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Report of the International Law Commission on the work of its fifty-eighth session (2006)

Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-first session, prepared by the Secretariat

Addendum

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J. Diplomatic protection

1. General remarks

1. The adoption of the draft articles on diplomatic protection was generally welcomed by delegations, many of whom considered the text to be comprehensive, objective and balanced. It was stated that the Commission had brought a contemporary perspective to the topic. Support was expressed for the changes made to the first-reading draft so as to enhance the position of the protected individual. According to another view, the draft articles lost sight of their subject matter and ventured into other areas of law: draft articles 8 and 19 seemed to have more to do with the legal protection of human rights than with diplomatic protection properly speaking.

2. Appreciation was also expressed for the clarification of the difference between diplomatic protection and consular assistance, which was no longer always clearly embodied in a structural division between diplomatic and consular services; much consular work was done by diplomats. Support was also expressed for the exclusion of the "Calvo clause" and the "clean-hands" doctrine from the draft articles.

3. A further suggestion was that consideration had to be given to the relationship between functional protection by international organizations of their officials and diplomatic protection, as well as to instances in which a State, or an international organization, administered or controlled a territory. Although, in principle, international organizations should be entitled to exercise diplomatic protection in favour of their employees, a criterion had to be established in order to decide whether priority in exercising that right should be accorded to the international organization or to the State of nationality of the person in question.

2. Future form of the draft articles

4. Different views were expressed regarding the recommendation of the Commission that a convention be elaborated on the basis of the draft articles. While support was expressed for the adoption of a convention, it was suggested that States be given more time for further reflection before deciding on the most appropriate procedure. It was also noted that the fate of the draft articles was tied to that of the articles on responsibility of States for internationally wrongful acts, adopted in 2001. Others observed that the draft articles could stand alone and should not be tied to those on State responsibility.

5. Still others expressed the view that it was not advisable to adopt a binding instrument on diplomatic protection, because the draft articles deviated from settled customary international law on only a limited set of issues. It was also stated that the draft articles would be useful to the international community in their current form and did not need to be transformed into a treaty. It was cautioned that opting for a convention might well reopen the debate on the draft articles and jeopardize the important work of consolidation and commentary already undertaken.

3. Comments on specific draft articles

(a) Draft article 1 — Definition and scope

6. Support was expressed for the definition of diplomatic protection in draft article 1. While it was maintained that the traditional view that the State of nationality exercised its own right when it took up the case of one of its subjects could no longer be upheld, some were of the view that the right to exercise diplomatic protection was the right of the State of nationality.

7. According to another suggestion, the reference to the exercise of diplomatic protection only on behalf of nationals of a State seemed inconsistent with protection of stateless persons and refugees in terms of draft article 8. The draft article could also be taken to mean that invocation of the responsibility of a State by a State other than the State of nationality would not be a case of diplomatic protection. Support was also expressed for the clarification in paragraph 8 of the commentary that diplomatic protection did not include demarches or other diplomatic action not involving invocation of the legal responsibility of another State, such as informal requests for corrective action.

(b) Draft article 2 — Right to exercise diplomatic protection

8. General support was expressed for the principle in draft article 2 that the right to exercise diplomatic protection under international law was vested in the State. It was clarified that the right was essentially discretionary in nature. It was also remarked that the combination of draft article 2 and draft article 19 offered the best possible solution, because it safeguarded the sovereign right of a State to exercise diplomatic protection and took account of the need to keep pace with developments in international practice. According to another view, the traditional doctrine of the State's absolute right needed to be adapted to contemporary practice, especially since the constitutions of many States guaranteed the individual's right to diplomatic protection.

(c) Draft article 3 — Protection by the State of nationality

9. It was suggested that draft article 3 be amended to read "the State of nationality is the State entitled to exercise diplomatic protection", so that the bond of nationality between the State and its national would be appropriately emphasized.

(d) Draft article 4 — State of nationality of a natural person

10. General support was expressed for the definition of the State of nationality of a natural person. Support was also expressed for the Commission's decision not to include the genuine-link test applied by the International Court of Justice in the *Nottebohm* case, because it could result in hardship to millions of persons who did not possess the nationality of their host States. It was also suggested that, since many States did not recognize more than one nationality, the identification of nationality should take into account the law of the States concerned other than the State of nationality. According to a similar view, States, in exercising their right to determine who their nationals were, should avoid adopting laws that increased the risk of dual or multiple nationality or statelessness.

