Liability**

Fifth meeting,  
Geneva, 11 (p.m.) – 13 November 2002

Item 4 of the provisional agenda

**DRAFT LEGALLY BINDING INSTRUMENT ON CIVIL LIABILITY FOR  
TRANSBOUNDARY DAMAGE CAUSED BY HAZARDOUS ACTIVITIES, WITHIN  
THE SCOPE OF BOTH CONVENTIONS**

Revised text prepared by the Chairperson and the Rapporteur with the assistance of the  
secretariat on the basis of the outcome of the third meeting

**[DRAFT PROTOCOL ON LIABILITY AND COMPENSATION FOR DAMAGE  
RESULTING FROM THE TRANSBOUNDARY EFFECTS OF INDUSTRIAL  
ACCIDENTS ON TRANSBOUNDARY WATERS]**

The Parties to the Protocol,

Alternative 1

(1a) Having taken into account the relevant provisions of principle 13 of the Rio Declaration on Environment and Development, [according to which States shall develop international and national legal instruments regarding liability and compensation for the victims of pollution and other environmental damage] [according to which States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage. States shall also co-operate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction.]

(1b) Having also taken into account the relevant provisions of principle 16 of the Rio Declaration on Environment and Development [according to which national authorities should endeavour to promote the internalisation of environmental costs and the use of economic instruments, taking in account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment],

Alternative 2

[(1) Taking into account the polluter pays principle as a general principle of international environmental law, accepted also by the Parties to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes and the Convention on the Transboundary Effects of Industrial Accidents,]

(2) Basing themselves upon the conclusions of the World Summit on Sustainable Development (Johannesburg, 2002), in particular the [ . . . ],

(3) Taking note of the Code of Conduct on Accidental Pollution of Transboundary Inland Waters (E/ECE/1225-ECE/ENVWA/16),

(4) [deleted]

(5) Mindful of the obligations under the Convention on the Protection and Use of Transboundary Watercourses and International Lakes and under the Convention on the Transboundary Effects of Industrial Accidents, [in particular, article 7 and article 13 respectively]

[(6) Considering risks imposed on public safety and security, human health, environment, sustainability of water uses - especially those serving drinking, bathing and aquaculture demands - by pollution of transboundary waters, caused by industrial accidents,]

(7) Aware of the risk of damage to human health, property and the environment caused by the transboundary effects of industrial accidents,

(8) Convinced of the need to provide for third-party liability and environmental liability in order to ensure that adequate and prompt compensation is available,

(9) Further taking note of [ . . . ],

(10) Acknowledging the desirability to review the Protocol at a later stage in order to broaden its scope of application as appropriate,

Have agreed as follows:

## Article 1

### Objective

The objective of this Protocol is to provide for a comprehensive regime for civil liability and for adequate and prompt compensation for damage resulting from the transboundary effects of industrial accidents on transboundary waters.

## Article 2

### Definitions

1. The definitions of terms contained in the Conventions apply to this Protocol, unless expressly provided otherwise in this Protocol.
2. For the purposes of the Protocol:
  - (a) «The Conventions» means the Convention on the Protection and Use of Transboundary Watercourses and International Lakes and the Convention on the Transboundary Effects of Industrial Accidents, done at Helsinki on 17 March 1992;
  - (b) «Damage» means:
    - (i) Loss of life or personal injury;
    - (ii) Loss of, or damage to, property other than property held by the person liable in accordance with this Protocol;
    - (iii) Loss of income directly deriving from an economic interest in any use of the transboundary waters, incurred as a result of impairment of the transboundary waters, taking into account savings and costs;
    - (iv) The cost of measures of reinstatement of the impaired transboundary waters, limited to the costs of measures actually taken or to be undertaken; and
    - (v) The cost of response measures, including any loss or damage caused by such measures, to the extent that the damage results from the transboundary effects of an industrial accident on transboundary waters;
    - (vi) [deleted]
  - (b)bis "Hazardous activity" means any activity in which one or more hazardous substances are present or may be present in quantities at or in excess of the threshold quantities listed in Annex I hereto, and which is capable of causing transboundary effects on transboundary waters and their water uses in case of an industrial accident.
  - (c) «Measures of reinstatement» means any reasonable measures aiming to reinstate or restore damaged or destroyed components of transboundary waters to the conditions that would have existed had the industrial accident not occurred, or, where this is not possible, to

introduce, where appropriate, the equivalent of these components into the transboundary waters.<sup>1/</sup>

