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DRAFT REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FIFTY-SIXTH SESSION

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CHAPTER VII

INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW (INTERNATIONAL LIABILITY IN CASE OF LOSS FROM TRANSBOUNDARY HARM ARISING OUT OF HAZARDOUS ACTIVITIES)

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A. Introduction

1. The Commission, at its thirtieth session, in 1978, included the topic “International liability for injurious consequences arising out of acts not prohibited by international law” in its programme of work and appointed Mr. Robert Q. Quentin-Baxter, Special Rapporteur.¹

2. The Commission, from its thirty-second (1980) to its thirty-sixth sessions (1984), received and considered five reports from the Special Rapporteur.² The reports sought to develop a conceptual basis and schematic outline for the topic and contained proposals for five draft articles. The schematic outline was set out in the Special Rapporteur’s third report to the thirty-fourth session of the Commission, in 1982. The five draft articles were proposed in the Special Rapporteur’s fifth report to the thirty-sixth session of the Commission, in 1984. They were considered by the Commission, but no decision was taken to refer them to the Drafting Committee.³

¹ At that session the Commission established a working group to consider, in a preliminary manner, the scope and nature of the topic. For the report of the Working Group, see *Yearbook ... 1978*, vol. II (Part Two), pp. 150-152.

² For the five reports of the Special Rapporteur, see *Yearbook ... 1980*, vol. II (Part One), p. 247, document A/CN.4/334 and Add.1 and 2; *Yearbook ... 1981*, vol. II (Part One), p. 103, document A/CN.4/346 and Add.1 and 2; *Yearbook ... 1982*, vol. II (Part One), p. 51, document A/CN.4/360; *Yearbook ... 1983*, vol. II (Part One), p. 201, document A/CN.4/373; *Yearbook ... 1984*, vol. II (Part One), p. 155, document A/CN.4/383 and Add.1.

³ The Commission, at the same thirty-sixth session, also had before it the replies to a questionnaire addressed in 1983 by the Legal Counsel of the United Nations to 16 selected international organizations to ascertain whether, amongst other matters, obligations which States owe to each other and discharge as members of international organizations may, to that extent, fulfil or replace some of the procedures referred to in the schematic outline, *Yearbook ... 1984*, vol. II (Part One), p. 129, document A/CN.4/378 and a study prepared by the secretariat entitled “Survey of State practice relevant to international liability for injurious consequences arising out of acts not prohibited by international law”. *Yearbook ... 1985*, vol. II (Part One), Addendum, document A/CN.4/384. See also “Survey of liability regimes relevant to the topic of international liability for injurious consequences arising out of acts not prohibited by international law”, *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/471.

3. The Commission, at its thirty-seventh session, in 1985, appointed Mr. Julio Barboza Special Rapporteur for the topic. The Commission received 12 reports from the Special Rapporteur from its thirty-seventh (1985) to its forty-eighth session (1996).⁴

4. At its forty-fourth session, in 1992, the Commission established a Working Group to consider some of the general issues relating to the scope, the approach to be taken and the possible direction of the future work on the topic.⁵ On the basis of the recommendation of the Working Group, the Commission at its 2282nd meeting on 8 July 1992 decided to continue the work on this topic in stages: first completing work on prevention of transboundary harm and subsequently proceeding with remedial measures.⁶ The Commission decided, in view of the ambiguity in the title of the topic, to continue with the working hypothesis that the topic deal with “activities” and to defer any formal change of the title.

5. At its forty-eighth session, in 1996, the Commission re-established the Working Group in order to review the topic in all its aspects in the light of the reports of the Special Rapporteur and the discussions held, over the years, in the Commission and make recommendations to the Commission. The Working Group submitted a report,⁷ which provided a complete picture of the topic relating to the principle of prevention and that of liability for compensation or other relief, presenting articles and commentaries thereto.

⁴ For the 12 reports of the Special Rapporteur, see: *Yearbook ... 1985*, vol. II (Part One), p. 97, document A/CN.4/394; *Yearbook ... 1986*, vol. II (Part One), p. 145, document A/CN.4/402; *Yearbook ... 1987*, vol. II (Part One), p. 47, document A/CN.4/405; *Yearbook ... 1988*, vol. II (Part One), p. 251, document A/CN.4/413; *Yearbook ... 1989*, vol. II (Part One), p. 131, document A/CN.4/423; *Yearbook ... 1990*, vol. II (Part One), p. 83, document A/CN.4/428; *Yearbook ... 1991*, vol. II (Part One), p. 71, document A/CN.4/437; *Yearbook ... 1992*, vol. II (Part One), p. 75, document A/CN.4/443; *Yearbook ... 1993*, vol. II (Part One), document A/CN.4/450; *Yearbook ... 1994*, vol. II (Part One), document A/CN.4/459; document A/CN.4/468; and document A/CN.4/475 and Add.1.