(e) Draft article 5 — Continuous nationality of a natural person

11. With regard to paragraph 1, support was expressed for the Commission's decision to retain the date of the official presentation of the claim as the end point for the continuous nationality rule. A view was also expressed that the draft article diverged from existing customary international law, most recently articulated in *The Loewen Group Inc. v. United States of America*. Support was also expressed for the presumption of the continuity of nationality if such nationality is established both at the date of injury and at the date of the official presentation of the claim.

12. Concerning paragraph 2, support was expressed for the position that it was necessary to guard against a person deliberately changing his or her nationality in order to acquire a State of nationality more willing and able to bring a claim on his or her behalf.

13. With regard to paragraph 3, it was suggested that an exception be included to the effect that, on attaining independence, a former colony should be able to exercise diplomatic protection on behalf of its nationals who had been nationals of the former colonial power vis-à-vis the latter, with regard to an injury caused by it before independence.

(f) Draft article 6 — Multiple nationality and claim against a third State

14. Support was expressed for the inclusion of a provision to cover cases of multiple nationality. It was suggested that claims made on behalf of persons holding multiple nationality should be dealt with in accordance with the general principles of law governing the satisfaction of joint claims.

(g) Draft article 7 — Multiple nationality and claim against a State of nationality

15. Although support was expressed for the approach taken by the Commission in draft article 7, some pointed out that there was no clear definition of "predominant nationality" in international law; that it was difficult to ascertain in practice; and that it could give rise to subjective interpretations. It was also noted that the factors enumerated in the commentary for determining which nationality was predominant might not be decisive. It was therefore suggested that either the concept should be clearly defined or the principle of closest association should be followed in determining which State was entitled to exercise diplomatic protection. Still others were of the view that it was a general rule of international law that a State would not support a claim of a dual national against another State of nationality, and that it was premature to include the "predominant nationality" test in the context of the progressive development of international law.

(h) Draft article 8 — Stateless persons and refugees

16. Support was expressed for the extension of the exercise of diplomatic protection to stateless persons and refugees as an exercise in progressive development of international law. At the same time, the view was expressed that the temporal requirement of lawful and habitual residence at the time of injury and at the date of the official presentation of the claim set too high a threshold because, in many cases in which the protection was needed, the injury would have occurred before the person's entry into the territory of the State concerned. A preference was expressed for the criterion of "lawful stay". Support was also expressed for the

approach of not limiting the term “refugee” to the definition in the Convention relating to the Status of Refugees of 1951 and its Protocol. A preference was, however, expressed for the earlier wording to the effect that a State might extend diplomatic protection to any person that it considered and treated as a refugee. According to another view, the protection of stateless persons and refugees did not come within the scope of diplomatic protection as currently understood in international law.

(i) Draft article 9 — State of nationality of a corporation

17. Support was expressed for the new formulation of draft article 9, which was considered clearer than the first-reading text and avoided the risk of multiple claims in relation to a single injury affecting one corporation. Some maintained that the decision to give priority to the State of the place of incorporation rather than of the seat of the corporation was controversial. It was also observed that the two separate criteria for corporations — their registered office and their seat of management — would deprive some corporations of diplomatic protection. It was further proposed that the principle of control ought to be retained as an alternative criterion, the concern being that incorporation was merely a formal, as opposed to substantive, connection with the State, which was supposed to defend the corporation’s interests through diplomatic protection. Another determining factor could be the location of the effective economic activities of a corporation.

18. According to another view, extending diplomatic protection to corporations was in most cases unnecessary, given that the circumstances in which corporations performed their activities and the procedures for settlement of disputes were largely regulated by bilateral and multilateral treaties.

(j) Draft article 10 — Continuous nationality of a corporation

19. The view was expressed that there was some inconsistency in the approach with regard to natural persons, in draft article 5, and legal persons, in draft article 10, on the question of changes in nationality, which merited further consideration. Support was expressed for the exception in draft article 10, paragraph 3.

(k) Draft article 11 — Protection of shareholders

20. The view was expressed that the two exceptions to the rule set out in draft article 11 reflected customary international law. Some considered the exceptions to be too narrow: there might be other situations in which it would be unfair or inappropriate to refuse the State of nationality of a shareholder the right to exercise diplomatic protection, for example, where the State of nationality of the corporation was unable or unwilling to act on behalf of the shareholders. It was suggested that the limited exception in draft article 11, paragraph (b) should be expanded.