(d) «Response measures» means any reasonable measures taken by any person, including public authorities, following an industrial accident, to prevent, minimize or mitigate possible loss or damage or to arrange for environmental clean-up. Domestic law may indicate who will be entitled to take such measures;

(e) «Party» means a Contracting Party to this Protocol;

(f) «Protocol» means this Protocol;

(g) «Unit of account» means the Special Drawing Right as defined by the International Monetary Fund.

(h) [deleted]

(i) «Industrial accident» means an event resulting from an uncontrolled development in the course of any activity involving hazardous substances either:

(i) In an installation, including tailing dams, for example during manufacture, use, storage, handling, or disposal; or

(ii) During [transportation via pipelines or] transportation on the site of a hazardous activity.

(j) [ . . . ]

### **Article 3**

#### **Scope of application**

1. The Protocol shall apply to damage due to an industrial accident occurring in a hazardous activity that has caused transboundary effects on transboundary waters.

[2. The Protocol shall apply only to damage as referred to in paragraph 1 suffered in an area under the national jurisdiction of a Party and arising from an industrial accident occurring under the national jurisdiction of another Party.]

### **Article 4**

#### **Strict liability**

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<sup>1/</sup> Several delegations indicated that they reserve their position with regard to the last part of this paragraph.

1. The operator that caused the damage shall be liable for it.
2. No liability in accordance with this article shall attach to the operator, if he or she proves that, despite there being in place appropriate safety measures, the damage was:
  - (a) The result of an act of armed conflict, hostilities, civil war or insurrection;
  - (b) The result of a natural phenomenon of exceptional, inevitable, unforeseeable and irresistible character;
  - (c) Wholly the result of compliance with a compulsory measure of a public authority of the Party where the industrial accident occurred; or
  - (d) Wholly the result of the wrongful intentional conduct of a third party, including the person who suffered the damage.
3. If two or more operators are liable according to this article, the claimant shall have the right to seek full compensation for the damage from any or all of the operators liable. However, the operator who proves that only part of the damage was caused by an accident in the hazardous activity shall be liable for that part of the damage only.

## **Article 5**

### **Fault-based liability**

Without prejudice to article 4, and in accordance with the relevant rules of applicable domestic law including the law on liability of servants and agents, any person shall be liable for damage caused or contributed to by his or her wrongful intentional, reckless or negligent acts or omissions.

## **Article 6**

### **Response measures**

1. Subject to any requirement of applicable domestic law and other relevant provisions of the Conventions, the operator shall take, following an industrial accident, all reasonable response measures.
2. Notwithstanding any other provision in the Protocol, any person other than the operator acting for the sole purpose of taking response measures, provided that this person acted reasonably and in accordance with applicable domestic law, is not thereby subject to liability under the Protocol.

## **Article 7**<sup>2/</sup>

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<sup>2/</sup> At a later stage, this article may be moved to the procedural part of the Protocol.

## **Right of recourse**

1. Any person liable under the Protocol shall be entitled to a right of recourse in accordance with the rules of procedure of the competent court [or arbitral tribunal established under article 13(bis)] against any other person also liable under the Protocol.
2. Nothing in this Protocol shall prejudice any right of recourse to which the person liable might be entitled either as expressly provided for in contractual arrangements or pursuant to the law of the competent court.

