The 1988 Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention — Explanatory Text

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THE 1988 JOINT PROTOCOL RELATING TO THE APPLICATION OF THE VIENNA CONVENTION AND THE PARIS CONVENTION — EXPLANATORY TEXT

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FOREWORD

by Yukiya Amano
Director General

At the International Conference on the Safety of Transport of Radioactive Material, held in Vienna in July 2003, it was noted that there are a number of liability conventions to which many States are Parties but to which many others are not, and that the provisions of the liability conventions and the relationships between them are not simple to understand. It was suggested, therefore, that an explanatory text for these instruments be prepared to assist in developing a common understanding of the complex legal issues involved and thereby to promote adherence to these instruments.

In view of this suggestion, and in order to foster an effective, global nuclear liability regime, the International Expert Group on Nuclear Liability (INLEX) was established in September 2003. Since its establishment, INLEX has held several meetings, as a result of which it, inter alia, finalized explanatory texts on the nuclear liability instruments adopted under IAEA auspices in 1997, namely, the Protocol to Amend the Vienna Convention on Civil Liability for Nuclear Damage and the Convention on Supplementary Compensation for Nuclear Damage. These explanatory texts have since been published as IAEA International Law Series No. 3.

Thereafter, INLEX also developed and finalized the present explanatory text on the 1988 Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention. This publication complements IAEA International Law Series No. 3 and comprises the explanatory text on the Joint Protocol and the text of the Joint Protocol as adopted by the Conference on the Relationship between the Paris Convention and the Vienna Convention, which met at IAEA Headquarters in Vienna in September 1988 under the joint auspices of the IAEA and the OECD Nuclear Energy Agency. It is hoped that this publication will further increase the awareness of nuclear liability as an important aspect of nuclear law.

ACKNOWLEDGEMENTS

Appreciation is expressed to the members of INLEX and, in particular, to A. Gioia of the Faculty of Law of the University of Modena and Reggio Emilia, Italy, for the valuable work they have done in developing the text.

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1. INTRODUCTION

1.1. THE EXISTENCE OF TWO DISTINCT INTERNATIONAL TREATY REGIMES ON CIVIL LIABILITY FOR NUCLEAR DAMAGE

When the Vienna Convention on Civil Liability for Nuclear Damage (the Vienna Convention) was adopted under the auspices of the International Atomic Energy Agency (IAEA) on 21 May 1963, another international treaty relating to the same subject matter already existed, namely, the Paris Convention on Third Party Liability in the Field of Nuclear Energy (the Paris Convention). The Paris Convention had been adopted on 29 July 1960 under the auspices of the then Organisation for European Economic Co-operation (OEEC), which was later reconstituted as the Organisation for Economic Co-operation and Development (OECD), but it had not yet entered into force at the time when the Vienna Convention was adopted.

Both the Paris Convention and the Vienna Convention purported to create, in the national law of their respective Contracting Parties, a special legal regime for nuclear liability derogating from the otherwise applicable rules governing third party liability. In fact, it was felt at the time that the problems of civil liability for damage caused by incidents at land based nuclear installations, and in the course of transport of nuclear material thereto or therefrom, called for special provisions in national law in order to ensure prompt and adequate compensation for nuclear damage without at the same time exposing the nuclear industry to excessive burdens. In addition, it was felt that the special nature of nuclear hazards, and the possibility that a nuclear incident might cause damage of an extreme magnitude and involve the nationals of more than one country, called for some degree of harmonization of national laws through the adoption of international agreements.[1]

In addition to sharing this fundamental purpose, both the Paris Convention and the Vienna Convention laid down very similar nuclear liability rules based on the same general principles: "absolute" liability, that is, liability without fault; exclusive liability of the operator of the nuclear installation concerned; obligation for the operator to cover his liability by insurance or other financial security; limitation of the amount of the operator's liability and/or limitation of liability cover; limitation of the operator's liability in time; and non-discrimination as regards the victims of a nuclear incident. Moreover, both the Paris Convention and the Vienna Convention laid down identical rules on jurisdiction, designed to establish a single competent forum to deal with all actions for compensation arising thereunder, and provided for the recognition and enforcement of final judgements entered by the competent court.[2]

Despite these very similar rules based on the same basic principles, a number of differences between the Paris Convention and the Vienna Convention remained. To reduce these differences, the Paris Convention was first amended, even before its entry into force, by the Additional Protocol of 28 January 1964; however, after the Paris Convention entered into force (on 1 April 1968), it was further amended by the Additional Protocol of 16 November 1982, which added new differences between the two Conventions. Similarly, when the Protocol to Amend the Vienna Convention on Liability for Nuclear Damage (the Vienna Protocol) was adopted on 12 September 1997, although the need to harmonize the provisions of the Vienna Convention with those of the Paris Convention was taken into account, significant differences were added.[3] The differences between the Paris Convention and the Vienna Protocol will be

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[1] For more details on the origin of the international civil liability regime and, in particular, of the Vienna Convention, see *The 1997 Vienna Convention on Civil Liability for Nuclear Damage and the 1997 Convention on Supplementary Compensation for Nuclear Damage — Explanatory Texts*, IAEA International Law Series No. 3, IAEA, Vienna (2007), Section 1.

[2] For more details on the general principles of nuclear liability as reflected, in particular, in the Vienna Convention, see IAEA International Law Series No. 3, Sections 1 and 2.

[3] For more details on the differences between the original Vienna Convention and the Vienna Convention as amended by the 1997 Vienna Protocol, see IAEA International Law Series No. 3, Section 2. Under Article 18 of the Vienna Protocol, the Vienna Convention as amended by the 1997 Vienna Protocol may be referred to as the 1997 Vienna Convention, as opposed to the 1963 Vienna Convention. Unless otherwise specified (e.g. 1963 Vienna Convention or 1997 Vienna Convention), all references to the Vienna Convention in this explanatory text are intended to refer to both the 1963 Vienna Convention and the 1997 Vienna Convention.

reduced, but not eliminated, once the Paris Convention is further amended by the Protocol of 12 February 2004, which is not yet in force.

The main remaining difference between the Paris Convention and the Vienna Convention (both in its 1963 version and as amended by the 1997 Vienna Protocol) is the 'regional' character of the Paris Convention, which is only open to OECD Member or Associated States (Article 21), versus the potentially global character of the Vienna Convention: the 1963 Vienna Convention is open to all Member States of the United Nations, its specialized agencies or the IAEA (Article XXIV), and the 1997 Vienna Protocol is open to all States (Article 20). There are, in addition, a number of substantive differences between the legal regimes laid down by the existing conventions, in particular, the different limits envisaged for the amount of the operator's liability (Article 7 of the Paris Convention and Article V of the Vienna Convention).[4] Another difference is the possibility for a Contracting Party to subject the transit of nuclear substances through its territory to the condition that the maximum amount of liability of the foreign operator concerned be increased to the maximum amount of liability of operators of nuclear installations situated in its territory, which is envisaged by the Paris Convention (Article 7(e)) but not by the Vienna Convention.[5]

There are, in addition, other differences, such as those concerning the conditions for the acquisition of a right of subrogation in cases where persons other than the operator of a nuclear installation have paid compensation for damage caused by a nuclear incident (Article 6(d) and (e) of the Paris Convention and Article IX.2(a) of the Vienna Convention). However, there seems to be no need to examine the substantive differences between the Paris Convention and the Vienna Convention in further detail, at least at this stage[6], since the problems that the 1988 Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention (the Joint Protocol) is intended to solve are, to a large extent, independent of those differences. The problems that the Joint Protocol was intended to solve derive from the very existence of distinct treaty regimes that, though largely similar in content, have different Contracting Parties.

1.2. THE PROBLEMS CREATED BY THE ABSENCE OF TREATY RELATIONS BETWEEN THE CONTRACTING PARTIES TO THE PARIS CONVENTION AND THE CONTRACTING PARTIES TO THE VIENNA CONVENTION

The first problem originating from the absence of treaty relations between the Contracting Parties to the two different Conventions relates to the so-called geographical scope of the nuclear liability regime, inasmuch as the Convention under which the operator is liable may not apply to nuclear damage suffered in the territory of the Contracting Parties to a different Convention. The Paris Convention, as at present in force, applies neither to nuclear incidents occurring in non-Contracting States nor to nuclear damage suffered in such States, unless otherwise provided by the legislation of the Contracting Party within whose territory the liable operator's installation is situated (hereinafter referred to as the 'Installation State') (Article 2); although the 1963 Vienna Convention is silent as to its territorial scope, it is often interpreted in the same way.[7] The 1997 Vienna Convention applies in principle to nuclear damage "wherever suffered", but then allows the legislation of the Installation State to exclude damage suffered in a nuclear

[4] In addition, the Vienna Convention envisages a minimum limit (Article V), thus not excluding the possibility to provide for unlimited liability, whereas the Paris Convention envisages a maximum limit (Article 7). However, when the 2004 Protocol to amend the Paris Convention enters into force, the liability limit envisaged in the Paris Convention will also be a minimum limit. On the other hand, both the Vienna Convention and the Paris Convention provide that the operator's obligation to cover liability by insurance or other financial security is limited to a given amount that is specified by the State in which the nuclear installation is situated in the case of the Vienna Convention (Article VII) and by the Convention itself in the case of the Paris Convention (Article 10).

[5] As a result of the negotiations that led to the adoption of both the Vienna Protocol and the Convention on Supplementary Compensation (CSC) in 1997, a provision similar to the one in Article 7(e) of the Paris Convention was inserted in the Annex to the CSC, which applies to States party to neither the Paris Convention nor the Vienna Convention, but not in the Vienna Convention as amended by the Vienna Protocol; see IAEA International Law Series No. 3, Section 3.3.2.

[6] See the discussion in Section 3.2.

[7] For more details as to the territorial scope of application of the Paris Convention and the Vienna Convention, see Section 3.1.

non-Contracting State not affording "equivalent reciprocal benefits" (Article I A); once the 2004 Protocol enters into force, a similar provision will be inserted in the Paris Convention as well (Article 2, as amended by the 2004 Protocol).

The second problem originating from the absence of treaty relations between the Contracting Parties to the two different Conventions relates to the determination of the operator liable in cases where nuclear material is being transported between the operators of different nuclear installations.[8] Although both Conventions lay down identical rules in this respect (Article 4 of the Paris Convention and Article II.1 of the Vienna Convention), these rules are different depending on whether the transport takes place between persons situated within the territories of Contracting Parties or between one person situated in the territory of a Contracting Party and another person situated in the territory of a non-Contracting State. The general rule under all nuclear liability Conventions is that, in the case of transport of nuclear material between the operators of two nuclear installations, the sending operator is liable until the receiving operator has assumed liability pursuant to the express terms of a written contract or, in the absence of such contract, until the receiving operator has taken charge of the material involved. However, this general rule only applies if both operators are within the territory of Contracting Parties to the same Convention: if the nuclear material is sent to a person in a non-Contracting State (including a Contracting Party to a different Convention), the sending operator remains liable until the nuclear material has been unloaded from the means of transport by which it arrived in the territory of that State; conversely, if the nuclear material is sent from a person in a non-Contracting State (including a Contracting Party to a different Convention), liability is imposed upon the receiving operator from the moment the material has been loaded on the means of transport. Thus, if a nuclear incident were to occur in the course of transport of nuclear materials between operators of nuclear installations situated in the territories of Contracting Parties to different nuclear liability Conventions, inasmuch as the applicable rules are those relating to transport to or from persons in non-Contracting States, and therefore the transfer of liability between the sending and the receiving operator cannot take place on the basis of a written contract between them or when one of them has taken charge of the materials involved, both operators may be held liable, each under the applicable Convention, for the entire time the nuclear materials are on the means of transport. One consequence of this situation would be the need for both operators to conclude insurance contracts in order to cover their respective liability for the damage caused by the same nuclear incident.

An additional and related problem originating from the absence of treaty relations between the Contracting Parties to different Conventions relates to the determination of the State whose courts have jurisdiction in the event of a nuclear incident in the course of transport of nuclear material.[9] The general rule under all nuclear liability Conventions is that jurisdiction lies with the courts of the Contracting Party within whose territory the nuclear incident occurred (hereinafter referred to as the 'Incident State'); however, jurisdiction lies with the courts of the Installation State if the nuclear incident occurred outside the territory of a Contracting Party (Article 13 of the Paris Convention and Article XI of the Vienna Convention).[10] In the case of a nuclear incident occurring in the course of transport of nuclear material between operators situated in Contracting Parties to different nuclear liability Conventions, these provisions may lead to a situation where the courts of both States have jurisdiction in respect of the same nuclear incident, each of them on the basis of the applicable Convention: since each of these States is to be considered as a non-Contracting State vis-à-vis the other, both the sending and the receiving operators may be held liable, each of them under the applicable

[8] In the case of a nuclear incident at a nuclear installation, there would be no specific problem, since the operator of that installation would be liable under the applicable Convention and the other Convention would not apply.

[9] In the case of a nuclear incident at a nuclear installation, there would be no specific problem, since only the Convention to which the Installation State is a Contracting Party would apply and the courts of that same State, which is at the same time the Installation State and the Contracting Party within whose territory the nuclear incident occurred (the 'Incident State'), would have exclusive jurisdiction thereunder.

[10] In the case of incidents occurring in the course of maritime transport, the term "territory" under all Conventions is deemed to include maritime areas subject to the coastal State's full sovereignty, such as internal and territorial waters, but not other maritime areas subject to more limited sovereign rights of the coastal State or otherwise subject to its jurisdiction for specific purposes, such as the exclusive economic zone. One of the most notable features of the 1997 Vienna Convention is the fact that, in the case of incidents occurring in the exclusive economic zone of a Contracting Party, jurisdiction lies with the courts of that State rather than with the courts of the Installation State (Article XI). Once the 2004 Protocol enters into force, a similar rule will be inserted in Article 13 of the Paris Convention.

Convention; in addition, the courts in both States, both being the Installation State under the applicable Convention, would have jurisdiction. At the same time, neither of these States would be under a specific treaty obligation to ensure that final judgements entered by the competent court in the other State are recognized and enforced within its territory (Article 13(d) of the Paris Convention and Article XII of the Vienna Convention).

1.3. THE DIFFERENT OPTIONS ENVISAGED IN ORDER TO CREATE A TREATY LINK BETWEEN THE CONTRACTING PARTIES TO THE PARIS CONVENTION AND THE CONTRACTING PARTIES TO THE VIENNA CONVENTION

The issue of the relationship between the Paris Convention and the Vienna Convention was first raised during the 1963 International Conference on Civil Liability for Nuclear Damage, which resulted in the adoption of the Vienna Convention.[11] As a result, the Conference agreed to insert two articles in the Vienna Convention. The first one (Article XVI) provides that "No person shall be entitled to recover compensation under this Convention to the extent that he has recovered compensation in respect of the same nuclear damage under another international convention on civil liability in the field of nuclear energy". Pursuant to the second one (Article XVII), the Vienna Convention "shall not, as between the Parties to them, affect the application of any international agreements or international conventions on civil liability in the field of nuclear energy in force, or open for signature, ratification or accession at the date on which this Convention is opened for signature." At the time these provisions were inserted in the Vienna Convention, the only international convention to which such provisions would have applied was the Paris Convention, with the possible addition of the 1963 Brussels Convention Supplementary to the Paris Convention (the Brussels Convention), which, however, does not itself lay down the rules of nuclear liability and only increases the amount of compensation available for nuclear damage.