⁵ *Yearbook ... 1992*, vol. II (Part Two), para. 281.

⁶ *Ibid.*, paras. 341-349. For a detailed recommendation of the Commission see *ibid.*, ... 1995, chap. V.

⁷ *Official Records of the General Assembly, Forty-eighth Session, Supplement No. 10 (A/51/10), Annex.*

6. At its forty-ninth session, in 1997, the Commission established a Working Group to consider how the Commission should proceed with its work on this topic. It reviewed the work of the Commission on the topic since 1978, noting that the scope and the content of the topic remained unclear due to such factors as conceptual and theoretical difficulties, appropriateness of the title and the relation of the subject to “State responsibility”. The Working Group further noted that the two issues dealt with under the topic, namely “prevention” and “international liability” were distinct from one another, though related. The Working Group therefore agreed that henceforth these issues should be dealt with separately.

7. Accordingly, the Commission decided to proceed with its work on the topic, dealing first with the issue of prevention under the subtitle “Prevention of transboundary damage from hazardous activities”.⁸ The General Assembly took note of this decision in paragraph 7 of its resolution 52/156. At the same session, the Commission appointed Mr. Pemmaraju Sreenivasa Rao Special Rapporteur for this part of the topic.⁹ The Commission, from its fiftieth (1998) to its fifty-second session (2000), received three reports from the Special Rapporteur.¹⁰

8. At its fiftieth session, in 1998, the Commission adopted on first reading a set of 17 draft articles on prevention of transboundary harm from hazardous activities.¹¹ At the fifty-third session, in 2001, it adopted the final text of a draft preamble and a set of 19 draft articles on prevention of transboundary harm from hazardous activities,¹² thus concluding its work on the first part of the topic. Furthermore, the Commission recommended to the General Assembly the elaboration of a convention on the basis of the draft articles.

⁸ Ibid., *Fifty-second Session, Supplement No. 10* (A/52/10), para. 168.

⁹ Ibid.

¹⁰ A/CN.4/487 and Add.1; A/CN.4/501 and A/CN.4/510. The Commission also had before it comments and observations from Governments, A/CN.4/509 and A/CN.4/516, the latter being received in 2001.

¹¹ *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), para. 52.

¹² Ibid., *Fifty-sixth Session, Supplement No. 10* (A/56/10), para. 97.

9. The General Assembly, in operative paragraph 3 of resolution 56/82, requested the Commission to resume its consideration of the liability aspects of the topic, bearing in mind the interrelationship between prevention and liability, and taking into account the developments in international law and comments by Governments.

10. At its fifty-fourth session, in 2002, the Commission resumed its consideration of the second part of the topic and established a Working Group to consider the conceptual outline of the topic. The report of the Working Group set out some initial understandings on the topic “International liability for injurious consequences arising out of acts not prohibited by international law (International liability in case of loss from transboundary harm arising out of hazardous activities)”, presented views on its scope and the approaches to be pursued. The Commission adopted the report of the Working Group and appointed Mr. Pemmaraju Sreenivasa Rao Special Rapporteur for the topic.¹³

11. At its fifty-fifth session, in 2003, the Commission considered the first report of the Special Rapporteur on the legal regime for the allocation of loss in case of transboundary harm arising out of hazardous activities (A/CN.4/531) and established an open-ended working group under the chairmanship of Mr. Pemmaraju Sreenivasa Rao to assist the Special Rapporteur in considering the future orientation of the topic in the light of his report and the debate in the Commission.

B. Consideration of the topic at the present session

12. At the present session, the Commission had before it the second report of the Special Rapporteur on the legal regime for the allocation of loss in case of transboundary harm arising out of hazardous activities (A/CN.4/540). The report analysed comments of States on the main issues concerning allocation of loss. It drew general conclusions in the light of the said comments as well as previous debates in the Commission. In his report the Special Rapporteur

¹³ Ibid., *Fifty-seventh Session*, Supplement No. 10 (A/57/10), para. 441.

also submitted a set of 12 draft principles.¹⁴ The Commission considered the report at its 2804th, 2805th, 2807th, 2808th and 2809th meetings on 26 and 27 May and 1, 2 and 3 June 2004. The

¹⁴ The set of the draft principles proposed by the Special Rapporteur read as follows:

1. Scope of application

The present draft principles apply to damage caused by hazardous activities coming within the scope of the draft articles on prevention of transboundary harm from hazardous activities, namely activities not prohibited by international law which involve a risk of causing significant transboundary harm through their physical consequences.