## **Article 8**

### **Implementation**

1. The Parties shall adopt any legislative, regulatory and administrative measures that may be necessary to implement the Protocol.
2. In order to promote transparency, the Parties shall inform the secretariat as provided for in article 19 of any such measures taken to implement the Protocol.
3. The provisions of the Protocol and measures adopted under paragraph 1 shall be applied [among the Parties] without discrimination based on nationality, domicile or residence. [The Parties shall ensure that claimants who are nationals of other Parties shall receive no less favourable treatment, including remedies, than claimants who are nationals of the Party where the claim is made.] [The Party where the industrial accident has occurred shall ensure that the claimants, who have suffered damage outside that Party and can avail themselves of remedies under this Protocol, shall receive no less favourable treatment, including remedies, than claimants who have suffered damage in the Party where the industrial accident has occurred.]
- [4. Public authorities of the Parties provide for close cooperation in order to promote fair legal proceedings in case of pollution of transboundary waters caused by industrial accidents.]

## **Article 9**

### **Financial limits**

1. Financial limits for the liability under article 4 are specified in annex II. Such limits shall not include any interests or costs awarded by the competent court.
3. There shall be no financial limit on liability under article 5.

## **Article 10**

### **Time limit of liability**

1. Claims for compensation under the Protocol shall not be admissible unless they are brought within [ten] [twenty] years from the date of the industrial accident.
2. Claims for compensation under the Protocol shall not be admissible unless they are brought within three years from the date the claimant knew or ought reasonably to have known of the damage and of the person liable, provided that the time limits established pursuant to paragraph 1 of this article are not exceeded.
3. Where the industrial accident consists of a series of occurrences having the same origin, time limits established pursuant to this article shall run from the date of the last of such occurrences. Where the industrial accident consists of a continuous occurrence, such time limits shall run from the end of that continuous occurrence.

### **Article 11**<sup>3/</sup>

#### **Financial security**

1. The operator shall establish, and maintain during the period of the time limit of liability, financial security such as insurance, bonds or other financial guarantees covering the liability under article 4 for amounts not less than the limits specified in paragraph 3 of annex II. In addition, Parties may fulfil their obligation under this paragraph with respect to state-owned operators by a declaration of self-insurance. Nothing in this paragraph shall prevent the use of deductibles or co-payments as between the insurer and the insured, but the failure of the insured to pay any deductible or co-payment shall not be a defence against the person who has suffered the damage.
2. Any claim under the Protocol may be asserted directly against any person providing financial security under paragraph 1 of this article. The insurer or the person providing the financial security shall have the right to require the person liable under article 4 to be joined in the proceedings. Insurers and persons providing financial security may invoke the defenses that the person liable under article 4 would be entitled to invoke.

### **[Article 11 bis]**

#### **[Access to information and access to justice accordingly]**<sup>4/</sup>

### **Article 12**

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<sup>3/</sup> Italy expressed its reservation to the entire article. Germany expressed its reservation to paragraph 2 of this article.

<sup>4/</sup> A small working group, with Germany as a lead delegation, will commence work on an appropriate text at the beginning of the fifth meeting of the Working Group.



## **International responsibility of States**

The Protocol shall not affect the rights and obligations of the Parties under the rules of general international law with respect to international responsibility of States.

### **PROCEDURES**

#### **Article 13**<sup>5/</sup>

##### **Competent courts**

1. Claims for compensation under the Protocol may be brought in the courts of a Party only where:
  - (a) The damage was suffered; or
  - (b) The industrial accident occurred; or
  - (c) The defendant has his or her habitual residence or principal place of business.
2. Each Party shall ensure that its courts possess the necessary competence to entertain such claims for compensation.

#### **Article 13bis**

##### **Arbitration**

In the event of a dispute between persons claiming for damage pursuant to this Protocol and persons liable under this Protocol, and where agreed by both or all parties, the dispute may be submitted to final and binding arbitration in accordance with the Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to the Environment and/or Natural Resources.

#### **Article 14**<sup>6/</sup>

##### **Related actions**

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<sup>5/</sup> The European Commission and the delegation of Denmark made a statement to the effect that articles 13, 14 and 17 are placed under general reservation pending confirmation of the competence of the European Commission to negotiate on behalf of the 15 EU Member States.

<sup>6/</sup> See footnote to article 13.