(l) Draft article 12 — Direct injury to shareholders

21. Support was expressed for draft article 12, which was characterized as reflecting customary international law. According to another view, the provision was jurisprudentially problematic and required further study because there was no clear definition of the term “rights of shareholders” in international law; it could lead to abuse if additional protection were to be provided for shareholders over and above the diplomatic protection provided to the corporation; and the provisions on

diplomatic protection applicable to natural persons could be invoked with regard to the rights of shareholders as distinct from those of the corporation itself. According to another view, it was preferable to deal with shareholders' protection in specific instruments of international law, such as the bilateral investment treaties envisaged in draft article 17.

(m) Draft article 13 — Other legal persons

22. Some delegations preferred the deletion of draft article 13, which seemed premature because there were no customary rules to cover the subject.

(n) Draft article 14 — Exhaustion of local remedies

23. A preference was expressed for further reflection on the provision because the exhaustion of the local remedies rule raised the question of the differing nature of local remedies from one State to another, some being rudimentary and others comprehensive in nature. The view was also expressed that, in the case of diplomatic action stopping short of bringing an international claim, no prior exhaustion of local remedies was required.

(o) Draft article 15 — Exceptions to the local remedies rule

24. Several delegations supported the Commission's treatment of the exceptions to the exhaustion of the local remedies rule. Others maintained that too many exceptions were allowed, with the ensuing risk of overlap. Support was expressed for the new wording of paragraph (a) and for the stipulation in paragraph 4 of the commentary that the test was whether the municipal system of the respondent State was reasonably capable of providing effective relief. Concerning the exception in paragraph (b), the view was expressed that slow proceedings should not be considered ipso facto an exception to the local remedies rule. While support was expressed for the exception in paragraph (c), some proposed that it be deleted because the criterion of "relevant connection" was vague, and it was doubtful whether the exception was sufficiently established in State practice and case law. While the view was expressed that the exception in paragraph (d) was reasonable, it was cautioned that its formulation should exclude possible misuse. It was suggested that paragraph (e) clearly require express waiver. According to another view, the exception in that paragraph seemed especially contrived and was difficult to understand.

(p) Draft article 16 — Actions or procedures other than diplomatic protection

25. Support was expressed for draft article 16 as an important reminder that diplomatic protection did not exclude resort to other forms of protection that might exist under international law. It was suggested that the provision be merged with draft article 17. Another view was that the provision was inappropriate and redundant.

26. It was observed that the reference to "States" had to be read in the context of the commentary with regard to the invocation of responsibility by States other than the State of nationality when the obligation breached was owed to the international community as a whole or to a group of States. It was also proposed that the phrase "under international law" be deleted, since it might be taken to suggest that resort to

actions or procedures under national law, such as *amicus curiae* letters, would be excluded.

(q) Draft article 17 — Special rules of international law

27. While support was expressed for draft article 17, it was suggested that it could be amalgamated with draft article 16.

(r) Draft article 18 — Protection of ships' crews

28. While support existed for the Commission's distinction between the diplomatic protection of crew members by their State of nationality and the right of the State of nationality of a ship to seek redress on behalf of such crew members, it was cautioned that the formulation of the provision could cause difficulty when it came to coordinating competing claims. According to another view, the protection of a ship's crew by the flag State was an issue adequately covered by existing international law and there was no need to address it in the draft articles.

(s) Draft article 19 — Recommended practice

29. Support was expressed for the inclusion of draft article 19. Another view was the provision could have been drafted in more prescriptive terms. It was acknowledged that recommendatory language, though not a common feature of treaties, was not unknown. Some were of the view that it was inappropriate to include a set of recommendations in a draft text meant to serve as the basis for the elaboration of a convention intended to regulate the rights of States.

30. The concern was expressed that draft article 19 could give the impression that States were required to exercise diplomatic protection and that the nationals concerned had the right to determine the nature of that protection. It was reiterated that the evolution of international human rights law had not changed the nature of diplomatic protection as a State right. It was also pointed out that, even at the national level, although a State might, under its own constitution, be under an obligation to exercise diplomatic protection in favour of its nationals, it still had a wide margin of discretion in deciding how to comply with that obligation.

31. The view was expressed that the notion of "reasonable deductions" by the State of nationality from compensation transferred to the injured person, in paragraph (c), could lead to exaggerated assessments by claimant States.

K. 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)

1. General comments

32. Delegations welcomed the completion, on second reading, and the adoption by the Commission of the draft principles on allocation of loss in the case of transboundary harm, thus completing the consideration of what had been a vexing topic for many years.