Although the Paris Convention was not yet in force at the time (nor, indeed, was the Brussels Convention), one of the reasons why these provisions were inserted in the Vienna Convention was clearly the desire to allow the Contracting Parties to the Paris Convention to become Contracting Parties to the Vienna Convention without at the same time having to terminate the former Convention, if and when both Conventions entered into force. The possibility that the Contracting Parties to the Paris Convention might at some stage become Contracting Parties to the Vienna Convention as well was also at the basis of the first revision of the Paris Convention by way of the 1964 Additional Protocol, which, as is pointed out in Section 1.1, was intended to harmonize the provisions of the Paris Convention with those of the Vienna Convention. In fact, the Preamble of the 1964 Additional Protocol made it clear that the desire of the Signatories "of ensuring that as far as possible there are no conflicts between the two Conventions" was meant to enable them "to become parties to both Conventions if they so decide". That possibility was, however, soon made unlikely by the widespread conviction that the ratification of both Conventions might lead to a number of conflicts of treaty obligations for the interested States, a possibility that was evoked during a 1968 symposium jointly organized by the IAEA and the then European Nuclear Energy Agency (now the OECD Nuclear Energy Agency (NEA)), a specialized OECD agency with specific competence in the nuclear field.[12]

As a result, a number of alternative options were examined in order to create a treaty link between the Contracting Parties to either Convention. At its very first session, in 1964, the IAEA Standing Committee on Civil Liability for Nuclear Damage (IAEA SCNL), a body created by the IAEA Board of Governors in 1963 to review and advise on

[11] See *Civil Liability for Nuclear Damage. Official Records of the International Conference on Civil Liability for Nuclear Damage held by the International Atomic Energy Agency in Vienna, 29 April–19 May 1963*, Legal Series No. 2, IAEA, Vienna (1964), in particular pp. 381–384.

[12] Nordenson, U.K., "Legal conflicts arising from the simultaneous application of the Paris and Vienna Conventions with regard to nuclear incidents in the course of carriage of nuclear substances", *Third Party Liability and Insurance in the Field of Maritime Carriage of Nuclear Substances* (Proc. Symp., Monaco, 1968), OECD/NEA, Paris (1969) pp. 427 ff.

problems relating thereto, briefly discussed the issue of the relationship between the Vienna Convention and "regional conventions" on the basis of a letter by Norway.[13] However, already at its second session, in 1967, the IAEA SCNL decided not to discuss the issue further, and instead asked the IAEA Secretariat, together with Norway, to study it.[14] Discussions resumed in October 1972 within the OECD/NEA Group of Governmental Experts on Third Party Liability in the Field of Nuclear Energy (hereinafter referred to as the "NEA Group"), which invited the NEA Secretariat to prepare a working document, in collaboration with the IAEA Secretariat, "analysing in detail the different formulas that might resolve [the] problem" of the relationship between the Paris and Vienna Conventions, and set up a Working Group (hereinafter referred to as the "NEA WG") in order to examine that document.[15] A first working document on "Possible Solutions to the Problems Concerning the Relationship between the Paris and Vienna Conventions" (hereinafter referred to as "WD I") was, therefore, produced by the NEA and IAEA Secretariats on 17 January 1973; this document, which outlined four alternative options, was discussed on 1–2 February 1973 by the NEA WG, which asked for its revision.[16] As a result, a second working document, titled "Possible Solutions to the Problem of the Relationship between the Paris and the Vienna Conventions" (hereinafter referred to as "WD II"), outlining five (rather than four) alternative options was produced by the two Secretariats on 16 March 1973.[17]

Of the five solutions outlined in WD II, the first three were based on the idea that the two existing Conventions should be replaced by a single treaty instrument. These solutions were included in Category I, as follows: (I.A) to make the Paris Convention (which had come into force on 1 April 1968) freely open to all States, but on the clear understanding that the Vienna Convention would not come into force; (I.B) to ask the Contracting Parties to the Paris Convention to terminate that Convention and to ratify the Vienna Convention; and (I.C) to adopt an entirely new convention coalescing the texts of the two existing Conventions and intended to replace both. The remaining two solutions were based on the different idea that the two existing Conventions would continue in being (once the Vienna Convention entered into force), and that some other way to create a treaty link between the Contracting Parties to either should be found. These solutions were included in Category II, as follows: (II.A) ratification of the Vienna Convention by the Contracting Parties to the Paris Convention without terminating the latter Convention; and (II.B) creation of a "bridge" between the two Conventions by means of a similar protocol to each Convention or a joint protocol to both, so that the Parties to either Convention would be treated "as if they were Parties" to the other.

WD II was first discussed within the NEA Group in April 1973.[18] As far as the solutions in Category I were concerned, "It appeared fairly rapidly that neither of the first two solutions were likely to be considered by the Experts", even though "certain Experts…expressed interest in the solution consisting of opening the Paris Convention to countries outside [the] OECD, without this resulting in impeding the entry into force of the Vienna Convention". As for the third solution, "most of the Experts considered that the practical difficulties in implementing it, as well as the risk that the previous Conventions might still be maintained and the principles of nuclear third party liability questioned, were too great compared to its advantages". The experts then turned to the solutions in Category II, and the discussion showed "a certain preference…for solution II.A without, however, solution II.B being set aside". Consequently, it was

[13] IAEA document CN-12/SC/9, paras 10–12. The Committee reached the following conclusions:
"The Committee recognizes that it would be for the States concerned to decide whether they should establish regional conventions on civil liability for nuclear damage and, if so, whether such conventions should be independent of, or supplementary to, the Vienna Convention. Nevertheless, the Committee unanimously expressed the view that any such regional convention should not conflict or compete with the Vienna Convention. A majority of the members of the Committee were of the opinion that it would be preferable if regional conventions were supplementary to the Vienna Convention, while some members felt that regional conventions might be independent."

[14] IAEA document CN-12/SC/14, para. 2.

[15] OECD-NEA document SEN (72)22, paras 16–17.

[16] WD I was never distributed as an official document, and there appears to be no official report of the NEA WG meeting of 1–2 February 1973. However, the meeting and its outcome are referred to in OECD-NEA document SEN(73)6, and a List of Participants is attached thereto as Annex I. The NEA WG consisted of representatives of France, Italy, the Netherlands, Portugal, Sweden, Switzerland and the United Kingdom.

[17] OECD-NEA document SEN(73)6, Annex II.

[18] OECD-NEA document SEN(73)10.

agreed that "these two solutions should be studied further, priority being given to solution II.A," and the NEA and IAEA Secretariats were requested to "prepare jointly a working document concerning the practical consequences of implementing solution II.A and the way remaining conflicts could be settled, for discussion at the next meeting."

Solution II.A in WD II — that is, ratification of the Vienna Convention by the Parties to the Paris Convention — was in fact the option that had already been envisaged in the Preamble of the 1964 Additional Protocol to the Paris Convention and that had soon been discarded in view of the widespread opinion that it would lead to conflicts of treaty obligations. This probably explains why it had not been proposed as a solution in WD I, which only envisaged four options. Its reappearance in WD II, as solution II.A, was due to a specific request by the Swedish representative within the NEA WG when WD I was discussed in February 1973,[19] and the "preference" for that solution at the NEA Group meeting in April 1973 was mainly expressed by the experts from Denmark, Sweden and Norway.[20] However, despite the priority given to the study of solution II.A, when the document concerning the practical consequences of implementing that solution, prepared by the NEA and IAEA Secretariats,[21] was in fact discussed by the NEA Group in October 1973, the Chairman's consultations quickly "revealed that a certain number of countries refused to envisage ratification of the Vienna Convention, a fact depriving this solution of all chances of success". Consequently, the experts agreed to study the remaining solution, namely, solution II.B, "which provided for the adoption of a Protocol for the settling of conflicts between the two Conventions."[22]

1.4. THE DRAFTING HISTORY OF THE JOINT PROTOCOL

As is pointed out in Section 1.3, at its October 1973 meeting the NEA Group decided to concentrate its efforts on the creation of a "bridge" between the Paris Convention and the Vienna Convention by means of a similar protocol to each or a joint protocol to both (solution II.B in WD II), this being the only remaining solution after none of the other possible solutions concerning the relationship between the two Conventions had met with sufficient agreement. Consequently, a first draft instrument (hereinafter referred to as the "1974 Draft Joint Protocol")[23] and a brief explanatory note thereon (hereinafter referred to as the "1974 Explanatory Note")[24] were produced by the NEA and IAEA Secretariats. It was accepted that the 1974 Draft Joint Protocol, together with the other options originally envisaged in WD II, would first be considered within a "Restricted Working Group" of the IAEA SCNL, which would meet in Vienna from 7 to 9 May 1974.[25] Since this Restricted Working Group, in turn, recommended to the IAEA SCNL that it pursue in detail the solution of a protocol establishing a relationship between the Vienna Convention and the Paris Convention,[26] the 1974 Draft Joint Protocol was then more formally discussed within the NEA Group in June 1974 and again in March 1975.

In June 1974, no clear conclusion on the protocol solution was reached by the NEA Group and, inter alia, the question was raised as to whether a satisfactory solution could be achieved by two other means that until then had not been discussed in detail, the first consisting of an appropriate conflict rule rather than a "bridge" between the two Conventions (the Netherlands), and the second consisting of a unilateral extension of the territorial scope of application of the Paris Convention, pursuant to its Article 2, to nuclear incidents occurring and damage suffered in the territory of non-Contracting States (Germany and the Netherlands). Consequently, the NEA and IAEA Secretariats were requested to submit a more detailed document on the subject in advance of the next meeting of the NEA Group.[27] In accordance

[19] OECD-NEA document SEN(73)6.

[20] OECD-NEA document SEN(73)10.

[21] OECD-NEA document SEN(73)14.

[22] OECD-NEA document SEN(74)2.

[23] OECD-NEA document SEN(74)7, Annex II. The text of the 1974 Draft Joint Protocol was also later reproduced in an annex to IAEA document N5.TC-462.6/2.

[24] OECD-NEA document SEN(74)7, Annex I.

[25] OECD-NEA document SEN(74)7.

[26] No official record of the meeting of this working group survives. However, the conclusion was reported by the IAEA representative at the next meeting of the NEA Group in June 1974: see OECD-NEA document SEN(74)14.

[27] OECD-NEA document SEN(74)14.

with that request, a document entitled "Relationship between the Paris and Vienna Conventions" (hereinafter referred to as "WD III")[28] was prepared in January 1975 by the two Secretariats in order to supplement the 1974 Draft Joint Protocol and the 1974 Explanatory Note.

WD III outlined a number of cases involving the simultaneous application of both the Paris Convention and the Vienna Convention and, for each such case, examined whether problems raised thereby could be solved by the solutions discussed at the previous NEA Group meeting, that is, a unilateral extension of the Paris Convention, a conflict rule or the proposed protocol. The conclusions arrived at in WD III made it clear that the protocol solution "would combine the advantages of the two foregoing solutions without having their drawbacks" and, in addition, would "offer an opportunity to realize the idea of achieving a world-wide system of nuclear third party liability in which all countries would participate irrespective of their differing constitutional and social systems"; and finally, that "A better protection of victims of a possible nuclear incident would go hand in hand with an improvement of insurance conditions and the furtherance of international collaboration in the field of nuclear energy."[29] While recognizing that the protocol solution might cause some difficulties of its own in the transitional period (i.e. the period between the date of its entry into force and the date on which all Parties to both Conventions are also Parties to the Protocol), WD III concluded that "the Protocol would appear to be the most effective solution to the problems discussed above".[30]

WD III was discussed within the NEA Group in March 1975. After extensive discussion of all of the cases presented therein, the experts, in the Chairman's words:

> "had not found arguments militating against the legal conclusion of the Secretariats that the conflict rule and the unilateral extension of the Paris Convention would not resolve all problems of the relationship between the two Conventions as would the Joint Protocol. There had been, however, a number of reservations to the latter solution, in particular as regards the question of amendment of the Conventions and the applicability of Article 7(e) of the Paris Convention."[31]

The question of the possible effects of the adoption of a joint protocol on the application of the Brussels Convention also raised concerns.[32] It was eventually agreed that the IAEA Secretariat would submit WD III to the IAEA SCNL, together with the experts' observations and comments during the meeting.[33] However, the IAEA SCNL took no action at this stage, probably because the Vienna Convention was not yet in force and, consequently, the question of the relationship between the Vienna Convention and the Paris Convention was not considered urgent: the question of the relationship between the two Conventions was not even placed on the agenda of the next IAEA SCNL meeting, thus putting a (provisional) end to the exercise.

Although the Vienna Convention eventually entered into force on 12 November 1977, the IAEA SCNL, at its fifth session, in 1978, confined itself to a brief discussion of the ways to promote wider acceptance thereof, in particular by States having significant nuclear activities. As to the relationship between the Vienna Convention and Paris Convention, the IAEA SCNL merely expressed a desire that "every effort should be made to achieve increased harmonization" between the two Conventions; it was also pointed out that "means should be explored to facilitate the simultaneous application of both".[34] No further attention appears to have been paid to the 1974 Draft Joint Protocol until, in May 1984, the IAEA SCNL resumed examination of the relationship between the Vienna Convention and the Paris Convention, and again raised the question of the desirability of establishing a formal link between the two Conventions.[35] Subsequently, at the NEA Group meeting of November 1985, the IAEA representatives stated that the

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[28] OECD-NEA document SEN(75)1.

[29] OECD-NEA document SEN(75)1, para. 16.

[30] OECD-NEA document SEN(75)1, para. 17.

[31] OECD-NEA document SEN(75)12, p. 14.

[32] All of these questions are addressed in Section 2, during the examination of the legal nature of the Joint Protocol and the implications of Articles III and IV thereof.

[33] OECD-NEA document SEN(75)12.

[34] IAEA document CN-12/SC-4/5, para. 9.

[35] IAEA document NS-TC-462.5, paras 14–15.

time had come to reactivate consideration of the matter, as additional States were considering ratification of, or accession to, the Vienna Convention and North–South bilateral nuclear cooperation and supply arrangements were increasing. Consequently, the NEA Group endorsed the IAEA representatives' proposal for a joint study of the relationship between the two Conventions.[36]

A joint Note was consequently produced by the NEA and IAEA Secretariats in May 1986 summarizing the work done in the 1970s and recommending the reassessment of the desirability of the solution envisaged at the time — that is, the adoption of a joint protocol aimed at "harmonizing the coexistence of the two Conventions". This Note was thereafter presented as a working paper for a Joint IAEA/NEA Informal Meeting of Experts which met in Vienna on 8–10 September 1986.[37] Attached to the Note were the text of the 1974 Draft Joint Protocol,[38] together with a new Explanatory Note (hereinafter referred to as the "1986 Explanatory Note")[39] and an Analytical Table of the Articles of the Vienna Convention and the Paris Convention in the Context of the Draft Joint Protocol[40]. At the September 1986 meeting, the experts reviewed the five options that had been envisaged in WD II, plus a sixth option consisting in "extension of the territorial scope of both Conventions". However, they concluded that the option of a joint protocol establishing a formal relationship between the two Conventions was "the most practicable and effective solution", since it would both: (a) "extend the benefit of the special regime of liability for nuclear damage set up under each Convention in order to provide for wider protection of victims", and (b) "eliminate problems arising from the simultaneous application of both Conventions to a nuclear incident". After reviewing the 1974 Draft Joint Protocol, the experts suggested a number of improvements thereto. Finally, the experts also suggested that discussions concerning a possible revision of the Vienna Convention would provide an opportunity to concurrently examine the question of a joint protocol.[41]

In this latter respect, the Chernobyl accident in April 1986 had in fact again raised the issues of ensuring a more widely accepted nuclear liability regime and of making that regime more adequate to cope with the transboundary consequences of a major nuclear incident. The discussions initiated within the IAEA in order to cope with these issues eventually led, on the one hand, to the adoption of the 1997 Vienna Protocol and, on the other, to the adoption of an entirely new Convention, the 1997 Convention on Supplementary Compensation for Nuclear Damage (CSC), designed to create a truly worldwide nuclear liability regime and to increase the amount of compensation available in the event of nuclear damage. The CSC, in particular, is designed to create a treaty link between not only the Contracting Parties to either the Paris Convention or the Vienna Convention (including any amendments thereto), but also other States party to neither Convention; it therefore has an even wider scope than the 1988 Joint Protocol.[42] However, in the early stages of the discussions that led to the adoption of these later Conventions, the decision was taken to first revive the earlier efforts to create a treaty link between the Contracting Parties to the Paris Convention and the Vienna Convention.