1. Where related actions are brought in the courts of different Parties, any court other than the court first seized may, while the actions are pending at first instance, stay its proceedings.
2. A court may, on the application of one of the parties, decline jurisdiction if the law of that court permits the consolidation of related actions and another court has jurisdiction over both actions.
3. For the purpose of this article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgements resulting from separate proceedings.

## **Article 15**

### **Applicable law**

1. Subject to paragraph 2, all matters of substance or procedure regarding claims before the competent court which are not specifically regulated in the Protocol shall be governed by the law of that court, including any rules of such law relating to conflict of laws.

[2. At the request of the person who has suffered the damage, all matters of substance and procedure regarding claims before the competent court shall be governed by the law of the Party where:

- (a) The damage was suffered; or
- (b) The industrial accident has occurred; or
- (c) The defendant has his or her habitual residence or principal place of business.] <sup>7/</sup>

## **Article 16**

### **Relation between the Protocol and the law of the competent court**

This Protocol is without prejudice to any rights of persons who have suffered damage or to any measures on the protection or reinstatement of the environment that may be provided under applicable domestic law.

## **Article 17** <sup>8/</sup>

### **Mutual recognition and enforcement of judgements and arbitral awards**

1. Any judgement of a court having jurisdiction in accordance with article 13 of the Protocol or of an arbitral award which is enforceable in the State of origin of the judgement and is no longer subject to ordinary forms of review shall be recognized in any Party as soon as the formalities required in that Party have been completed, except:

- (a) Where the judgement or arbitral award was obtained by fraud;

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<sup>7/</sup> On a preliminary basis, a small working group has elaborated two alternative text proposals that were circulated to delegations for consideration.

<sup>8/</sup> See footnote to article 13.

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

(c) Where the judgement or arbitral award is irreconcilable with an earlier judgement or arbitral award validly pronounced in another Party with regard to the same cause of action and the same parties; or

(d) Where the judgement or arbitral award is contrary to the public policy of the Party in which its recognition is sought.

2. A judgement or arbitral award recognized under paragraph 1 of this article shall be enforceable in each Party as soon as the formalities required in that Party have been completed. The formalities shall not permit the merits of the case to be reopened.

3. The provisions of paragraphs 1 and 2 of this article shall not apply between Parties to an agreement or arrangement in force on mutual recognition and enforcement of judgements or arbitral award under which the judgement or arbitral award would be recognizable and enforceable.

#### **[Article 17bis**

#### **Rules concerning conflicts between international liability agreements**

Whenever the provisions of the Protocol and the provision of a bilateral, multilateral or regional agreement apply to liability and compensation for damage resulting from the transboundary effects of industrial accidents on transboundary waters, the Protocol shall not apply provided the other agreement is in force for the Parties concerned and has been opened for signature when the Protocol was opened for signature, even if the agreement was amended afterwards.]

### **FINAL CLAUSES**

#### **Article 18**

#### **Meeting of the Parties**

1. A Meeting of the Parties is hereby established.

2. The first meeting of the Parties shall be convened no later than eighteen months after the date of the entry into force of this Protocol and, where possible, in conjunction with a meeting of the governing body of one of the Conventions. Thereafter, ordinary meetings shall be held at dates to be determined by the Meeting of the Parties to the Protocol and, as appropriate, in conjunction with a meeting of the governing body of one of the Conventions. Extraordinary meetings of the Parties shall be held at such other times as may be deemed necessary by the Meeting of the Parties, or at the written request of any Party, provided that, within six months of such a request being communicated to them by the secretariat, it is supported by at least one third of the Parties.

3. The Parties, at their first meeting, shall adopt by consensus rules of procedure for their meetings and consider any necessary financial provisions.
4. The functions of the Meeting of the Parties shall be:
  - (a) To review the implementation of and the compliance with the Protocol including relevant case law provided by the Parties;
  - (b) To consider and adopt, where necessary, proposals for amendment of the Protocol or any annexes and for any new annexes; and
  - (c) To consider and undertake any additional action that may be required for the purposes of the Protocol.