2. Use of terms

For the purposes of the present draft articles:

- (a) “Damage” means significant damage caused to persons, property or the environment; and includes:
 - (i) Loss of life or personal injury;
 - (ii) Loss of, or damage to, property other than the property held by the person liable in accordance with these articles;
 - (iii) Loss of income from an economic interest directly deriving from an impairment of the use of property or natural resources or environment, taking into account savings and costs;
 - (iv) The costs of measures of reinstatement of the property, or natural resources or environment, limited to the costs of measures actually taken;
 - (v) The costs of response measures, including any loss or damage caused by such measures, to the extent of the damage that arises out of or results from the hazardous activity;
- (b) “Damage to the environment” means loss or damage by impairment of the environment or natural resources;
- (c) “Environment” includes: natural resources both abiotic and biotic, such as air, water, soil, fauna and flora and the interaction between the same factors; property which forms part of the cultural heritage; and the characteristic aspects of the landscape;
- (d) “Hazardous activity” means an activity that has a risk of causing significant or disastrous harm”;

(e) “Operator” means any person in command or control of the activity at the time the incident causing transboundary damage occurs and may include a parent company or other related entity whether corporate or not;

(f) “Transboundary damage” means damage caused in the territory or in other places outside the territory but under the jurisdiction or control of a State other than the State of origin or in other places beyond the jurisdiction or control of any State including the State of origin, whether or not the States or areas concerned share a common border;

(g) “Measures of reinstatement” means any reasonable measures aiming to assess, reinstate or restore damaged or destroyed components of the environment, or where this is not possible, to introduce, where appropriate, the equivalent of these components into the environment. Domestic law may indicate who will be entitled to take such measures;

(h) “Response measures” means any reasonable measures taken by any person, including public authorities, following the occurrence of the transboundary damage, to prevent, minimize or mitigate possible loss or damage or to arrange for environmental clean-up. Domestic law may indicate who will be entitled to take such measures;

(i) “State of origin” means the State in the territory or otherwise under the jurisdiction or control of which the activities referred to in principle 1 are carried out;

(j) “State of injury” means the State in the territory or otherwise under the jurisdiction or control of which transboundary damage occurs;

(k) “State likely to be affected” means the State or States in the territory of which there is a risk of significant transboundary harm, or the State or States which have jurisdiction or control over any other place which is exposed to the risk of such harm;

(l) “States concerned” means the State of origin, the State likely to be affected and the State of injury.

3. Compensation of victims and protection of environment

1. The main objective of the present principles is to ensure that victims are not left entirely on their own, within the limits prescribed under national law, to bear the loss that they may suffer due to transboundary damage.

2. The objective is also to ensure that any transboundary damage to environment or natural resources even in areas or places beyond the jurisdiction or control of States arising from the hazardous activities is compensated within the limits and under conditions specified in these principles.

4. Prompt and adequate compensation

Alternative A

1. The State of origin shall take necessary measures to ensure that prompt and adequate compensation is available for persons in another State suffering transboundary damage caused by a hazardous activity located within its territory or in places under its jurisdiction or control.
2. The State of origin shall also take necessary measures to ensure that such prompt and adequate compensation is available for transboundary damage to the environment or natural resources of any State or of the areas beyond the jurisdiction and control of any State arising from the hazardous activity located within its territory or in places under its jurisdiction or control.
3. Measures referred to in paragraphs 1 and 2 above may be subject to applicable conditions, limitations or exceptions under the law of the State of origin which authorized the activity.
4. When considering evidence of the causal link between the hazardous activity and the transboundary damage, [due] account shall be taken of the risk of causing significant damage inherent in the hazardous activity.

Alternative B

1. The operator of a hazardous activity located within the territory or in places within the jurisdiction and control of a State shall be liable for the transboundary damage caused by that activity to persons or environment or natural resources within the territory or in places under the jurisdiction and control of any other State or to environment or natural resources in areas beyond the jurisdiction and control of any State.
2. The liability of the operator is subject to applicable conditions, limitations or exceptions under the law of the State of origin which authorized the activity.
3. When considering evidence of the causal link between the hazardous activity and the transboundary damage, [due] account shall be taken of the risk of causing significant damage inherent in the hazardous activity.