The suggestions made by the September 1986 Joint IAEA/NEA Informal Meeting were thus brought to the attention of, on the one hand, the NEA Group and, on the other, the IAEA SCNL. In November 1986, the NEA Group endorsed the suggestions made in September.[43] In March 1987, an open ended session of the IAEA SCNL was convened and the IAEA SCNL, in its turn, discussed and endorsed the solution of a joint protocol. The IAEA SCNL was presented with the 1974 Draft Joint Protocol and an Explanatory Note almost identical to the 1986 Explanatory Note[44], approved changes to the 1974 Draft Joint Protocol consisting in the elaboration of a draft preamble and the amendment of its operative provisions, and, finally, recommended that completion of work be aimed at, either by reconvening the IAEA SCNL in the future or by establishing a Joint IAEA/NEA Working Group.[45] This latter solution

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[36] OECD-NEA document SEN/LEG(86)1, paras 65–66.

[37] IAEA document 250-N5.52.14.

[38] IAEA document 250-N5.52.14, Appendix I.

[39] IAEA document 250-N5.52.14, Appendix II. The 1986 Explanatory Note was later reproduced almost verbatim in a corresponding Explanatory Note presented to the IAEA SCNL in March 1987 (IAEA document N5.TC-462.6/3).

[40] IAEA document 250-N5.52.14, Appendix III. The Analytical Table was also later reproduced in IAEA document N5.TC-462.6/3.

[41] IAEA document N5.TC-462.6/2.

[42] IAEA International Law Series No. 3. Section 3 is devoted, in particular, to the CSC.

[43] OECD-NEA document SEN/LEG(87)1, paras 18 and 36.

[44] IAEA document N5.TC-462.6/3.

[45] IAEA document 250-N.5.TC-462.6.

was agreed to in principle by the NEA Steering Committee in April 1987[46] and by the IAEA Board of Governors in June 1987[47].

Before the Joint IAEA/NEA Working Group met, the NEA Group met again in June 1987 in order to examine the outcome of the IAEA SCNL, and examined a Note on the "Draft Joint Protocol Relating to the Application of the Paris Convention and the Vienna Convention" prepared by the Secretariat in order to synthesize the essential elements of the working documents distributed in the past that had led to the preparation of the 1974 Draft Joint Protocol and to reflect the evolution in thinking since then.[48] The NEA Group agreed that, subject to appropriate adjustments, that Note could be used as a basis for a joint document of the NEA and IAEA Secretariats to be presented to the Joint IAEA/NEA Working Group meeting; in addition, it produced an alternative text for the operative provisions of the Joint Protocol.[49] Consequently, when the Joint IAEA/NEA Working Group of Governmental Experts on the Relationship between the Paris and the Vienna Convention met in Vienna, on 27–30 October 1987, it was presented with the draft preamble and articles adopted in principle by the IAEA SCNL in March 1987, the drafting proposals discussed by the NEA Group in June 1987, and a document prepared by the IAEA and NEA Secretariats entitled "Background Material on a Draft Joint Protocol";[50] in addition, draft final clauses prepared by the Secretariats of the IAEA and the NEA were also presented to the meeting for discussion.[51]

The Joint IAEA/NEA Working Group adopted by consensus a Final Document with a new draft text (hereinafter referred to as the "1987 Draft Joint Protocol"), which later became the definitive text of the Joint Protocol.[52] This text was later approved by the NEA Group at its meeting in November 1987. At the same time, the NEA Group recommended to the Steering Committee that, subject to approval by the IAEA Board of Governors, the required preparations be made for the organization of a 'Diplomatic Conference' in conjunction with the IAEA General Conference in 1988 to adopt the Joint Protocol as agreed upon in the Joint Meeting. Finally, the NEA Group requested the two Secretariats to prepare an explanatory note for the governing bodies of the two organizations, in view of the fact that "the rather simple text of the Protocol might easily lead to erroneous conclusions".[53] This Explanatory Note (hereinafter referred to as the "1987 Explanatory Note") was produced in December 1987.[54]

The 1987 Draft Joint Protocol, together with the 1987 Explanatory Note, was examined by the IAEA Board of Governors in February 1988. The Board endorsed the 1987 Draft Joint Protocol and agreed to convene a one-day conference to be organized jointly by the IAEA and the NEA in conjunction with the 32nd regular session of the IAEA General Conference for the purpose of adopting the Joint Protocol and opening it for signature.[55] A similar decision was later taken, upon the recommendation of the NEA Steering Committee, by the OECD Council in June 1988.[56] Consequently, a diplomatic conference was jointly convened by the two organizations in Vienna on 21 September 1988.[57] The Diplomatic Conference adopted the text of the Joint Protocol by consensus. Nineteen States signed the

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[46] OECD-NEA document NE/M(87)1, para. 9(b).

[47] IAEA document GOV/2305, and IAEA document GOV/OR.675.

[48] OECD-NEA document LEG/DOC(87)3 (Rev. 1).

[49] OECD-NEA document SEN/LEG(87)3.

[50] IAEA document N5/TC/643 (4). This was in fact the envisaged revision of OECD-NEA document LEG/DOC(87)3.

[51] IAEA document N5/TC/643 (4), Room Document No. 1 (attached).

[52] IAEA document N5/TC/643, Final Document (attached). The Draft Joint Protocol was later reproduced in Annex I to IAEA document GOV/2326.

[53] OECD-NEA document SEN/LEG(88)1.

[54] The 1987 Explanatory Note was then reproduced in Annex II to IAEA document GOV/2326.

[55] IAEA document GOV/2326, and IAEA document GOV/OR.686.

[56] OECD document C/M(88)12.

[57] *Conference on the Relationship between the Paris and Vienna Conventions, Official Record of a Meeting held at the Vienna International Centre on Wednesday, 21 September 1988, at 10.15 a.m.*, IAEA, Vienna (1988).

Joint Protocol on the very day of its adoption, but the Joint Protocol remained open for signature until the date of its entry into force on 27 April 1992 (i.e. three months after the date of deposit of instruments of ratification or accession by at least five States party to the Paris Convention and five States party to the Vienna Convention). In 1989, a short publication was issued on behalf of both the IAEA and the NEA containing the Final Act of the Diplomatic Conference, together with the text of the Joint Protocol and the 1987 Explanatory Note. [58]

[58] *Nuclear Liability: Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention, 1988*, IAEA, Vienna (1989).

2. GENERAL ASPECTS

2.1. THE LEGAL NATURE OF THE JOINT PROTOCOL AND ITS RELATION TO THE VIENNA CONVENTION AND THE PARIS CONVENTION

As is pointed out in Section 1.3, one of the options envisaged in the 1970s for creating a treaty link between the Contracting Parties to either the Vienna Convention or the Paris Convention was to adopt "an instrument or instruments whereby a 'bridge' is created between the two Conventions and whereby all Parties…to the Vienna Convention would be treated…as if they were Parties to the Paris Convention…and vice versa"[59]. This solution was eventually preferred to the others for various reasons, among which was that it would "leave the two Conventions intact so that there will be no reopening of certain issues regarding the substance of the two Conventions" and, at the same time, the envisaged instrument(s) "could be limited to relatively few Articles and the changes required in the legislation of the Parties would be limited."[60]

Although the 'bridge' between the two Conventions could have consisted of either a single instrument (additional to both Conventions) or two separate instruments (each additional to one Convention), the former solution was eventually preferred, again for various reasons. In the first place, it was thought that it "would stress the element of reciprocity", since the Parties to one Convention would undertake to treat the Parties to the other Convention as if they were Parties to the former Convention and, at the same time and "as consideration therefor", the Parties to the other Convention would undertake to afford the same treatment to the Parties to the former Convention. In addition, the adoption of a single joint instrument would entail certain practical advantages, such as the need for only one diplomatic conference. As for its designation, although it was considered that the term 'protocol' (or 'additional protocol') would have better suited the adoption of two distinct instruments, whereas the term 'convention' would have been more appropriate for a single instrument, it was also recognized that the question was not one of substance and the term 'protocol' was eventually preferred.[61]

The Joint Protocol is, therefore, an international agreement or treaty which is, on the one hand, distinct from the Vienna Convention and the Paris Convention and, on the other, additional to both. Inasmuch as it is intended to create a 'bridge' between the two Conventions, whereby the Parties to either Convention are to be treated as if they were Parties to the other, the Joint Protocol is not a 'free-standing' international agreement and, under Articles VI and IX, is only open to States which are already Parties to either the Vienna Convention or the Paris Convention and only so long as they remain Parties thereto.[62]

Both the Vienna Convention and the Paris Convention are defined in similar terms in Article I of the Joint Protocol in order to include not only the original version, but also "any amendment thereto which is in force for a Contracting Party" to the Joint Protocol: this definition, which did not appear in the 1974 Draft Joint Protocol, was first provisionally adopted by the Joint IAEA/NEA Working Group in October 1987 and thereafter remained unchanged until its final adoption at the Diplomatic Conference in 1988. As is recalled in Section 1.1, the Paris Convention was amended by two Additional Protocols adopted respectively in 1964 and 1982, and will be further amended by a Protocol adopted in 2004, which, however, is not yet in force, whereas the Vienna Convention has been amended only once as a result of the entry into force of the 1997 Vienna Protocol.

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[59] WD I, para. III.1, and WD II, para. 46.

[60] WD I, para. III.1, and WD II, para. 47. It was, however, recognized that this solution would add another instrument (or instruments) to the existing Conventions and "might create complications by adding a 'third class' of countries, i.e. those that ratify the instrument(s), to the existing two, i.e. the Parties of the Paris and of the Vienna Convention", and it was pointed out that this would have to be borne in mind when examining the provisions concerning the entry into force of the instrument(s) (WD I, para. III.1, and WD II, para. 48). This latter issue is touched upon in Section 4.3.

[61] WD I, para. III.2, and WD II, paras 49–50.

[62] On this issue, see also Section 4.2.

The adoption of the 1997 Vienna Protocol has potentially complicated the legal framework in which the Joint Protocol is called to operate, since, unlike the successive Protocols purporting to amend the Paris Convention, the 1997 Vienna Protocol was conceived as a distinct treaty, to some extent independent of the original Vienna Convention.[63] There can be little doubt that a Party to the Vienna Protocol, which is expressly intended to "amend" the 1963 Vienna Convention, is entitled to become a Party to the Joint Protocol under Article I thereof. However, the Parties to the Vienna Protocol need not necessarily be in treaty relations with the Parties to the original 1963 Vienna Convention:[64] consequently, although in practice this has not happened so far, the Joint Protocol is now potentially called upon to create a bridge between three, rather than two, distinct treaty regimes.[65]

2.1.1. The question of whether the Joint Protocol constitutes an amendment of the Vienna Convention and the Paris Convention

The Joint Protocol is not an amending treaty in respect of either the Vienna Convention or the Paris Convention, whose provisions remain thereby formally unaffected. Although, in the early stages of its elaboration, some concerns were raised as to whether the projected new treaty would amount to an amendment of the two Conventions, the view eventually prevailed that neither its procedural provisions nor its operative rules would legally amount to such an amendment.

As far as the procedural provisions are concerned, WD III points out, in respect of the 1974 Draft Joint Protocol, that: "If that were the case, a separate Protocol to each Convention would in fact be necessary." WD III goes on to say that:

> "it would be necessary to amend the Conventions if it were required that all future ratifications of, and accessions to, either Convention be accompanied by ratification of, or accession to, the Protocol. The Draft Joint Protocol does not contain this requirement [nor, indeed, does the Joint Protocol as adopted in 1988]. Instead, Article V [Article VII of the Joint Protocol] stipulates that a sufficiently high number of Parties to either Convention must have deposited their instruments of ratification before the Protocol will enter into force; Articles IV(b) and VII [Articles VI.1 and IX of the Joint Protocol] ensure that only Parties to either Convention may become and remain Parties to the Protocol. These procedural Articles of the Protocol change neither the text nor the substance of either Convention."[66]

[63] Amendments to the Paris Convention have been adopted in accordance with Article 20 thereof, whereby the amendments, once adopted, come into force when ratified or confirmed by two thirds of the Contracting Parties, and, for each Contracting Party ratifying or confirming later, at the date of such ratification or confirmation. Therefore, only the Contracting Parties to the Paris Convention are entitled to ratify or confirm the amendments so adopted. In contrast, under its Article 20, the Vienna Protocol is open to all States, not just the Contracting Parties to the 1963 Vienna Convention.

[64] Under Article 19 of the Vienna Protocol, a State which is a Party to the 1997 Vienna Protocol but not to the 1963 Vienna Convention shall be bound by the Vienna Convention as amended by the Vienna Protocol in relation to other States Parties to the Vienna Protocol. In addition, a State which is a Party to the 1997 Vienna Protocol but not to the 1963 Vienna Convention shall also be bound by the 1963 Vienna Convention in relation to the States which are only Parties thereto, but only "failing an expression of a different intention" at the time when it signs, ratifies or accedes to the Vienna Protocol.

[65] So far, no Contracting Party to the 1997 Vienna Protocol has expressed the intention not to be in treaty relations with the Contracting Parties to the 1963 Vienna Convention. In a (theoretical) situation where there were no treaty relations between a Contracting Party to the 1963 Vienna Convention and a Contracting Party to the 1997 Vienna Protocol, such treaty relations could not be established by virtue of the Joint Protocol alone in the case that both States were Parties thereto: the Joint Protocol is intended to establish treaty relations between Parties to the Vienna Convention and Parties to the Paris Convention, and not between Parties to different versions of the Vienna Convention.

[66] OECD-NEA document SEN(75)1, para. 18. WD III also points to para. 6 of the 1974 Explanatory Note.

As for the operative provisions of the projected new treaty, WD III further points out that:

> "The same is true for its operative Articles I and II [Articles IV and III of the Joint Protocol]. The Parties to the Protocol and either Convention accord to the Parties of the other Convention and the Protocol the status of Contracting Parties by means of a separate international agreement which is completely outside both Conventions. The Convention determined as applicable under the rule of Article II of the Draft Joint Protocol [Article III of the Joint Protocol] will be applied without any change. The Parties to either Convention which do not ratify the Protocol will not suffer any disadvantage or discrimination vis à vis the Parties to the Protocol which neither affects the enjoyment of their rights nor the performance of their obligations under the Conventions. The interests of all States entitled to become Parties to either Convention could be safeguarded by inviting them to the diplomatic conference for the adoption of the Joint Protocol."[67]

During the discussion of WD III that took place within the NEA Group in March 1975, France specifically raised the question of whether the extension of the operator's liability under the Vienna Convention to cover damage suffered in the territory of Contracting Parties to the Paris Convention — which was then envisaged in Article I of the 1974 Draft Joint Protocol, corresponding to Article IV of the Joint Protocol, but which is now more clearly spelled out in Article II of the Joint Protocol — would amount to an amendment to Article VIII.3 of the Vienna Convention whereby, according to France's interpretation, "the funds provided by insurance or otherwise should be exclusively available for compensation due under the Vienna Convention", and the Netherlands expressed the view that this was in fact the case. However, the NEA Secretariat explained that:

> "States Party to the Vienna Convention were free, at least according to some views, to extend by national legislation the operator's liability to incidents occurring and nuclear damage suffered in non-Contracting States. If that were the case, the proposed Protocol would not affect Article VII.3 of the Vienna Convention."[68]

On the same issue, the background materials that were at the basis of the definitive adoption of Articles IV and II of the Joint Protocol confirmed the view thus expressed and in respect of both the Vienna Convention and the Paris Convention.[69]

2.2. THE OBJECT AND PURPOSE OF THE JOINT PROTOCOL AS EXPRESSED IN ITS PREAMBLE

As is often the case with international treaty instruments, the Preamble of the Joint Protocol briefly explains the reasons for the adoption of the treaty, as well as its object and purpose. The original 1974 Draft Joint Protocol did not have a preamble. The current Preamble is the result of a draft which was first examined and endorsed by the IAEA SCNL at its sixth session, in March 1987; the Preamble was then provisionally adopted by the Joint IAEA/NEA Working Group in October 1987 and remained unchanged until its final adoption at the Diplomatic Conference in 1988.[70]

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[67] OECD-NEA document SEN(75)1, para. 18.