33. The topicality of the subject was highlighted. Some delegations recalled its historical evolution and linkage with the law concerning international responsibility in general, and therefore the need for harmony and coherence in the development of the subject, while others alluded to the relevance of hazardous activities and their continuing importance much more so as a result of emerging technologies, which were giving rise to the need to address an existing gap in the law for situations in which loss is incurred despite prevention efforts.

34. In adopting the draft principles, the Commission had thus taken an important step forward in addressing complex questions concerning international responsibility and filled a significant gap in the international legal order; the draft principles represented a major contribution in a rapidly evolving field of international law, including that of the environment and sustainable development. The rules on liability would play an important role in compensating victims and would provide an incentive for the prevention of damage. It was nevertheless pointed out by some delegations that, since the draft principles were predicated on a hazardous activity involving a risk causing damage, there were still a number of questions that remained unanswered and required further study, particularly with respect to the relationship between the topic and the law on responsibility for internationally wrongful acts.

35. In view of the conundrum presented by the topic, some delegations welcomed the fact that the Commission was not overly ambitious and had addressed it with utmost generality, sensibly avoiding the difficulties of trying to harmonize national laws and legal systems, while proposing a text flexible enough to cater for the diversity of national legal systems. The text was conceptually well founded, well balanced and firmly based on existing practice and numerous international instruments. Moreover, the draft principles were perceived by some delegations to be of great theoretical and practical significance. They struck a reasonable balance between the rights and interests of the operator of the hazardous activity and the State authorizing it and those of the victims of transboundary harm resulting from such activity. They also identified a set of procedural and substantive minimum standards to protect potential victims, whether States or natural or legal persons. In doing so, the Commission had completed its task within the limits of its role in the codification and progressive development of international law. However, other delegations regarded the draft principles as incorporating progressive ideas; many of its provisions represented desirable practice for States to follow, rather than an agreed state of international law.

36. Some delegations viewed the draft principles as a significant step forward in the development of international law on civil liability. Yet the point was made that while some States favoured civil liability regimes that were largely sectoral in nature, strict liability regimes were preferable in the case of hazardous activities.

37. It was noted that the draft principles should provide essential guidance for international practice, in the conclusion of bilateral and multilateral treaties and for States in the formulation of laws and regulations. In that connection, it was important to take the necessary measures to put them into effect, at the national and international levels.

38. With regard to the substantive provisions, some delegations expressed support for the general thrust of the draft principles, their underlying policy considerations, conceptual approach and content. In particular, support was expressed for the notion

that liability for transboundary harm could arise even in situations in which a State had complied with its prevention obligations. In addition, the general and residual character of the draft principles was acknowledged. In this connection, the point was made that "general" meant that the draft principles were general principles to guide State practice, and it was up to States concerned to adopt by agreement concrete measures for their implementation; and "residual" was understood to mean that, in application, particular or specific compensation arrangements would take precedence over the draft principles. Moreover, the following principles were welcomed: that the innocent victim should not be left to bear the loss from transboundary harm alone; the obligation of each State to take all necessary measures to ensure prompt and adequate compensation for victims; the need to preserve and protect the environment; the primary and strict liability of the operator; the need for non-discriminatory access to redress and remedies; and the establishment of mechanisms, such as insurance or funds, to finance compensation. In addition, the draft principles had wisely set out obligations of compensation and response rather than attempt to resolve the more theoretical question concerning the status of precautionary principle. Ultimately, the way the draft principles would be applied in State practice might settle that issue.

39. While acknowledging the fact that their comments had been taken into account in the consideration of the draft principles, on second reading, and that the commentaries had been improved and were more detailed, some delegations noted that the treatment of certain parts of the text still raised some doubts. For example, the retention of "significant" as a threshold for damage was considered problematic; it gave rise to conceptual difficulties when transposed from international relations to transnational ones, and would lead to unequal treatment between domestic and foreign victims of a single damage-causing incident. Furthermore, such a threshold was not included in some existing special civil liability regimes. It was claimed that the main basis of the draft principles should be the polluter-pays principle, in particular, "all damage should be covered", and the financial burden should fall on the operator of the activity causing the damage. It was also pointed out that, in the development of specific international regimes, the question of the concurrent or supplementary liability of the State of origin of the hazardous activity would need to be addressed further.

2. Specific comments on the draft principles

Draft principle 1 — Scope of application

40. The fact that the Commission had decided not to include a list of hazardous activities was considered positively by some delegations; any such list would, in view of rapid technological advances, become easily outdated. A suggestion was made that the draft principles should also apply to damage to global commons, at least in respect of damage arising from activities emanating from the State of origin and response measures taken in global commons by another State or entity. The point was also made that draft principle 1 should be re-examined; its language, more typical of an international convention, could suitably be placed in the preamble.