#### **Article 18bis**

[deleted]

#### **Article 19**

##### **Secretariat**

The Executive Secretary of the Economic Commission for Europe shall carry out the following secretariat functions for this Protocol:

- (a) The convening and preparing of meetings of the Parties;
- (b) The transmission to the Parties of reports and other information received in accordance with the provisions of this Protocol;
- (c) The performance of such other functions as may be determined by the Meeting of the Parties on the basis of available resources.

#### **Article 19bis**

##### **Annexes**

Annexes to this Protocol shall constitute an integral part thereof.

#### **Article 20**

##### **Amendments to the Protocol**

1. Any Party may propose amendments to this Protocol.
2. The text of any proposed amendment to this Protocol shall be submitted in writing to the Executive Secretary of the Economic Commission for Europe, who shall circulate it to all Parties. The Meeting of the Parties shall discuss proposed amendments at its next meeting, provided that such proposals have been circulated to the Parties by the Executive Secretary of the Economic Commission for Europe at least 6 months in advance:
3. For amendments to this Protocol - other than those to annexes I and II, for which the procedure is described in paragraph 4 of this article:
  - (a) Amendments shall be adopted by consensus of the Parties present at the meeting. If all efforts at consensus have been exhausted and no agreement reached, the amendments shall, as a last resort, be adopted by a two-third-majority vote of the Parties present and voting at the meeting. Amendments shall be submitted by the Depository to all Parties for ratification, acceptance or approval;
  - (b) Instruments of ratification, acceptance or approval of amendments shall be deposited with the Depository. Amendments adopted in accordance with this article shall enter into force for Parties that have accepted them on the ninetieth day following the day of receipt by the Depository of the sixteenth instrument of ratification, acceptance or approval;
  - (c) Thereafter, amendments shall enter into force for any other Party on the ninetieth day after that Party deposits its instruments of ratification, acceptance or approval of the amendments.
4. For amendments to annexes I and II:
  - (a) The Parties shall make every effort to reach agreement by consensus. If all efforts at consensus have been exhausted and no agreement reached, the amendments shall, as a last resort, be adopted by a two-third-majority vote of the Parties present and voting at the meeting. If adopted by the Conference of the Parties, the amendments shall be communicated to the Parties and recommended for approval;
  - (b) On the expiry of twelve months from the date of their communication by the Executive Secretary of the Economic Commission for Europe, the amendments to annexes I and II shall become effective for those Parties to this Protocol which have not submitted a notification in accordance with the provisions of paragraph 4 (c) of this article, provided that at least sixteen Parties have not submitted such a notification;

(c) Any Party that is unable to approve an amendment to annexes I and II of this Protocol shall so notify the Executive Secretary of the Economic Commission for Europe in writing within twelve months from the date of the communication of the adoption. The Executive Secretary shall without delay notify all Parties of any such notification received. A Party may at any time substitute an acceptance for its previous notification and the amendment to annexes I and II shall thereupon enter into force for that Party.

(d) [moved to paragraph 5]

5. For the purpose of this article, «Parties present and voting» means Parties present and casting an affirmative or negative vote.

## **Article 21**

### **Right to vote**

1. Except as provided for in paragraph 2 of this article, each Party shall have one vote.
2. Regional economic integration organizations, in matters within their competence, shall exercise their right to vote with a number of votes equal to the number of their member States which are Parties. Such organizations shall not exercise their right to vote if their member States exercise theirs, and vice versa.

## **Article 22**

### **Settlement of disputes**

1. If a dispute arises between two or more Parties about the interpretation or application of this Protocol, they shall seek a solution by negotiation or by any other means of dispute settlement acceptable to the parties to the dispute.
  
2. When signing, ratifying, accepting, approving or acceding to this Protocol, or at any time thereafter, a Party may declare in writing to the Depositary that for a dispute not resolved in accordance with paragraph 1 of this article, it accepts one of the following means of dispute settlement as compulsory in relation to any Party accepting the same obligation:
  - (a) Submission of the dispute to the International Court of Justice;
  - (b) Arbitration in accordance with the procedure set out in annex III hereto.
  