[68] OECD-NEA document SEN(75)12, pp. 11–12.

[69] See, in particular, OECD-NEA document LEG/DOC(87)3 (Rev. 1), para. 46, where it is pointed out that, although "the Protocol could lead to enlarging the number of victims entitled to compensation, to the detriment of victims suffering damage in the territories of Contracting Parties to either Convention which are not Parties to the Protocol", this consequence "does not seem to modify the text of the Conventions. The [Paris Convention] (and also the [Vienna Convention], according to some authors) may be extended by Contracting Parties to nuclear damage suffered in non-Contracting Parties without the other Contracting Parties having to consent thereto and the Joint Protocol does not change this situaton". It was also pointed out that "the Protocol establishes the principle of channelling between [Contracting Parties to the Paris Convention] and [Contracting Parties to the Vienna Convention]". See also IAEA document N5/TC/643(4), para. 45.

[70] IAEA document 250-N.5.TC-462.6, and IAEA document N5/TC/643.

In the Preamble, the Contracting Parties to the Joint Protocol declare themselves "desirous to establish a link" between the Paris Convention and the Vienna Convention on the basis, on the one hand, of the consideration that no State was a Party to both Conventions at the time of its adoption (a fact that has since remained unchanged) and, on the other, of their conviction that "adherence to either Convention by Parties to the other Convention could lead to difficulties resulting from the simultaneous application of both Conventions to a nuclear incident".

Having thus briefly explained the reason why the Joint Protocol was adopted, the Contracting Parties further clarify that the principal purpose of the establishment of a treaty link between the Vienna Convention and the Paris Convention is the mutual extension of "the benefit of the special regime of civil liability for nuclear damage set forth under each Convention". At the same time, they also make it clear that the Joint Protocol is intended to "eliminate conflicts arising from the simultaneous application of both Conventions to a nuclear incident". As was explained in the 1987 Explanatory Note, it can, therefore, be said that the Joint Protocol has a "dual purpose" and is based on two underlying principles.[71]

The first principle, which underlines Articles II and IV of the Joint Protocol, is "to create a link or 'bridge' between the two Conventions by abolishing the distinction between Contracting Parties and non-Contracting States as regards the operative provisions of either Convention."[72] Of course, this does not mean that, by becoming Parties to the Joint Protocol, the Contracting Parties to either Convention become Contracting Parties to the other Convention. Rather, it means that the Contracting Parties to either Convention and the Joint Protocol undertake to apply the operative provisions of that Convention with respect to the Contracting Parties to both the other Convention and the Joint Protocol in the same manner as those provisions apply between Contracting Parties to the same Convention.

The second principle, which underlines Article III of the Joint Protocol, consists in making either the Vienna Convention or the Paris Convention exclusively apply to a nuclear incident by means of an "appropriate conflict rule."[73]

[71] 1987 Explanatory Note, para. 5.

[72] 1987 Explanatory Note, para. 4.

[73] 1987 Explanatory Note, para. 4.

3. OPERATIVE PROVISIONS

3.1. THE MUTUAL EXTENSION OF THE OPERATOR'S LIABILITY UNDER EITHER CONVENTION TO DAMAGE SUFFERED IN THE TERRITORY OF CONTRACTING PARTIES TO THE OTHER CONVENTION (ARTICLE II)

As is pointed out in Section 1.2, the first problem originating from the absence of treaty relations between the Contracting Parties to different Conventions relates to the so-called geographical scope of the nuclear liability regime, inasmuch as the Convention under which the operator is liable may not apply to nuclear damage suffered in the territory of the Contracting Parties to a different Convention.

The Paris Convention, as at present in force, applies neither to nuclear incidents occurring in non-Contracting States nor to nuclear damage suffered in such States, unless otherwise provided by the legislation of the Installation State (Article 2). Although, on 22 April 1971, the OECD Steering Committee recommended to the Contracting Parties that they extend the application of the Paris Convention to damage suffered in Contracting States (or on the high seas on board a ship registered in the territory thereof) even if the nuclear incident occurs in a non-Contracting State, it did not recommend a similar extension to damage suffered in non-Contracting States.[74] Once the 2004 amending Protocol enters into force, under the amended Article 2, the Paris Convention will apply to damage in non-nuclear non-Contracting States, but will only apply to damage suffered in nuclear non-Contracting States if these States have legislation in place conforming to the basic principles of nuclear liability of the Paris Convention and affording "equivalent reciprocal benefits".

Similarly, although the 1963 Vienna Convention contains no express provision as to its territorial scope, at its very first session, in April 1964, the IAEA SCNL took the view that the Convention is applicable even if the nuclear incident occurs on the high seas or in the territory of a non-Contracting State, but only in respect of damage suffered within the jurisdiction of the Contracting Parties or on the high seas.[75] The 1997 Vienna Convention applies in principle to nuclear damage "wherever suffered", but then allows the legislation of the Installation State to exclude damage suffered in a nuclear non-Contracting State not affording "equivalent reciprocal benefits" (Article I A of the 1997 Vienna Convention).

The Joint Protocol is intended to make sure that, in relations between the Contracting Parties to the Protocol, there is a mutual extension of the operator's liability under one Convention to damage suffered in territories of Parties to the other Convention. In the 1974 Draft Joint Protocol there was no express provision to this effect, but the same principle was implicit in the more general provision whereby the Parties to either the Paris Convention or the Vienna Convention were to be "considered as if they were Parties" to the other Convention in respect of the application of the operative provisions thereof, including those relating to the scope of the operator's liability (Article I of the 1974 Draft Joint Protocol, corresponding to what is now Article IV of the Joint Protocol, which is discussed in the next section). However, at the June 1987 NEA Group meeting, the NEA Secretariat explained the reasons that had led it "to replace the abstract provisions of the 1974 Draft Joint Protocol with more concrete ones" and, in particular, to propose a new provision which would clearly state "the main substantive rule of the Protocol, mainly the territorial extension of both Conventions", and the experts agreed with that approach.[76] As was rightly pointed out in the NEA Secretariat Note of

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[74] *Paris Convention: Decisions, Recommendations, Interpretations*, OECD Nuclear Energy Agency, Paris (1990), pp. 9–10.

[75] IAEA document CN-12/SC/9, paras 4–5. In the course of the discussions that eventually led to the adoption of the Joint Protocol, the question arose within the NEA Group as to the legal force of the view expressed by the IAEA SCNL in 1964. In particular, when the question was raised by Germany at the March 1975 meeting, the representative of the IAEA Secretariat quoted from the record of the IAEA SCNL's first series of meetings (IAEA document CN-12/SC/9, para. 3) that "It was the understanding of the Committee that the conclusions it reached, as set forth in Chapter IV, could not be regarded as an interpretation of the Convention which would be binding upon the parties thereto". However, the IAEA representative added that, "Although not legally binding, this interpretation would presumably have a strong authoritative force" (OECD-NEA document SEN(75)12, para. V).

[76] OECD-NEA document SEN/LEG(87)3, paras 32–33.

May 1987, as well as in the "Background Material" thereafter presented to the October 1987 Joint IAEA/NEA Working Group meeting, this new approach was the result of a "change of emphasis" as far as the objectives of the Joint Protocol were concerned: in the early 1970s, when the work on the relationship between the Vienna Convention and the Paris Convention began, the principal objective pursued was the "avoidance of conflicts between the two Conventions from which operators, insurers and carriers would benefit in the first place", as well as the "wider acceptance of the basic system underlying both Conventions". The aim of providing compensation for victims of a nuclear incident occurring in the territories of Contracting Parties to either Convention "was emphasized as well, but it did not become the essential preoccupation until after the Chernobyl accident", an event which "triggered public concern about international civil liability regimes for nuclear damage and…made lawmakers aware of the need not only to enlarge this system but also to state the objectives of such enlargement as clearly as possible".[77]

Having thus decided to place the emphasis on directly spelling out the extension of the liability and compensation system of both Conventions, the NEA Group, at the June 1987 meeting, discussed two alternative ways to provide therefor: one was to provide for the extension of the scope of application of either Convention to cover nuclear damage suffered in the territory of one or more Contracting Parties to the other Convention (alternative 1); the other was to stipulate that nuclear operators would be liable for such damage according to the Convention to which their Installation State is a Party (alternative 2)[78]. Although both alternatives would have achieved the result of extending the benefits afforded by either Convention, the NEA Secretariat pointed out that alternative 1, by focusing on the territorial scope of application of either Convention rather than on the operator's liability thereunder, "might be interpreted as implying an amendment to the Conventions".[79] Opinions were divided within the NEA Group as to which alternative was preferable, and both were provisionally retained for consideration by the Joint IAEA/NEA Working Group.[80] At its meeting in October 1987, the Joint IAEA/NEA Working Group eventually decided to opt for alternative 2, and the text of Article II of the Joint Protocol was provisionally adopted.[81] This text remained unchanged until its final adoption at the Diplomatic Conference in September 1988.

Thus Article II of the Joint Protocol explicitly states that, for the purpose of the Joint Protocol, the operator of a nuclear installation situated in the territory of a Party to either the Paris Convention or the Vienna Convention shall be liable in accordance with that Convention for nuclear damage suffered in the territory of a Party to the other Convention and the Joint Protocol. This mutual extension of the territorial scope of the operator's liability does not, however, otherwise affect that liability as determined by the applicable Convention: the operator remains liable under the Convention to which the State in which his installation is situated is a Party, and the amount of his liability is still determined by the legislation of that State pursuant to that Convention.[82]

Interestingly, Article II of the Joint Protocol says nothing of the place of the nuclear incident. The original draft Article I proposed by the NEA Secretariat in 1987 contained the proviso that the nuclear incident causing the damage must have occurred in the territory of a Contracting Party to either the Vienna Convention or the Paris Convention that is also a Party to the Protocol, but only in respect of alternative 2,[83] and the NEA Group decided to insert it in alternative 1 as well.[84] The experts apparently felt that such a proviso was needed in order to "specify that the Joint Protocol as such does not cover nuclear damage suffered in the territories of its Contracting Parties by incidents occurring in non-Contracting States, i.e. in those States which are not Party to either Convention nor to the Protocol", this being "a matter for national legislation outside the Protocol", although they did recall that the OECD Steering Committee had adopted a recommendation to extend the Paris Convention to such damage. On the other hand, they pointed out that, in the June 1987 draft, no mention was made of nuclear incidents occurring and nuclear damage

[77] OECD-NEA document LEG/DOC(87)3 (Rev. 1), para. 9, and IAEA document N5/TC/643(4), para. 9.
[78] OECD-NEA document LEG/DOC(87)3 (Rev. 1), Annex IV.
[79] OECD-NEA document SEN/LEG(87)3, para. 32.
[80] OECD-NEA document SEN/LEG(87)3, para. 34.
[81] IAEA document 250-N5-TC-643.
[82] See Sections 3.2.3 and 3.3.
[83] OECD-NEA document LEG/DOC(87)3 (Rev. 1), Annex IV.
[84] OECD-NEA document SEN/LEG(87)3, para. 34.

suffered on or over the high seas, "as there seems to be general agreement that both Conventions apply in such cases".[85] This observation probably explains why all reference to the place of the nuclear incident was eventually dropped when the definitive text of Article II was adopted, since the June 1987 proviso would have excluded, inter alia, incidents on the high seas causing damage in Contracting Parties to the Joint Protocol.

3.2. THE ELIMINATION OF THE DISTINCTION BETWEEN CONTRACTING PARTIES AND NON-CONTRACTING STATES AS REGARDS THE APPLICATION OF THE OPERATIVE PROVISIONS OF EITHER CONVENTION (ARTICLE IV)

The 1987 Explanatory Note described Article IV as a "complementary" provision with respect to the other operative provisions in the Joint Protocol, namely, Article II, which is examined in Section 3.1 and relates to the mutual extension of the operator's liability to damage suffered in the territory of Contracting Parties to the Joint Protocol, and Article III, which is examined in Section 3.3 and relates to the choice of the applicable Convention. This may well be an accurate description of the function of Article IV in the context of the Joint Protocol as it emerged from the discussions held in 1987. However, it must not be overlooked that, as the 1987 Explanatory Note itself points out, the first purpose of the Joint Protocol still is to "create a link or 'bridge' between the two Conventions by abolishing the distinction between Contracting Parties and non-Contracting States as regards the operative provisions of either Convention"[86]. Indeed, as is pointed out in Section 3.1, in the original 1974 Draft Joint Protocol even the mutual extension of the operator's liability under one Convention to damage suffered in territories of Parties to the other Convention, which is now expressly provided for in Article II of the Joint Protocol, was implicit in the more general provision whereby the Parties to either the Paris Convention or the Vienna Convention were to be "considered as if they were Parties" to the other Convention in respect of the application of the operative provisions thereof. That provision, which, significantly, opened the 1974 Draft Joint Protocol as Article I, was the basis of Article IV of the Joint Protocol. Therefore, despite the change of emphasis that occurred as a result of the Chernobyl accident, which resulted in the direct spelling out of the extension of the liability and compensation system of both Conventions in Article II of the Joint Protocol, it seems fair to say that Article IV can still be regarded as a fundamental provision, if not the core provision, of the Joint Protocol.

As is pointed out in Section 1.2, the problems which the Joint Protocol was intended to solve derive from the very existence of distinct treaty systems which, although largely similar in content, have different Contracting Parties. When the idea of a treaty instrument creating a link between the Vienna Convention and the Paris Convention was first envisaged in the early 1970s, a thorough discussion was undertaken in the working documents in order to determine under which conditions and to what extent the Parties to one Convention are to be treated as if they were Parties to the other Convention. This discussion explains the choices made in Article I of the original 1974 Draft Joint Protocol, the substance of which largely corresponds to Article IV of the Joint Protocol.

First, regarding the question as to which States should be treated as if they were Parties to the Conventions, WD I and WD II point out that a solution whereby all (present and future) Parties to either Convention would be treated as if they were Parties to the other, regardless of whether they were Parties to the Protocol, "could, at least partially, result in a unilateral treatment as Party". In this respect, it was further pointed out that, according to the principle of international law that a treaty does not create either obligations or rights for a third party without its consent,[87] such a unilateral treatment would not be automatically binding on the non-Parties to the Protocol, which would have to give their consent

[85] IAEA document N5/TC/643(3), p. 4. This document, which was presented to the October 1987 Joint IAEA/NEA Working Group meeting, contains the "Drafting proposals discussed by the NEA Group … in June 1987", together with "Comments" relating thereto which were discussed by the NEA Group at the same meeting and which were included in the IAEA document at the request of the NEA Secretariat.

[86] 1987 Explanatory Note, para. 4.