Draft principle 2 — Use of terms

41. Some delegations welcomed the broad definition of damage, including damage to the environment, as reflecting recent treaty practice; the attendant difficulties

concerning its quantification, and identification of victims were, however, well recognized. For other delegations, the broad definition of the term "environment" raised concerns over the potential for multiplicity of claims. A suggestion was also made to delete the reference to "cultural heritage" in the definition unless special rules were elaborated for damage to such property.

42. While some delegations found the threshold of "significant" acceptable, other delegations would have preferred a lower threshold. The point was also made that the term "significant" as explained in the commentary could give rise to ambiguity and was likely to lead to confusion as to whether a "lower" or "higher" threshold was established. Any interpretation that the threshold was "higher" was likely to give rise to legitimate claims of discrimination between victims of transboundary harm within the State of origin and victims outside the State of origin than a "lower" threshold. In order to address questions raised regarding what constituted "significant damage" and who would have the competence to decide on the question, it was suggested that "the law of the competent court" be considered an option, as reflected in some treaty regimes.

43. Some delegations welcomed the clarification of the context in which a State would be a victim for purposes of the draft principles, namely that it would have *locus standi* to pursue claims in respect of environmental damage. A view was expressed in support of the definition of hazardous activity in paragraph (c).

44. The point was also made that the whole of draft principle 2 should be re-examined because its content was typical for a binding instrument.

Draft principle 3 — Purposes

45. Although the content of draft principle 3 was considered acceptable by some delegations, it was noted that compensation should not only be prompt and adequate but also effective and proportional; it should take into account the conduct of the operator. The view was expressed that the language of draft principle 3 was suitable for an international convention; it should accordingly be re-examined and its content placed in the preamble instead.

Draft principle 4 — Prompt and adequate compensation

46. Some delegations welcomed the regime of strict liability of the operator established by draft principle 4. The State of origin was required to take the necessary measures to give effect to such liability and it would secure adequate protection of victims. It was understood by other delegations that, where the State was the operator, its liability would be primary. The draft principle also rightly emphasized the obligation of the operator to provide compensation, while also offering alternative possibilities in the event that the various measures taken were insufficient to provide adequate compensation. On the other hand, it was asserted that operator liability was based on the polluter-pays principle, which should consequently also guide the implementation of the draft principle as a whole.

47. With respect to paragraph 1, the view was expressed that "prompt and adequate compensation" meant "fair and reasonable compensation". Such an understanding was consistent with the purposes of the draft principles, as read with the commentaries, and with the need to strike a reasonable balance between protection of victims and protection of lawful economic activities by the relevant

State. The point was also made that it was not clear from the text whether States were being requested to ensure compensation only for victims outside their territory or also those within their territory.

48. Concerning paragraph 2, some delegations sought a clearer definition of the terms “operator” and “other person or entity”. It was also noted that the inclusion of “other person or entity” diluted the application of the polluter-pays principle. Other delegations wondered whether the liability was strict or absolute liability. Some delegations highlighted the need to spell out expressly in the draft principles, rather than in the commentary, the conditions, limitations and exceptions leading to exoneration of liability of the operator, such as *force majeure*, armed conflict or conduct of the victim or a third party. Such specification was supported by treaty practice. Moreover, it was observed that the linkage to draft principle 3 in the last sentence required further clarification.

49. In relation to paragraph 3, some delegations echoed the need to provide insurance, bonds or other financial guarantees to ensure compensation and, in that regard, attention was drawn to the environmental and other criteria laid down in the *Principles for Responsible Investment* launched by the Secretary-General on 27 April 2006.[1] The comment was also made that it was unrealistic to impose a requirement on States to make financial security such as insurance available to all enterprises engaged in hazardous activities.

50. Concerning paragraph 4, the observation was made that “industry-wide funds” were not very common in some States, especially developing States. Accordingly, other options, including the establishment of an international fund, modelled on funds for oil spills or nuclear accidents, could be considered to cover situations in which the operator’s compensation was insufficient. Such a fund would not necessarily limit the liability of the operator.

51. Concerning paragraph 5, some delegations suggested that the State of origin should assume a larger role in providing compensation for victims, particularly in instances in which the operator or other person or entity involved was incapable of providing prompt and adequate compensation or where the State of origin failed to prevent environmental damage from a hazardous activity that it itself had authorized. Other delegations, however, found merit in the attenuated obligation of the State of origin. The wording simply reflected the lawfulness of the activities covered by the draft principles. The point was also made that the paragraph be reconsidered in the light of the polluter-pays principle.