3. If the Parties to the dispute have accepted both means of dispute settlements referred to in paragraph 2 of this article, the dispute may be submitted only to the International Court of Justice, unless the Parties to the dispute agree otherwise.

## **Article 23**

### **Signature**

#### **Alternative 1**

The Protocol shall be open for signature in [ ] from [ ] to [ ] and thereafter at United Nations Headquarters in New York until [ ] by States members of the Economic Commission for Europe, as well as States having consultative status with the Economic Commission for Europe pursuant to paragraph 8 of Economic and Social Council resolution 36 (IV) of 28 March 1947, and by regional economic integration organizations constituted by sovereign States members of the Economic Commission for Europe to which their member States have transferred competence in respect of matters governed by this Protocol, including the competence to enter into treaties in respect of these matters.



## Other Alternatives

The Protocol shall be open for signature in [ ] from [ ] to [ ] and thereafter at United Nations Headquarters in New York until [ ] by States members of the Economic Commission for Europe, as well as States having consultative status with the Economic Commission for Europe pursuant to paragraph 8 of Economic and Social Council resolution 36 (IV) of 28 March 1947, and by regional economic integration organizations constituted by sovereign States members of the Economic Commission for Europe to which their member States have transferred competence in respect of matters governed by this Protocol, including the competence to enter into treaties in respect of these matters, provided that the States and organizations concerned are

[Parties to both Conventions]

[Parties to one of the Conventions]

[Parties or Signatories to both Conventions]

[Parties or Signatories to one of the Conventions].

## **Article 24**

### **Ratification, acceptance, approval and accession**

1. The Protocol shall be subject to ratification, acceptance or approval by the signatory States and regional economic integration organizations referred to in article 23.
2. This Protocol shall be open for accession by the States and organizations referred to in article 23.
- 2bis. Any other State, not referred to in paragraph 2 above, that is Member of the United Nations may accede to the Protocol upon approval by the Meeting of the Parties.]
3. Any organization referred to in article 23 which becomes Party to this Protocol without any of its member States being a Party shall be bound by all the obligations under this Protocol. In the case of such organizations, one or more of whose member States is a Party to this Protocol, the organization and its member States shall decide on their respective responsibilities for the performance of their obligations under this Protocol. In such cases, the organization and the member States shall not be entitled to exercise rights under this Protocol concurrently.
4. In their instruments of ratification, acceptance, approval or accession, the regional economic integration organizations referred to in article 23 shall declare the extent of their competence with respect to the matters governed by this Protocol. These organizations shall also inform the Depositary of any substantial modification to the extent of their competence.

## **Article 25**

### **Entry into force** <sup>9/</sup>

1. This Protocol shall enter into force on the ninetieth day after the date of deposit of the sixteenth instrument of ratification, acceptance, approval or accession.
2. For the purposes of paragraph 1 of this article, any instrument deposited by an organization referred to in article 23 shall not be counted as additional to those deposited by States members of such an organization.
3. For each State or organization referred to in article 23 which ratifies, accepts or approves this Protocol or accedes thereto after the deposit of the sixteenth instrument of ratification, acceptance, approval or accession, this Protocol shall enter into force on the ninetieth day after the date of deposit by such State or organization of its instrument of ratification, acceptance, approval or accession.

## **Article 25bis**

### **Reservations**

No reservation or exception may be made to this Protocol.

## **Article 26**

### **Withdrawal**

1. At any time after three years from the date on which the Protocol has entered into force for a Party, that Party may withdraw from the Protocol by giving written notification to the Depositary.
2. Any such withdrawal shall take effect one year from the date of its receipt by the Depositary, or on such later date as may be specified in the notification.

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<sup>9/</sup> At a later stage, the Working Group will draft a text passage indicating that accidents that occurred after the entry into force of the Protocol fall under the provisions of this Protocol.

**Article 27**

**Depositary**

The Secretary-General of the United Nations shall act as the Depositary of the Protocol.

**Article 28**

**Authentic texts**

The original of this Protocol, of which the English, French and Russian texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF the undersigned, being duly authorized thereto, have signed this Protocol.

DONE in [ ], this [ ].