[87] 1969 Vienna Convention on the Law of Treaties, Article 34.

or assent.[88] Moreover, the absence of a condition of reciprocity might provide little incentive for ratification of the Protocol. Therefore, the alternative solution, whereby only the Parties to the Protocol would be treated as if they were Parties to the Convention in question, was eventually preferred as being "truly reciprocal". This solution was, therefore, reflected in Article I of the original 1974 Draft Joint Protocol and is still reflected in Article IV of the Joint Protocol.[89]

As to the substance of the problem, WD I and WD II point out that two basic solutions might be envisaged. The first consisted in merely aiming at "resolving problems caused by the simultaneous application of Article II.1 (b) (iv) and (c) (iv) of the Vienna Convention and Article 4 (a) (iv) and (b) (iv) of the Paris Convention and would limit the treatment as parties to those provisions". Thus, the mutual extension of the operator's liability under one Convention to damage suffered in the territories of Parties to the other Convention was clearly not considered to be the main issue at that time; rather, the main issue was considered to be the determination of the operator liable in transport cases, since, as is pointed out in Section 1.2, the identical rules laid down in both Conventions differentiate between transport taking place between persons situated within the territories of Contracting Parties and transport taking place between one person situated in the territory of a Contracting Party and another person situated in the territory of a non-Contracting State. In any event, WD I and WD II further point out that "Such a limited solution might…not be adequate, since a number of problems might still remain". It was mentioned, inter alia, that, if that limited solution were adopted, "It could be argued that the jurisdictional Articles would not be covered" by the Protocol. As a result, the second solution, providing, in principle, that "the Parties to either Convention would be generally treated as if they were Parties to both Conventions", though only in respect of the operative provisions thereof, was eventually preferred.[90]

In Article I of the original 1974 Draft Joint Protocol, this question was resolved by enumerating the inapplicable articles of each Convention, namely, Articles XVI, XVII and XXI–XXVI of the Vienna Convention and Articles 6(e), 7(e) and 17–22 of the Paris Convention. Interestingly, the enumeration of the inapplicable articles did not exclusively refer to the "procedural" provisions in either Convention relating to such matters as signature, ratification, accession, etc., as had been envisaged in WD I and WD II. The 1974 and 1986 Explanatory Notes, both concerning the 1974 Draft Joint Protocol, clarified the choice made in that draft. Since both Explanatory Notes are identical in substance, only the 1986 Explanatory Note will be quoted here:

> "From an Article-by-Article analysis of both Conventions, it would appear that three categories of provisions can be distinguished for the purposes of the Joint Protocol:
>
> (i) Provisions which should be made applicable, i.e. those which refer to the concept of non-Contracting States, proposed to be eliminated under the Joint Protocol;
> (ii) Provisions which are not directly relevant to the concept of non-Contracting States and which are identical in substance to those of the other Convention; these provisions would be applicable pursuant to Article II of the Joint Protocol [corresponding to Article III of the Joint Protocol relating to the applicable Convention], in particular, if referred to in the applicable provisions of either Convention, or if they set out general concepts or definitions …[;]
> (iii) Provisions which are not applicable: these include firstly, the procedural provisions of either Convention dealing with signature, ratification, accession, entry into force, etc.; secondly, those provisions which are either peculiar to each Convention (e.g. Articles 7(e) and 17 of the Paris Convention and Article XVI of the Vienna Convention) or are different in substance (Article 6(e) of the Paris Convention)".[91]

[88] 1969 Vienna Convention on the Law of Treaties, Articles 35 and 36.
[89] WD I, para. III. 3, and WD II, paras. 57–63.
[90] WD I, para. III. 3, and WD II, paras. 57–63.
[91] 1986 Explanatory Note, para. 3.

At its March 1987 meeting, however, the IAEA SCNL decided to change the approach taken in the 1974 Draft Joint Protocol and proposed a new text based on the opposite approach: Article I of the 1974 Draft Joint Protocol became Article II, and the enumeration of the inapplicable Articles was replaced by a positive formula whereby the applicable articles of either Convention, that is, Articles I–XV of the Vienna Convention and Articles 1–14 of the Paris Convention, were enumerated instead.[92] A similar text was agreed to by the NEA Group at its June 1987 meeting, except that Article II became Article III as a result of the already mentioned insertion of a new provision specifically dealing with the mutual extension of the "geographical scope" of the operator's liability.[93] Article III was then provisionally adopted as Article IV at the Joint IAEA/NEA Working Group meeting in October 1987, as a result of a reordering of articles within the 1987 Draft Joint Protocol,[94] and thereafter remained unchanged until its final adoption at the Diplomatic Conference in 1988.

The text of what became Article IV of the Joint Protocol was presented to the October 1987 Joint IAEA/NEA Working Group meeting with a commentary stating that the choice of a positive enumeration of the applicable articles was:

> "mainly determined by practical considerations as well as by the wish not to mention expressly those Articles of the Conventions which are not directly relevant to the concept of non-Contracting States and to exclude expressly not only the procedural Articles but also those Articles of either Convention which have no counterpart in the other (Articles 7(e) and 17 [of the Paris Convention], XVI [of the Vienna Convention]) or are different in substance (Article 6(e) [of the Paris Convention])."

The commentary also "submitted that the positive formula is as valid as the negative one; it may even be preferable as it does not state exceptions" but further noted that, "contrary to the 1974 Draft Joint Protocol, Articles 6(e) and 7(e) of the [Paris Convention] are not excluded".[95]

This latter notation makes it clear that there is no exact correspondence between the articles in either Convention whose application was expressly excluded by Article I of the 1974 Draft Joint Protocol and the articles whose application is now implicitly excluded by Article IV of the Joint Protocol, and that the change from a negative to a positive enumeration was largely but not exclusively a drafting change. In particular, the fact that Articles 6(e)[96] and 7(e)[97] of the Paris Convention are no longer excluded entails that there is no perfect reciprocity

[92] IAEA document 250-N5.TC-462.6, Annex C.

[93] OECD-NEA document LEG/DOC(87)3 (Rev. 1).

[94] IAEA document N5-TC-643.

[95] IAEA document N5/TC/643(3), p. 5.

[96] Article 6(e) of the Paris Convention relates to subrogation in cases where persons other than the operator of a nuclear installation have paid compensation for damage caused by a nuclear incident. Under Article 6(d) of the Paris Convention, "any person" who has paid compensation pursuant to any international transport agreement or to the legislation of a non-Contracting State acquires, up to the amount which he has paid, the rights under the Paris Convention of the person whom he has so compensated. Article IX.2(a) of the Vienna Convention restricts such subrogation to the nationals of the Contracting Parties. Article 6(e) of the Paris Convention, which has no corresponding provision in the Vienna Convention, also gives a right of subrogation to persons with a principal base of business in a Contracting State, where they or their servants pay compensation for damage suffered in a non-Contracting State or caused by a nuclear incident occurring in such State.

[97] Article 7(e) of the Paris Convention, which is mentioned in Section 1.1, relates to transit of nuclear material and allows a Contracting Party to subject the transit of nuclear substances through its territory to the condition that the maximum liability of the operator of the foreign nuclear installation be increased up to the maximum liability applicable within its own territory. No corresponding provision exists in either the original or the 1997 Vienna Convention.

in the substantive obligations undertaken by the Parties to the two Conventions under Article IV of the Joint Protocol.[98]

Another difference between Article I of the original 1974 Draft Joint Protocol and Article IV of the Joint Protocol relates to the terms whereby the same idea is expressed and does not appear to entail a major difference of substance. Whereas Article I of the 1974 Draft provided that the Parties to the Protocol which were Parties to either the Vienna Convention or the Paris Convention would be "considered as if they were Parties" to the other Convention (with the exception of the enumerated articles), Article IV of the Joint Protocol now provides that (the enumerated articles of) either the Vienna Convention or the Paris Convention "shall be applied" with respect to the Parties to the Protocol which are Parties to the other Convention "in the same manner" as between Parties to that Convention. As was explained in the documentation examined by the Joint IAEA/NEA Working Group meeting of October 1987, the revised wording "aims at establishing equal treatment as regards the operative Articles of either Convention without implying the status of a full Contracting Party", thus addressing "the concern that the wording used in Article I of the 1974 draft…might be too far-reaching in the light of international treaty practice".[99] But the idea that the Joint Protocol would not afford to the Parties of either Convention the full status of a Party to the other was clear to the drafters from the beginning.[100] Moreover, as has been pointed out, the 1987 Explanatory Note, while confirming that the new wording in Article IV is intended to make it clear that the Joint Protocol "does not afford the full status of a Party to the other Convention",[101] still emphasizes that the principle underlying that provision "is to create a link or 'bridge' between the two Conventions by abolishing the distinction between Contracting Parties and non-Contracting States as regards the operative provisions of either Convention".[102]

Inasmuch as the mutual extension of the operator's liability under either Convention to damage suffered in the territory of Contracting Parties to the other Convention is now specifically provided for in Article II of the Joint Protocol, the main effects of Article IV of the Joint Protocol may be said to concern, in respect of the transport of nuclear material: the determination of the liable operator; and the determination of the State whose courts have jurisdiction. Moreover, a more general issue that does not exclusively relate to transport cases may arise in respect of

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[98] The following comments were made in the documentation presented to the October 1987 Joint IAEA/NEA Working Group meeting in respect of this choice:

> "As a matter of fact, Article 6(e) is confined to compensation in respect of damage caused by a nuclear incident occurring in the territory of a non-Contracting State or in respect of damage caused in such territory. This rule would remain unaffected if an operator is liable under the [Paris Convention], but would not apply to incidents occurring and damage suffered in Contracting States to the [Vienna Convention] as they are not considered as non-Contracting States under the terms of draft Article III [corresponding to Article IV of the Joint Protocol]….As regards Article 7(e) of the [Paris Convention], it remains applicable among its Contracting Parties. As the Joint Protocol establishes the principle of equal treatment and non-discrimination between the Contracting Parties to either Convention, this Article should also apply in the relationship between those Parties. It is to be noted that this provision would be applied among Contracting Parties to the [Paris Convention] only, if a [Paris Convention operator] assumes liability by contract during carriage of nuclear material between his installation and that of a [Vienna Convention operator] (Articles 4(a)(i) and (b)(i) [of the Paris Convention], II.1(b)(i) and (c)(i) [of the Vienna Convention], in connection with Article II above [corresponding to Article III of the Joint Protocol]). This assumption of liability would preserve the application of the [Paris Convention] and hence of the [Brussels Convention]" (IAEA document N5/TC/643(3), pp. 5–6).

Article 7(e) of the Paris Convention will be dealt with in greater detail when discussing the amount of compensation to be paid under the applicable Convention, in Section 3.2.3.

[99] IAEA document N5/TC/643(3), p. 6.

[100] For example, WD I and WD II point out that the original formula whereby the Parties to the Vienna Convention would be "treated as if they were" Parties to the Paris Convention would imply that they would not, as a result thereof, be eligible for accession to the Brussels Convention, which, under Article 19 thereof, is only open to Contracting Parties to the Paris Convention.

[101] 1987 Explanatory Note, para. 9.

[102] 1987 Explanatory Note, para. 4.

the amount of compensation to be paid. There are, of course other effects,[103] but these three were singled out from the beginning as the major effects of the "formula under which the parties to one Convention are treated as if they were parties to the other Convention"[104] and appear to deserve some comment.

3.2.1. The determination of the liable operator

As is pointed out in Section 1.2, the general rule under both the Paris Convention and the Vienna Convention is that, in the case of a nuclear accident occurring during transport of nuclear material between the operators of two nuclear installations, the sending operator is liable until the receiving operator has assumed liability pursuant to the express terms of a written contract or, in the absence of such contract, until the receiving operator has taken charge of the materials involved.[105] However, this general rule only applies if both operators are within the territory of Contracting Parties to the same Convention: if the nuclear materials are sent to a person in a non-Contracting State, including a Contracting Party to a different Convention, the sending operator remains liable until the nuclear materials have been unloaded from the means of transport by which they arrived in the territory of that State; conversely, if the nuclear materials are sent from a person in a non-Contracting State, including a Contracting Party to a different Convention, liability is imposed upon the receiving operator from the moment when the materials have been loaded on the means of transport.[106] As a result, if a nuclear incident occurs in the course of transport of nuclear material between operators of nuclear installations situated in the territories of States party to different nuclear liability Conventions, the transfer of liability between the sending and the receiving operator cannot take place on the basis of a written contract between them or when one of them has taken charge of the materials involved, and both operators may be held liable, each under the applicable Convention, for the entire time when the nuclear materials are on the means of transport.

The effect of Article IV of the Joint Protocol is that the transport of nuclear material between the operators of two nuclear installations situated within the territory of Contracting Parties to different Conventions where both are party to the Joint Protocol is treated as if the transport took place between operators of installations situated in the territory of Contracting Parties to the same Convention. Consequently, as is stated in the "Background Material" presented at the Joint IAEA/NEA Working Group meeting in October 1987, "the transfer of liability between [Vienna Convention and Paris Convention] operators is determined by the terms of a contract in writing or, in the absence thereof, by taking charge of the nuclear material".[107]

From the perspective of the Contracting Parties to the Paris Convention, the possibility for a Paris Convention–Joint Protocol operator to assume liability by contract in the case of the transport of nuclear material between his installation and an installation situated in the territory of a Contracting Party to the Vienna Convention and the Joint Protocol is especially important since, under Article III of the Joint Protocol, which is examined in Section 3.3, it would

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[103] In the "Background Material" presented to the October 1987 Joint IAEA/NEA Working Group meeting, it was stated that:
"the distinction between 'Contracting Parties' or 'Installation State' (the latter term being used by the [Vienna Convention] only but defined with reference to 'Contracting Party' in Article I.1(d)) and non-Contracting States is of particular significance in both Conventions in respect to:
(a) their geographical scope (Article 2 [Paris Convention]);
(b) the transport of nuclear material (Articles 4(a)(iv) and (b)(iv) [Paris Convention], II.1(b)(iv) and (c)(iv) [Vienna Convention]);
(c) the right of subrogation (Articles 6(d) and (e) [Paris Convention], IX.2 [Vienna Convention]);
(d) the free transfer of compensation and funds provided by insurance or other financial security (Articles 12 [Paris Convention] and XV [Vienna Convention]);
(e) the jurisdictional provisions (Articles 13(a) to (c) [Paris Convention], XI [Vienna Convention]);
(f) the enforcement of judgments (Articles 13(d) [Paris Convention], XII [Vienna Convention]);
(g) the principle of non-discrimination (Articles 14 [Paris Convention], XIII [Vienna Convention])" (IAEA document N5/TC/643(4), para. 36).

[104] WD II, para. 52.

[105] Article 4 (a)(i)–(iii) and (b)(i)–(iii) of the Paris Convention and Article II.1 (b)(i)–(iii) and (c) (i)–(iii) of the Vienna Convention.

[106] Article 4 (a)(iv) and (b)(iv) of the Paris Convention and Article II.1 (b)(iv) and (c)(iv) of the Vienna Convention.

[107] IAEA document N5/TC/643(4), para. 38.

preserve the application of the Paris Convention and, therefore, of the Brussels Convention.[108] However, even where a Paris Convention–Brussels Convention–Joint Protocol operator has assumed liability by contract in the case of the transport of nuclear material between his installation and an installation situated in the territory of a Vienna Convention–Joint Protocol State, the Brussels Convention, under Article 2 thereof, would only apply provided that the incident does not take place wholly in a non-Contracting State and that the courts of a Contracting Party have jurisdiction under the Paris Convention. Moreover, the additional funds available under the Brussels Convention could only be used to compensate damage suffered in the Contracting Parties (or on the high seas on board a ship or aircraft registered in a Contracting Party or by a national of a Contracting Party).