5. Supplementary compensation

1. The States concerned shall take the necessary measures to establish supplementary funding mechanisms to compensate victims of transboundary damage who are unable to obtain prompt and adequate compensation from the operator for a [legally] established claim for such damage under the present principles.

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2. Such funding mechanisms may be developed out of contributions from the principal beneficiaries of the activity, the same class of operators, earmarked State funds or a combination thereof.
 3. The States concerned shall establish criteria for determining insufficiency of compensation under the present draft principles.

6. Insurance and financial schemes

The States concerned shall take the necessary measures to ensure that the operator establishes and maintains financial security such as insurance, bonds or other financial guarantees to cover claims of compensation.

7. Response action

1. States shall require all operators involved in the conduct of activities falling within the scope of the present principles to take prompt and effective action in response to any incident involving such activities with a view to minimizing any damage from the incident, including any transboundary damage. Such response action shall include prompt notification, consultation and cooperation with all potentially affected States.
2. In the event that the operator fails to take the required prompt and effective response action the State of origin shall, where appropriate, in consultation with the States likely to be affected, make arrangements for such action.

8. Availability of recourse procedures

1. The States concerned shall ensure the availability of prompt, adequate and effective administrative and judicial remedies to all the victims of transboundary damage arising from the operation of hazardous activities.
2. States shall ensure that such remedies are no less prompt, adequate and effective than those available to their nationals and include access to such information as is necessary to exercise their right of access to compensation.
3. Each State shall ensure that its courts possess the necessary competence to entertain such claims for compensation.

9. Relationship with other rules of international law

The present set of principles is without prejudice to rights and obligations of the Parties under the rules of general international law with respect to the international responsibility of States.

Commission also had, as an informal document, the Survey of Liability Regimes relevant to the topic, updated by the Secretariat.¹⁵

13. At its 2809th meeting, on 3 June 2004, the Commission established a working group under the chairmanship of Mr. Pemmaraju Sreenivasa Rao to examine the proposals submitted by the Special Rapporteur, taking into account the debate in the Commission, with view to

10. Settlement of disputes

1. Any dispute concerning the interpretation or application of the present articles shall be settled expeditiously through peaceful means of settlement, including negotiations, mediation, conciliation, arbitration or judicial settlement.
2. For a dispute not resolved in accordance with paragraph 1, parties may by mutual agreement accept either or both of the means of dispute settlement, that is, (a) submission of the dispute to the International Court of Justice or (b) arbitration.

11. Development of more detailed and specific international regimes

1. States shall cooperate in the development of appropriate international agreements on a global or regional basis in order to prescribe more detailed arrangements regarding the prevention and response measures to be followed in respect of a particular class of hazardous activities as well as the insurance and compensation measures to be provided.
2. Such agreements may include industry- and/or State-funded compensation funds to provide supplementary compensation in the event that the financial resources of the operator, including insurance, are insufficient to cover the losses suffered as result of an incident. Any such funds may be designed to supplement or replace national industry-based funds.

12. Implementation

1. States shall adopt any legislative, regulatory and administrative measures that may be necessary to implement the above provisions.
2. These provisions and any implementing provisions shall be applied among all States without discrimination based on nationality, domicile or residence.
3. States shall cooperate with each other to implement the provisions according to their obligations under international law.

¹⁵ Survey of liability regimes relevant to the topic of international liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from transboundary harm arising out of hazardous activities), to be issued as document A/CN.4/543.

recommending draft principles ripe for referral to the Drafting Committee, while also continuing discussions on other issues, including the form that work on the topic should take. The Working Group held six meetings, on 4 June, and on 6, 7 and 8 July 2004. In its work the Working Group reviewed and revised the 12 draft principles submitted by the Special Rapporteur and it recommended that the 8 draft principles contained in its report (A/CN.4/661) be referred to the Drafting Committee.

14. At its 2815th meeting, on 9 July 2004, the Commission received the oral report of the Chairman of the Working Group and decided to refer the eight draft principles to the Drafting Committee. The Commission also requested the Drafting Committee to prepare a text of a preamble.

15. At its ... meeting, on ... July 2004, the Commission considered the report of the Drafting Committee and adopted on first reading a set of eight draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities (see section C below).

16. ...

17. At the ... meeting, the Commission decided, in accordance with articles 16 and 21 of its statute to transmit the draft principles (see section C below), through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2006.

C. Text of draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities adopted by the Commission on first reading

1. Text of the draft principles

[insert text of draft principles, contained in document A/CN.4/L.662]