3.2.2. The determination of the State whose courts have jurisdiction

As is pointed out in Section 1.2, the general rule under all nuclear liability conventions is that jurisdiction lies with the courts of the Incident State, that is, the Contracting Party within whose territory, including maritime areas subject to its full sovereignty, the nuclear incident occurs.[109] Under the 1997 Vienna Protocol (and under the Paris Convention once it is amended by the 2004 Protocol), the courts of that Contracting Party have jurisdiction even if the incident occurs beyond its territorial sea, within the area of its exclusive economic zone (or, if such a zone has not been established, within an area not exceeding the limits thereof), provided that it has notified the depository of such area prior to the nuclear incident.[110] On the other hand, if the nuclear incident occurs outside the territory of any Contracting Party or, under the 1997 Vienna Protocol (or the Paris Convention once it is amended by the 2004 Protocol), outside the area of the exclusive economic zone of any Contracting Party (e.g. on the high seas), jurisdiction lies with the courts of the Installation State, that is, the Contracting Party within whose territory the nuclear installation of the operator liable is situated.[111]

As a result, no particular problem would arise in the case of a nuclear incident at a nuclear installation, since only the Convention to which the Installation State is a Contracting Party would apply and the courts of that State, which is at the same time the Installation State and the Incident State, would have exclusive jurisdiction thereunder. On the other hand, in the case of a nuclear incident involving the transport of nuclear materials, problems may arise if the transport takes place between operators situated in Contracting Parties to different nuclear liability Conventions, each of which is to be considered as a non-Contracting State vis-à-vis the other: as is pointed out in Section 3.2.1, both the sending and the receiving operators may be held liable, each of them under the applicable Convention, and in that case, the courts in both States, both being the Installation State under the applicable Convention, would have jurisdiction; on the other hand, the Contracting Parties to each of the Conventions would be under no specific obligation to ensure that final

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[108] The problems of the possible effects of the Joint Protocol on the Brussels Convention were on the minds of the drafters from the very beginning: in WD II (para. 55), it was pointed out that one effect of the Protocol would be that the Brussels Convention (at the time not yet in force) would not be applicable in some cases where it would have been applicable (had it been in force) without the Protocol. It was pointed out, for example, that, in the case of the transport of nuclear material between a Paris Convention–Brussels Convention–Joint Protocol operator and a Vienna Convention–Joint Protocol operator, had an incident occurred in the Paris Convention–Brussels Convention–Joint Protocol State after the Vienna Convention State operator had taken charge of the material or had assumed liability therefore, the Brussels Convention would not have applied, whereas it would have applied without the Protocol. According to WD II:

> "a possible solution to this problem may be that all [Paris Convention] States ensure, either in their domestic legislation or by some administrative means, that operators of installations in their territory assume liability by contract for any incidents which may occur in the course of carriage between their installation and a [Vienna Convention] State and for which the system of the [Brussels Convention] would be applicable".

After the Joint Protocol was adopted, a solution along those lines was recommended to the Contracting Parties to the Paris Convention by the OECD Council in 1989.

[109] Article 13(a) of the Paris Convention and Article XI.1 of the Vienna Convention.

[110] Articles XI.1 bis of the 1997 Vienna Convention and Article 13(b) of the Paris Convention as amended by the 2004 Protocol.

[111] Article 13(b) of the Paris Convention and Article XI.2 of the Vienna Convention; Article XI.2 1997 of the Vienna Convention; Article 13(c) of the Paris Convention as amended by the 2004 Protocol.

judgements entered by a court in a Contracting Party to the other Convention are recognized and enforced within their territories.

Under Article IV of the Joint Protocol, the jurisdictional provisions in either the Vienna Convention or the Paris Convention are to be applied with respect to the Contracting Parties to the other Convention and the Joint Protocol "in the same manner as between Parties" to that Convention. Therefore, in the case of a nuclear incident involving the transport of nuclear materials between operators whose installations are situated in Contracting Parties to different nuclear liability Conventions but which are both party to the Joint Protocol, jurisdiction lies with the courts of the Incident State (including, in the case of a Party to the 1997 Vienna Protocol or, in the future, to the Paris Convention as amended by the 2004 Protocol, in cases where the nuclear incident occurs within the area of the Incident State's exclusive economic zone). On the other hand, if the operator is liable under the Convention to which the Installation State is a Party, the competent court in the Incident State will still have to refer, in principle, to that Convention under Article III of the Joint Protocol.[112]

The above interpretation — whereby in the event of an accident during transport involving operators in States that are Contracting Parties to different Conventions (the Paris Convention or the Vienna Convention) but which are both party to the Joint Protocol, the rules giving competence to the courts of the Incident State should apply — appears to be the one most in accordance with the ordinary meaning to be given to the terms of Article IV of the Joint Protocol in their context and in the light of the Joint Protocol's object and purpose.[113] As pointed out in its Preamble, the object and purpose of the Joint Protocol is precisely to "establish a link" between the Paris Convention and the Vienna Convention, and the 1987 Explanatory Note confirms that this link was provided by "abolishing the distinction between Contracting Parties and non-Contracting States as regards the operative provisions of either Convention".[114] Article IV of the Joint Protocol expressly enumerates the provisions relating to jurisdiction in both the Vienna Convention and the Paris Convention among those that have to be applied "in the same manner as between Parties": there would be no need for such enumeration if those provisions were still to apply as between non-Contracting States. As is pointed out in Section 3.3, as far as the context is concerned, Article III of the Joint Protocol, relating to the choice of the applicable Convention, is based on the assumption that the applicable Convention is the one in force for the Installation State, even where jurisdiction lies with the courts of a Contracting Party to another Convention: there would be no need for such a provision if, under the Joint Protocol, jurisdiction in transport cases involving Parties to different Conventions lay always with the courts of the Installation State.

The same interpretation is also supported by the travaux préparatoires.[115] A clear example was given in this respect in WD II:

> "If…an operator in State A, which has ratified the Paris Convention and the Protocol(s) sends nuclear material from his nuclear installation to an operator in State B, which has ratified the Vienna Convention and the Protocol(s), and an incident occurs in State B caused by that material, the legal situation would be as follows…:
>
> — Article 4(c)(ii) of the Paris Convention and Article II.1(c)(iv) of the Vienna Convention would not apply as A and B would not be considered as non-contracting States within the meaning of these provisions. The liable operator would be determined pursuant to the identical provisions of Article 4(a)(i) or (ii) of the Paris Convention and Article II.1(c)(i) or (ii) of the Vienna Convention;

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[112] See Section 3.3.

[113] Under Article 31.1 of the 1969 Vienna Convention on the Law of Treaties: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

[114] 1987 Explanatory Note, para. 4.

[115] Under Article 32 of the 1969 Vienna Convention on the Law of Treaties:
"Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable."

— Jurisdiction would lie with the courts of B under both Article 13(a) of the Paris Convention and Article XI.1 of the Vienna Convention (the first alternatives of Article 13(b) of the Paris Convention and XI.2 of the Vienna Convention not being applicable under the terms of the Protocol(s));
— The amount of compensation to be paid would be governed by the law of the Installation State.…"[116]

Of course, WD II was more directly relevant for the adoption of Article I of the original 1974 Draft Joint Protocol. But the same example was then repeated almost verbatim in the NEA Secretariat's Note presented to the June 1987 NEA Group meeting,[117] and in the "Background Material" presented to the October 1987 Joint IAEA/NEA Working Group meeting,[118] both of which were at the basis of the definitive adoption of Article IV of the Joint Protocol.

A different interpretation was recently put forward by a leading nuclear law expert on the occasion of a 2005 NEA Workshop. According to this interpretation, in the event of an accident during transport involving operators in Contracting Parties to different Conventions (the Paris Convention or the Vienna Convention) but which are both party to the Joint Protocol, jurisdiction should still lie with the courts of the Installation State rather than those of the Incident State.[119] However, the interpretation given in this Explanatory Text was confirmed by the NEA Secretariat on the same occasion.[120]

3.2.3. The amount of compensation to be paid

As is pointed out in Section 3.2.2, the amount of compensation is governed by the law of the Installation State both in the case where jurisdiction lies with the courts of that same State and in the case where jurisdiction lies with the courts of the Incident State, if different from the Installation State. This clearly results from Article III of the Joint Protocol, which relates to the choice of the applicable nuclear liability Convention and is examined in Section 3.3. But even in the absence of such a provision, Article IV of the Joint Convention would still have led to the same result, inasmuch as both Article V of the Vienna Convention and Article 7 of the Paris Convention refer to the Installation State as the State competent to determine, within the limits allowed by either Convention, the amount of the operator's liability. The same goes for the amount that has to be covered by insurance or other financial security under Article VII of the Vienna Convention and Article 10 of the Paris Convention.

One issue more directly related to the effects of Article III of the Joint Protocol relates to reciprocity in respect of the amount of the operator's liability, since, as is pointed out in Section 1.1, the nuclear liability Conventions differ

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[116] WD II, para. 52.

[117] OECD-NEA document LEG/DOC(87)3 (Rev. 1), para. 38.

[118] IAEA document N5/TC/643(4), para. 38.

[119] Pelzer, N., "Interpretation of the Joint Protocol in transport cases — The German position", *Indemnification of Damage in the Event of a Nuclear Accident* (*Proc. Workshop, Bratislava, 2005*), OECD/NEA, Paris (2006) p. 105 ff. According to this view, the opposite interpretation would be in contradiction to Article III.3 of the Joint Protocol, which provides for the application of the Convention to which the Installation State is a Party; moreover, it would entail that the courts of two States would have jurisdiction, since the courts of the Installation State would still have jurisdiction under either the Paris Convention or the Vienna Convention "in relation to" States party to that Convention that were not party to the Joint Protocol.

[120] "Note by the OECD/NEA Secretariat", *Indemnification of Damage in the Event of a Nuclear Accident* (*Proc. Workshop, Bratislava, 2005*), p. 101 ff. The Note concluded that:

> "in respect of an accident involving only [Paris Convention/Vienna Convention] countries that are also Party to the [Joint Protocol], the rules giving competence to the courts of the accident State should apply. On the other hand, to the extent that non-[Joint Protocol] States would be involved because of damage suffered in their respective territories, there may be a problem if they object to the designation of the competent court under the rules of the [Joint Protocol]" (p. 102).

This latter observation hints at the conflicts of treaty obligations that may arise for Parties to the Joint Protocol vis-à-vis Parties to either the Vienna Convention or the Paris Convention which are not Parties to the Joint Protocol. Such conflicts may arise as a result of the decision to allow the Joint Protocol to enter into force even if not all Parties to the Vienna Convention and the Paris Convention have ratified it (see Section 4.2). It seems sufficient here to point out that conflicts of that nature may not only arise in respect of the jurisdictional provisions of the Vienna Convention and the Paris Convention, but also in respect of other provisions thereof (e.g. those relating to the determination of the liable operator).

considerably as to that amount. More specifically, under Article V of the 1963 Vienna Convention, the minimum liability amount is $5 million,[121] whereas Article 7 of the Paris Convention, as at present in force, establishes a maximum amount of 15 million SDRs[122] but then allows the Installation State to establish by legislation a greater or lesser amount, taking into account the possibilities for the operator to obtain the required insurance or other financial security. Under Article V of the 1997 Vienna Convention, the minimum amount is raised to 300 million SDRs[123] (or 150 million SDRs, provided that public funds are made available by the Installation State to compensate the damage in excess, up to 300 million SDRs), but Article 7 of the Paris Convention, as it will be amended by the 2004 Protocol, will also establish a minimum, rather than a maximum, amount and will raise that amount to €700 million.

As far as the Contracting Parties to the Paris Convention are concerned, a partial remedy to the potential imbalance in the liability amounts in a transport situation is represented by Article 7(e), which, as mentioned, allows a Contracting Party to subject the transit of nuclear material through its territory to the condition that the maximum amount of liability of the foreign operator concerned be increased to the maximum amount of liability of operators of nuclear installations situated in its own territory. As also mentioned, as a result of the drafting changes which led from Article I of the 1974 Draft Joint Protocol to Article IV of the Joint Protocol, a Contracting Party to both the Paris Convention and the Joint Protocol can avail itself of this provision not only in respect of other Contracting Parties to the Paris Convention, but also in respect of the Contracting Parties to both the Vienna Convention and the Joint Protocol. However, it is unclear whether this remedy is available to the Contracting Parties to the Vienna Convention, since there is no express provision corresponding to Article 7(e) of the Paris Convention in either the 1963 Vienna Convention or the 1997 Vienna Convention. On the other hand, given the much higher amount of liability available under the Paris Convention, it is unlikely that this situation would in practice pose a problem for the Contracting Parties to the Vienna Convention.

Quite apart from the possibility envisaged in Article 7(e) of the Paris Convention, the more general question arises as to whether, under the terms of the Joint Protocol, the Contracting Parties to one Convention may limit the amount of compensation available under their legislation to the lesser amount that may be available under the legislation of the Contracting Parties to the other Convention. The drafters of the Joint Protocol were aware of this question from the very beginning, and the answer they gave in the earliest stages of the preparatory work was as follows:

> "As far as the relationship between the Parties to the same Convention [is] concerned such restriction is not possible (Article 7(d) of the Paris Convention). Consequently, if there is treatment as Party in the general sense…the same would apply. Such limitations would also be contrary to the non-discrimination Articles of both Conventions (Article 14(a) of the Paris Convention and Article XIII of the Vienna Convention) and would put nationals of non-parties to both Conventions who suffer damage in the territory of the Parties or on the high seas in a more favourable position than nationals of the Parties".[124]

These words were repeated verbatim in WD II,[125] but not in the Note presented to the June 1987 NEA Group meeting, nor in the "Background Material" presented to the October 1987 Joint IAEA/NEA Working Group meeting, which were at the basis of the definitive adoption of Article IV of the Joint Protocol. On the other hand, these documents did point out that, as a result of the approach taken in the Joint Protocol, "The maximum amount of the operator's liability as fixed by his Installation State's legislation pursuant to the Convention to which the latter is a

[121] Article V. 2 of the Vienna Convention defines the US dollar referred to in the Convention as "a unit of account equivalent to the value of the United States dollar in terms of gold on 29 April 1963, that is to say US $35 per one troy ounce of fine gold".

[122] SDR is the acronym for 'special drawing right', which is defined in Article 7 of the Paris Convention as "the unit of account defined by the International Monetary Fund and used by it for its own operations and transactions".

[123] Like Article 7 of the Paris Convention, Article I.1(p) of the 1997 Vienna Convention uses SDR as the acronym for 'special drawing right', defined as "the unit of account defined by the International Monetary Fund and used by it for its own operations and transactions".

[124] WD I, para. III.3.

[125] WD II, paras 61–63.

Party, covers nuclear damage suffered in [Vienna Convention] as well as in [Paris Convention] States without discrimination".[126]

Even if the interpretation given above is considered to be in line with both the Paris Convention and the Vienna Convention as they existed at the time the Joint Protocol was adopted, the additional question arises as to whether, and to what extent, the situation changed after the entry into force of the 1997 Vienna Protocol and/or will change after the Paris Convention is further amended by the 2004 Protocol.

As far as the Vienna Convention is concerned, it could be argued that the situation has indeed changed as a result of the entry into force of the 1997 Vienna Protocol. In fact, a Contracting Party to the Vienna Protocol may avail itself of Article XIII.2 of the 1997 Vienna Convention, providing that:

> "notwithstanding paragraph 1 of this Article [relating to non-discrimination], insofar as compensation for nuclear damage is in excess of 150 million SDRs, the legislation of the Installation State may derogate from the provisions of this Convention with respect to nuclear damage suffered in the territory, or in any maritime zone established in accordance with the international law of the sea, of another State which, at the time of the incident, has a nuclear installation in such territory, to the extent that it does not afford reciprocal benefits of an equivalent amount."

To some extent, this provision was inspired by Article 15(b) of the Paris Convention, which is referred to below; however, unlike Article 15(b) of the Paris Convention, Article XIII.2 of the 1997 Vienna Convention appears to apply to compensation in excess of 150 million SDRs quite irrespective of the basis for such compensation, for example, even if such compensation is based on the operator's liability and not on public funds in excess thereof. The Explanatory Text relating to the Vienna Protocol points out that the interpretation of this provision is not very easy:

> "[W]hereas the context of the new provision might be seen as implying that a derogation could only relate to the non-discrimination principle, a broader interpretation is also possible, since reference is made to the possibility of derogating from 'the provisions' of the Convention. Under this broader interpretation, it could be argued, for example, that the legislation of the Installation State could establish lower amounts of compensation in respect of damage suffered in a State not affording reciprocal benefits; this interpretation may be seen as reinforced by the fact that the new provision is intended to apply to a nuclear State not affording 'reciprocal benefits of an equivalent amount', a language which clearly refers to the amounts of compensation".[127]

Inasmuch as the new Article XIII.2 of the 1997 Vienna Convention refers to "another State", it is clearly intended to apply both to the other Contracting Parties to the Vienna Protocol and to non-Contracting States, to the extent that damage suffered in such States is covered. In any event, if a Contracting Party to the Vienna Protocol ratifies or accedes to the Joint Protocol, it would have to cover damage suffered in the Contracting Parties to both the Paris Convention and the Joint Protocol, but Article IV of the Joint Protocol would allow it to apply the new Article XIII.2 to these latter States "in the same manner" as it applies between Contracting Parties to the Vienna Protocol.

Similar considerations may be said to apply to the Paris Convention once it is amended by the 2004 Protocol. The new Article 2 of the Paris Convention will make it explicit that, as far as Contracting Parties to the Paris Convention which are also Contracting Parties to the Joint Protocol are concerned, damage suffered in Contracting Parties to the Vienna Convention which are in their turn also Contracting Parties to the Joint Protocol will be covered under the amended Paris Convention, whereas the amended Paris Convention will only cover damage suffered in nuclear non-Contracting States which are not party to the Joint Protocol if these States, at the time of the nuclear incident, have nuclear liability legislation in place which affords "equivalent reciprocal benefits". This provision is in line with Article II of the Joint Protocol. The new Article 3(g) of the Paris Convention will allow a Contracting Party, in cases where the amended Paris Convention applies to a non-Contracting State, "to establish in respect of nuclear damage amounts of

[126] OECD-NEA document LEG/DOC(87)3 (Rev. 1), para. 38; IAEA document N5/TC/643(4), para. 38.

[127] IAEA International Law Series No. 3, Section 2.8.

liability lower than the minimum amounts established under this Article…to the extent that such State does not afford reciprocal benefits of an equivalent amount", but this provision explicitly confines its application to those non-Contracting States which are not Contracting Parties to both the Vienna Convention and the Joint Protocol.

On the other hand, attention has to be focused on the new text of Article 15(b) of the Paris Convention. At the time when the Joint Protocol was adopted, no attention was paid to this provision, which, as at present in force, provides that, "in so far as compensation for damage involves public funds" and is in excess of the minimum amount of the operator's liability provided for in Article 7 of the Paris Convention, "any such measure in whatever form may be applied under conditions which may derogate from the provisions of this Convention". In contrast, the new Article 15(b), as it will be amended by the 2004 Protocol, no longer refers to public funds and simply provides, in language similar to the new Article XIII.2 of the 1997 Vienna Convention, that, "Insofar as compensation for nuclear damage is in excess of the 700 million euros referred to in Article 7(a), any such measure in whatever form may be applied under conditions which may derogate from provisions of this Convention". Inasmuch as this provision will apply as between Contracting Parties to the amended Paris Convention, the effect of Article IV of the Joint Protocol is that a Contracting Party to both the amended Paris Convention and the Joint Protocol will be allowed to apply that provision "in the same manner" to the Contracting Parties to both the Vienna Convention and the Joint Protocol.

It appears, therefore, that, under the above interpretation of Article XIII, para. 2, of the 1997 Vienna Convention, the Contracting Parties to the Vienna Protocol may resort to reciprocity in respect of compensation available in excess of 150 million SDRs, but, for those of them that are party to the Joint Protocol, it is highly unlikely that they may in fact do so vis-à-vis the Contracting Parties to the Paris Convention that are also party to the Joint Protocol, in view of the much higher amount of compensation that will be available under this latter Convention once it is amended by the 2004 Protocol. On the other hand, despite the much lower amount of compensation available under the other Convention, the Contracting Parties to the amended Paris Convention that are also party to the Joint Protocol will only be allowed to resort to reciprocity vis-à-vis the Contracting Parties to the Vienna Convention in respect of compensation available in excess of €700 million.[128]

3.3. THE CHOICE OF THE APPLICABLE CONVENTION (ARTICLE III)

As is pointed out in Section 2.2, the Joint Protocol aims not only at establishing a treaty link between the Contracting Parties to the Vienna Convention and the Contracting Parties to the Paris Convention, but also at eliminating problems arising from the simultaneous application of both Conventions to the same nuclear incident. Thus, the second principle underlining the Joint Protocol consists in making either the Vienna Convention or the Paris Convention exclusively apply to a nuclear incident by means of an appropriate conflict rule.

At the time when the Joint Protocol was originally drafted, it was felt that "the formula under which the parties to one Convention are treated as if they were parties to the other Convention would achieve, at the same time, the objective of avoiding conflicts between and simultaneous application of the two Conventions as well as establishing a relationship between them".[129] However, it was also felt that, although that formula would result in a clear "determination of the operator liable, the competent court and the national law under which the compensation is to be paid", it might still be necessary to determine the Convention applicable: it was pointed out, in particular, that the

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[128] This interpretation is based exclusively on the text of the Paris Convention as amended by the 2004 Protocol. However, mention must be made of a Joint Declaration made on 23 November 2004 by the Signatories to the Protocol of 12 February 2004 to Amend the Paris Convention, whereby:

> "if the following reservation is made in accordance with Article 18 of the Paris Convention, such a reservation is accepted:
> '[Name of the State making the reservation], without prejudice to Article 2(a)(iii), reserves the right to establish in respect of nuclear damage suffered in the territory of, or in any maritime zones established in accordance with international law of, or on board a ship or aircraft registered by, a State other than [name of the State making the reservation], amounts of liability lower than the minimum amount established under Article 7(a) to the extent that such other State does not afford reciprocal benefits of an equivalent amount'".

[129] WD II, para. 52.

"Brussels Supplementary Convention presupposes, inter alia, that the operator is liable under the Paris Convention" and that "the Conventions have different rules on the right of subrogation and recourse". It was further considered in this respect that "the general formula that the Parties to one Convention shall be treated as if they were Parties to the other Convention would not seem to provide a clear determination of the Convention applicable", since "the identical provisions of both Conventions merely lead to the same result". Moreover, "Articles 11 of the Paris Convention and VIII of the Vienna Convention do not appear to be relevant in this respect, as they deal only with the nature, form and extent of the compensation as to be settled by the law of the competent court and presuppose the applicability of the Convention in question".[130]

Once it was established that an appropriate conflict rule was required in order to determine the applicable Convention, WD II pointed out that the choice could be made in two ways: it "could be either the Convention to which the Installation State of the operator liable is a Party or the Convention to which the State whose courts have jurisdiction is a Party."[131] However, the first solution was the one preferred from the very beginning and consequently was already reflected in the 1974 Draft Joint Protocol (Article II). WD II explained this choice by pointing out that, under the alternative solution:

> "the liable operator may be held liable under a Convention to which his Installation State is not a Party. For example, as the provisions of the Paris Convention on the rights of subrogation and recourse are wider than those of the Vienna Convention, the Parties to the latter would have to amend their national law to provide for the case that an action is brought before a [Paris Convention] State court against a [Vienna Convention] State operator under Article 6(d) or (e) of the Paris Convention. Such legislation would, however, not be in conformity with the Vienna Convention."[132]

Under the preferred solution, no such problems would arise:

> "the operator would always be held liable under the Convention which corresponds to his own national law. The competent court may have to apply a Convention different from the lex fori, but that is not unusual in conflict of law cases".[133]

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[130] WD II, para. 53.

[131] WD II, para. 54.

[132] WD II, para. 54.

[133] WD II, para. 54. At the 2005 Bratislava Workshop, the interpretation whereby the competent court would have to apply the Convention to which the Installation State is a Party rather than the Convention in force for its own State was criticized by some nuclear law experts as not "reasonable" (N. Pelzer) and as "unacceptable in terms of constitutionality" (V. Lamm) (see *Indemnification of Damage in the Event of a Nuclear Accident* (*Proc. Workshop, Bratislava, 2005*), pp. 106 and 109, respectively). In view of these late criticisms, it may be of interest to recall that, although para. 39 of the original Note presented to the June 1987 NEA Group meeting (OECD-NEA document LEG/DOC(87)3) also referred to the fact that, under the preferred solution, the competent court may have to apply "a Convention and national law different from the lex fori" (just as in para. 54 of WD II, which is quoted in the text), during the discussion regarding the determination of the applicable Convention at the June 1987 meeting, that language was criticized and eventually changed: "several Representatives considered that it was incorrect to refer to a foreign convention since, if the Protocol were ratified, the Convention became an integral part of national law", and the Group eventually agreed to delete the word "Convention" and refer only to "national law different from the lex fori", as suggested by the Swedish representative (OECD-NEA document SEN/LEG(87)3, para. 29). Consequently, the revised Note (OECD-NEA document LEG/DOC(87)3 (Rev. 1), para. 39), as well as the "Background Material" presented to the October 1987 Joint IAEA/NEA Working Group meeting (IAEA document N5/TC/643(4), para. 39), referred to the fact that "the competent court may have to apply a national law different from the lex fori". In fact, from the point of view of public international law, the obligation for the Incident State to apply the Convention to which the Installation State is a Party would not derive from this latter Convention, which is not in force for the Incident State, but rather from the Joint Protocol, a treaty to which the Incident State itself is a Party; from the point of view of private international law, the competent court in the Incident State would apply the Convention to which the Installation State is a Party, as part of the national law of this latter State, by virtue of a conflict rule inserted in the lex fori by the Joint Protocol, either as directly applicable or as implemented in the lex fori.

WD II then points out that:

> "Moreover, the application of the foreign Convention will in most cases be limited to the amount of compensation available under the foreign operators' national law, while the nature, form and extent of the compensation as well as the equitable distribution thereof will be governed by the national law of the competent court."[134]

These reasons were repeated almost verbatim in the Note presented to the June 1987 NEA Group meeting[135] and in the "Background Material" presented to the October 1987 Joint IAEA/NEA Working Group meeting,[136] which were the basis for the adoption of Article III of the Joint Protocol.

The conflict rule determining the applicable Convention was formulated in Article II of the original 1974 Draft Joint Protocol by simply referring to "the Convention to which the Installation State of the operator liable, by virtue of either Convention, is liable". [137] The substance of this rule has not changed, despite the drafting changes to which it was subjected to before its final adoption. It was felt, in particular, that, inasmuch as both Conventions apply not only to nuclear incidents occurring in nuclear installations, but also to nuclear incidents occurring during carriage of nuclear materials, two conflict rules (as opposed to one) were required.[138] Thus, in the Note presented to the June 1987 NEA Group meeting the NEA Secretariat proposed a revised text for Article II,[139] which was then adopted with minor amendments by the Group.[140] This text was then presented at the October 1987 Joint IAEA/NEA Working Group meeting, where it was further amended and, as a result of an internal reorganization of provisions, was finally adopted as Article III of the Joint Protocol.[141] The text of Article III of the Joint Protocol thereafter remained unchanged until its final adoption in September 1988.

Despite the formulation of two conflict rules, Article III of the Joint Protocol achieves the same result that was originally envisaged when only one conflict rule was formulated. Having stated, in para. 1, that "either the Vienna Convention or the Paris Convention shall apply to a nuclear incident to the exclusion of the other", Article III, para. 2, relies on the principle of territoriality in order to lay down the conflict rule in the case of nuclear incidents occurring in nuclear installations (i.e. the place of the nuclear incident determines the applicable Convention), whereas Article III, para. 3, lays down the conflict rule in transport cases by simply referring to the Convention in force for the State in whose territory is situated the installation of the operator liable by virtue of the identical provisions of Article II.1(b)

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[134] WD II, para. 54. See also Article 11 of the Paris Convention and Article VIII of the Vienna Convention. It must be pointed out, however, that the 1997 Vienna Protocol amends Article VIII of the Vienna Convention by adding a second paragraph providing for priority in the distribution of claims to claims in respect of loss of life or personal injury, in the event that the damage to be compensated exceeds the amount available under the Convention. No corresponding provision will be inserted in the Paris Convention by the 2004 amending Protocol.

[135] OECD-NEA document LEG/DOC(87)3 (Rev. 1), para. 39.

[136] IAEA document N5/TC/643 (4), para. 39.

[137] Article II of the 1974 Draft Joint Protocol reads as follows:

> "For the purposes of this Protocol and taking account of the provisions of Article I thereof, either the Paris Convention or the Vienna Convention shall apply to a nuclear incident, to the exclusion of the other. The Convention applicable shall be that to which the Installation State of the operator liable by virtue of either Convention is a Party".

Having recalled the relevant paragraphs in WD II, the 1974 Explanatory Note explained that:

> "This formula would also remove any doubt that in case of a nuclear incident involving only States Party to either the Paris Convention or the Vienna Convention, only that Convention would be applicable. The provisions of Article I [now Article IV of the Joint Protocol] would have to be taken into account only in those cases where Parties to the Paris Convention and to the Vienna Convention are involved" (para. 5).

These words were repeated almost verbatim in the 1986 Explanatory Note (para. 5). However, the words "for the purposes of this Protocol" were deleted at the June 1987 NEA Group meeting as a result of the adoption of the revised text prepared by the NEA Secretariat, which is referred to later in the text.

[138] 1987 Explanatory Text, para. 8.

[139] OECD-NEA document LEG/DOC(87)3 (Rev. 1), Annex IV.

[140] OECD-NEA document SEN/LEG(87)3, para. 35.

[141] IAEA document N5/TC/643(3).

and (c) of the Vienna Convention and Article 4(a) and (b) of the Paris Convention. In both cases, the applicable Convention is the Convention in force for the Installation State. As is pointed out in Section 3.1, the idea that the operator remains liable under the Convention to which the State in which his installation is situated is a Party is now also made explicit in Article I of the Joint Protocol, which was first adopted in 1987 together with the revised text of Article III of the Joint Protocol.

A particular issue, which was discussed in 1987, relates to the applicable Convention in the case of different nuclear consignments —that is, where nuclear material is carried from or to an operator whose installation is situated in the territory of a Contracting Party to the Paris Convention and, at the same time and on the same means of transport (e.g. a ship), nuclear material is carried from or to another operator whose installation is situated in the territory of a Contracting Party to the Vienna Convention. In this respect, both the Note presented to the June 1987 NEA Group meeting and the "Background Material" presented to the October 1987 Joint IAEA/NEA Working Group meeting pointed out that:

> "Which Convention applies is not a problem, where one of the operators has actually taken charge of the material or has accepted liability in writing…. [In that case,] that Convention will apply whose Contracting Party is the Installation State of the operator taking in charge. Where there is no actual taking in charge or no written acceptance of liability by one of the operators, the Convention applicable is only clear when the nuclear incident is caused exclusively by one of the nuclear consignments. Where it is caused by both consignments or — what is more likely, it is uncertain which one was responsible — both operators will be liable [Article 5(d) [of the Paris Convention], II.3 (a) [of the Vienna Convention]]. Both Conventions are applicable, and the Protocol does not point to the exclusive application of one Convention. This legal position is however in no way the result of the Protocol, and would not be different without it. The advantage of the Protocol is precisely that it permits agreements between [Paris Convention and Vienna Convention] operators which exclude the simultaneous application of both Conventions."[142]

[142] OECD-NEA document LEG/DOC(87)3 (Rev. 1), para. 40, and IAEA document N5/TC/643 (4), para. 40.

4. FINAL CLAUSES AND TRANSITIONAL ISSUES

The original 1974 Draft Joint Protocol already contained a number of provisions (Articles III–IX) dealing with signature, ratification, accession, entry into force and denunciation of the treaty, as well as with depositary functions in respect thereof. These provisions were at the basis of the largely corresponding final clauses now contained in Articles V–XI of the Joint Protocol. These final clauses were provisionally adopted, on the basis of a draft prepared by the IAEA and NEA Secretariats, by the Joint IAEA/NEA Working Group in October 1987,[143] and thereafter remained unchanged, except for the date of the opening for signature of the Joint Protocol, which was inserted at the Diplomatic Conference in 1988. In addition to the issues already dealt with in the 1974 Draft Joint Protocol, the current final clauses also deal with denunciation, termination and authentic texts of the Joint Protocol. The final clauses do not envisage a specific amendment procedure, as it was felt that amendments could be dealt with in accordance with the general rules of the law of treaties as codified in Articles 39 and 41 of the 1969 Vienna Convention on the Law of Treaties.

4.1. DEPOSITARY FUNCTIONS AND AUTHENTIC TEXTS

Article VI.2 of the Joint Protocol designates the Director General of the IAEA as the depositary of the Joint Protocol and, consequently, as the recipient of instruments of ratification (acceptance, approval) or accession and of notifications by Contracting Parties. Under Articles VIII.1 and IX.1 of the Joint Protocol, notifications of denunciation and of termination of application of the Joint Protocol must also be directed to the depositary, whereas the usual depositary duties are specified in Articles X and XI of the Joint Protocol. The Secretary General of the OECD, which is the depositary of the Paris Convention, is mentioned in Articles X and XI as the beneficiary of those duties, together with the Contracting Parties to the Joint Protocol and the States invited to the 1988 Diplomatic Conference.

Under Article XI of the Joint Protocol, the Arabic, Chinese, English, French, Russian and Spanish texts of the Joint Protocol are equally authentic.

4.2. SIGNATURE, RATIFICATION, ACCESSION, ENTRY INTO FORCE, DENUNCIATION AND TERMINATION

As is pointed out in Section 2.1, the Joint Protocol is not intended as an amendment of either the Vienna Convention or the Paris Convention, both defined in Article I of the Joint Protocol so as to include "any amendment thereto which is in force for a Contracting Party", but aims at creating a "bridge" between the two Conventions in order to establish treaty relations between the Parties to one Convention that are not party to the other. Therefore, the Joint Protocol is not a free-standing international agreement and is only open to States which are already Parties to either the Vienna Convention or the Paris Convention, and only so long as they remain Parties thereto.

Thus, under Article V of the Joint Protocol, only States having signed, ratified or acceded to either the Vienna Convention or the Paris Convention were allowed to sign the Joint Protocol as from the date of its opening for signature, on 21 September 1988, until the date of its entry into force, on 27 April 1992. Under Article VI, the Joint Protocol is subject to ratification (acceptance or approval) on the part of the signatory States and is open to accession by non-signatory States, but instruments of ratification (acceptance, approval) or accession can only be accepted from States party to either the Vienna Convention or the Paris Convention. Conversely, under Article IX, the Joint Protocol automatically ceases to apply to any Contracting Party which ceases to be a Party to either the Vienna Convention or the Paris Convention.

[143] IAEA document N5/TC/643.

In accordance with Article VII.1, the Joint Protocol entered into force three months after the date of deposit of instruments of ratification (acceptance, approval) or accession "by at least five States Party to the Vienna Convention and five States Party to the Paris Convention", that is, on 27 April 1992. For each State ratifying (accepting, approving) or acceding to the Protocol after that date, the Protocol enters into force three months after the date of deposit of its instrument of ratification (acceptance, approval) or accession.

Under Article VIII, any Contracting Party may denounce the Joint Protocol by written notification to the depositary. In that case, the Joint Protocol ceases to apply to that Contracting Party one year after the date on which that notification is received. Moreover, as has been mentioned, under Article IX, the Joint Protocol automatically ceases to apply to a Contracting Party which has terminated application of either the Vienna Convention or the Paris Convention on the date when such termination takes effect, that is, quite irrespective of any formal denunciation of the Joint Protocol. Indeed, under Article IX of the Joint Protocol, such a Contracting Party is obliged to notify the depositary of the termination of the application of the relevant Convention with respect to it and of the date such termination takes effect.[144]

In the event that, in accordance with Articles VIII or IX of the Joint Protocol, the number of the Contracting Parties to the Joint Protocol falls below the number necessary for its entry into force under Article VII.1, this does not automatically entail its termination. Under Article 55 of the 1969 Vienna Convention on the Law of Treaties, "unless the treaty otherwise provides, a multilateral treaty does not terminate by reason only of the fact that the number of the parties falls below the number necessary for its entry into force". Far from providing otherwise, the Joint Protocol, in Article VII.2, expressly provides that it "shall remain in force as long as both the Vienna Convention and the Paris Convention are in force", that is, quite irrespective of whether or not the number of the Parties thereto falls below the number necessary for its entry into force.

4.3. TRANSITIONAL ISSUES RELATING TO POTENTIAL CONFLICTS OF TREATY OBLIGATIONS

As far as the conditions for the entry into force of the Joint Protocol are concerned, the number of five States party to the Vienna Convention and five States party to the Paris Convention, which already appeared in the 1974 Draft Joint Protocol, was chosen because it corresponded to the number of ratifications or accessions required for the entry into force of both the Vienna Convention (Article XXIII) and the Paris Convention (Article 19(b)), and because it was considered to constitute an acceptable compromise between the interest of allowing the Joint Protocol to become effective within a reasonable period of time, on the one hand, and that of ensuring its practical application by a sufficient number of adhesions, on the other.[145]

However, as is mentioned in Section 2.1, it was recognized at the same time that this compromise solution would not avoid "the creation of a 'third class' of countries"[146], that is, the Contracting Parties to the Joint Protocol as opposed to either the Contracting Parties to the Vienna Convention only or the Contracting Parties to the Paris Convention only. In other words, it was recognized from the very beginning that the smooth functioning of an instrument such as the Joint Protocol requires that as many Parties to either the Paris Convention or the Vienna Convention as possible (ideally all

[144] It may be of interest to recall in this respect that Article XX of the 1963 Vienna Convention provides that: "Notwithstanding the termination of the application of this Convention to any Contracting Party, either by termination pursuant to Article XXV or by denunciation pursuant to Article XXVI, the provisions of this Convention shall continue to apply to any nuclear damage caused by a nuclear incident occurring before such termination". Although Article XX is deleted in the Vienna Convention as amended by the 1997 Vienna Protocol (Article 18.1), a similar provision is contained in Article 22.4 of the Vienna Protocol and applies in case of denunciation of the 1997 Vienna Protocol (and thus of the 1997 Vienna Convention). There is no corresponding provision in the Paris Convention (in either its present form or as it will be amended by the 2004 Protocol), nor does the Joint Protocol itself contain any specific provision in this respect. Under the general rules of the law of treaties as codified in Article 70 of the 1969 Vienna Convention on the Law of Treaties, the termination of a treaty releases the Parties from any obligation to further perform the treaty but does not affect any right, obligation or legal situation of the Parties created through the execution of the treaty prior to its termination.

[145] 1974 Explanatory Note, para. 5.

[146] 1974 Explanatory Note, para. 5.

the Parties thereto) accept the treaty link offered by the Joint Protocol. In order to achieve that result, when the negotiations started again in the 1980s, consideration was given to the possibility of inserting in the Draft Joint Protocol the requirement that all future ratifications of, and accessions to, either the Vienna Convention or the Paris Convention must be accompanied by a ratification of, or accession to, the Joint Protocol, but that idea was discarded because it would have amounted to an amendment to both Conventions.[147] Alternatively, the NEA and IAEA Secretariats proposed that the number of ratifications required for the entry into force of the Joint Protocol be raised to two thirds of the Contracting Parties to the Vienna Convention and the Paris Convention, so as to make the Protocol attractive to future Contracting Parties of the Conventions as well.[148] However, when the final Draft Joint Protocol was adopted at the October 1987 Joint IAEA/NEA Working Group meeting, the original number was retained.

As for the kinds of problems that may transitionally arise for a Contracting Party to the Joint Protocol, so long as there are Contracting Parties to either the Paris Convention or the Vienna Convention that are not Party to the Joint Protocol, these are in essence similar to those that would have been caused by the ratification of the either the Vienna Convention or the Paris Convention by some (as opposed to all) States party to the other Convention (see Section 1.3). It was clearly pointed out from the early stages of the elaboration of the Joint Protocol that a limited number of ratifications or accessions "would not achieve in all cases the desired objective of removing simultaneous liability of two different operators and of ensuring that only one court is competent" in the event of a nuclear incident.[149]

In particular, WD III contained more specific remarks on this issue and deserves full quotation. It was therein pointed out that:

> "certain problems could arise in those cases where a nuclear incident would affect States Party to the Protocol and States Party to either Convention, but not to the Protocol. If, for example, an operator in a P-State which has not ratified the Protocol sends nuclear material to an operator in a V-State which has ratified the Protocol (Vp-State) through the territory of a P-State which has ratified the Protocol (Pp-State), and a nuclear incident occurs and damage is suffered in Pp, it might be argued that victims in Pp could bring actions for compensation against either the P-operator (pursuant to the Paris Convention) or the Vp-operator (pursuant to the Protocol in conjunction with the Vienna Convention), a choice which would not be possible without the Protocol being in force, as then only the Paris Convention would apply. It is to be noted that without the Protocol, victims in the transit P-State would not be protected under any Convention if the damage had been caused by a similar incident in V. If a Pp-operator sends nuclear material through the territory of P to a Vp-operator and a nuclear incident occurs in Vp which causes damage in P, an agreement between the Pp-operator and the Vp-operator that the latter should assume liability for the entire transport would not be binding as regards P. The Vp-operator could argue that the Vienna Convention would not be applicable as the nuclear damage was suffered in a non-Contracting State. The solution here (on which the transit P-State would insist) would be that the Pp-operator assumed liability for the transport. There are a number of variants to the above examples an analysis of which shows that the difficulties arising in the transitional period are by far less numerous and easier to resolve than those caused by the present situation where there is no relationship between the Conventions at all".[150]

[147] OECD-NEA document LEG/DOC(87)3 (Rev. 1), para. 47.
[148] OECD-NEA document LEG/DOC(87)3 (Rev. 1), para. 48, and IAEA document N5/TC/643(4), para. 48.
[149] WD I, para. III.4.
[150] WD III, para. 17. "P" refers to the Paris Convention; "V" refers to the Vienna Convention.

JOINT PROTOCOL RELATING TO THE APPLICATION OF THE VIENNA CONVENTION AND THE PARIS CONVENTION

THE CONTRACTING PARTIES

HAVING REGARD to the Vienna Convention on Civil Liability for Nuclear Damage of 21 May 1963;

HAVING REGARD to the Paris Convention on Third Party Liability in the Field of Nuclear Energy of 29 July 1960 as amended by the Additional Protocol of 28 January 1964 and by the Protocol of 16 November 1982;

CONSIDERING that the Vienna Convention and the Paris Convention are similar in substance and that no State is at present a Party to both Conventions;

CONVINCED that adherence to either Convention by Parties to the other Convention could lead to difficulties resulting from the simultaneous application of both Conventions to a nuclear incident; and

DESIROUS to establish a link between the Vienna Convention and the Paris Convention by mutually extending the benefit of the special regime of civil liability for nuclear damage set forth under each Convention and to eliminate conflicts arising from the simultaneous applications of both Conventions to a nuclear incident;

HAVE AGREED as follows:

ARTICLE I

In this Protocol:

(a) "Vienna Convention" means the Vienna Convention on Civil Liability for Nuclear Damage of 21 May 1963 and any amendment thereto which is in force for a Contracting Party to this Protocol;

(b) "Paris Convention" means the Paris Convention on Third Party Liability in the Field of Nuclear Energy of 29 July 1960 and any amendment thereto which is in force for a Contracting Party to this Protocol.

ARTICLE II

For the purpose of this Protocol:

(a) The operator of a nuclear installation situated in the territory of a Party to the Vienna Convention shall be liable in accordance with that Convention for nuclear damage suffered in the territory of a Party to both the Paris Convention and this Protocol;

(b) The operator of a nuclear installation situated in the territory of a Party to the Paris Convention shall be liable in accordance with that Convention for nuclear damage suffered in the territory of a Party to both the Vienna Convention and this Protocol.

ARTICLE III

1. Either the Vienna Convention or the Paris Convention shall apply to a nuclear incident to the exclusion of the other.

2. In the case of a nuclear incident occurring in a nuclear installation, the applicable Convention shall be that to which the State is a Party within whose territory that installation is situated.

3. In the case of a nuclear incident outside a nuclear installation and involving nuclear material in the course of carriage, the applicable Convention shall be that to which the State is a Party within whose territory the nuclear installation is situated whose operator is liable pursuant to either Article II.1(b) and (c) of the Vienna Convention or Article 4(a) and (b) of the Paris Convention.

ARTICLE IV

1. Articles I to XV of the Vienna Convention shall be applied, with respect to the Contracting Parties to this Protocol which are Parties to the Paris Convention, in the same manner as between Parties to the Vienna Convention.

2. Articles 1 to 14 of the Paris Convention shall be applied, with respect to the Contracting Parties to this Protocol which are Parties to the Vienna Convention, in the same manner as between Parties to the Paris Convention.

ARTICLE V

This Protocol shall be open for signature, from 21 September 1988 until the date of its entry into force, at the Headquarters of the International Atomic Energy Agency by all States which have signed, ratified or acceded to either the Vienna Convention or the Paris Convention.

ARTICLE VI

1. This Protocol is subject to ratification, acceptance, approval or accession. Instruments of ratification, acceptance or approval shall only be accepted from States Party to either the Vienna Convention or the Paris Convention. Any such State which has not signed this Protocol may accede to it.

2. The instruments of ratification, acceptance, approval or accession shall be deposited with the Director General of the International Atomic Energy Agency, who is hereby designated as the depositary of this Protocol.

ARTICLE VII

1. This Protocol shall come into force three months after the date of deposit of instruments of ratification, acceptance, approval or accession by at least five States Party to the Vienna Convention and five States Party to the Paris Convention. For each State ratifying, accepting, approving or acceding to this Protocol after the deposit of the above-mentioned instruments this Protocol shall enter into force three months after the date of deposit of the instrument of ratification, acceptance, approval or accession.

2. This Protocol shall remain in force as long as both the Vienna Convention and the Paris Convention are in force.

ARTICLE VIII

1. Any Contracting Party may denounce this Protocol by written notification to the depositary.

2. Denunciation shall take effect one year after the date on which the notification is received by the depositary.

ARTICLE IX

1. Any Contracting Party which ceases to be a Party to either the Vienna Convention or the Paris Convention shall notify the depositary of the termination of the application of that Convention with respect to it and of the date such termination takes effect.

2. This Protocol shall cease to apply to a Contracting Party which has terminated application of either the Vienna Convention or the Paris Convention on the date such termination takes effect.

ARTICLE X

The depositary shall promptly notify Contracting Parties and States invited to the Conference on the relationship between the Paris Convention and the Vienna Convention as well as the Secretary General of the Organisation for Economic Co-operation and Development of:

(a) Each signature of this Protocol;
(b) Each deposit of an instrument of ratification, acceptance, approval or accession concerning this Protocol;
(c) The entry into force of this Protocol;
(d) Any denunciation; and
(e) Any information received pursuant to Article IX.

ARTICLE XI

The original of this Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the depositary, who shall send certified copies to Contracting Parties and States invited to the Conference on the relationship between the Paris Convention and the Vienna Convention as well as the Secretary General of the Organisation for Economic Co-operation and Development.

IN WITNESS WHEREOF the undersigned being duly authorized by their respective Governments for that purpose have signed the present Joint Protocol.

DONE at Vienna this twenty-first day of September, one thousand nine hundred and eighty-eight.

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