52. The view was expressed that, because of globalization, it was not unusual for hazardous industries to relocate from developed to developing States. Accordingly, instead of a developing State of origin, the State of nationality of an industry and other States that benefited from its activities should ensure that additional financial resources are made available in paragraph 5.

53. In addition to the scheme envisaged under draft principle 4, other delegations recommended that provision be made for a third-party damage-assessment mechanism to settle disputes relating to claims arising from incidents causing damage.

[1] http://www.unglobalcompact.org/docs/news_events/9.1_news_archives/2006_04_27/pri.pdf.

Draft principle 5 — Response measures

54. Some delegations welcomed the text of draft principle 5; it presented general rules that would make it possible to identify the obligations arising for the State of origin, together with the role to be played by other parties. The channelling of liability to the operator would not absolve the State of origin of its obligation to take measures to mitigate the damage. It was nevertheless pointed out that paragraph (b) as formulated was unclear as to what kind of response measures were to be taken and the term "appropriate" did not add clarity to the text. To other delegations, draft principle 5 was too prescriptive for a declaration of principles.

Draft principle 6 — International and domestic remedies

55. Although the text of draft principle 6 was much improved and welcomed, some delegations pointed out that it required additional work; for instance, it did not resolve the question that innocent victims would be entitled to compensation only for damage that was "significant". It was also stated that it would be desirable to spell out clearly the inter-relationship between international and domestic remedies; and there was also a need to develop various options to avert multiple claims or forum shopping. On the other hand, the point was made that the language of draft principle 6 was prescriptive.

Draft principle 7 — Development of specific international regimes

56. Some delegations welcomed the formulation of draft principle 7. It was however suggested that, in addition to "particular categories of hazardous activities", it would be necessary to cover "and/or specific types of environmental damage", as exemplified by the 2003 Kiev Protocol.[2] Furthermore, the comment was made that it might be advisable to expressly encourage the conclusion of comprehensive bilateral or regional agreements in that field, instead of only agreements on specific categories of hazardous activities.

Draft principle 8 — Implementation

57. Some delegations expressed support for draft principle 8. It was noted that paragraph 1 should be understood to mean that the draft principles were to serve as guidance to States when they adopted rules on liability at the national or the international level.

3. Final form

58. Some delegations supported the recommendation by the Commission that the General Assembly should adopt a resolution endorsing the draft principles. In view of the paucity of practice in the area, draft principles were the best possible approach. It was appropriate that the draft principles take the form of non-binding standards, as they were innovative and aspirational in character rather than descriptive of current law or State practice. Moreover, they were too broadly stated to constitute a desirable direction for *lex ferenda*. Accordingly, the Assembly should not take action to convert them into a convention. Some delegations noted that they could support efforts to cast the draft principles as a declaration or a set of

[2] Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters, signed in Kiev on 21 May 2003.

guidelines, or possibly a model law, not only for States to invoke and apply, but also to serve as a basis for concluding treaties in the future.

59. While acknowledging that the adoption of the draft principles in a General Assembly resolution would be a positive step, other delegations expressed preference for a final text in the form of draft articles. It was hoped that, in the future, it would be possible to elaborate a single convention on international liability. It was also noted that, if a set of principles was the preferred option, it was necessary to cast them as such; a General Assembly resolution should not contain a convention in disguise. Some delegations made their support for the Commission's recommendation conditional on the understanding that all interested countries would contribute to fulfilling the objectives of the draft principles, while others noted that the draft principles should constitute the primary material for a future framework convention.

60. Other delegations stressed that the final form on the liability aspects of the topic should not be different from the prevention aspects. Since the latter aspects had taken the form of draft articles on transboundary harm from hazardous activities and the elaboration of a convention was recommended, a similar approach should have been followed with respect to the liability aspects and, in that connection, the elaboration of a convention was favoured, noting that it was premature for the General Assembly to adopt a resolution as recommended by the Commission.

61. One possible alternative was the suggestion that, as a minimum, the obligation of States to take the necessary measures to ensure that prompt and adequate compensation was available for victims be incorporated into the draft articles on prevention. Such an obligation could be supplemented by guidance in the form of draft principles.

62. Some delegations simply required more time for reflection before a collective decision was taken on the matter. It was recalled that it would be logical for the General Assembly to revert to the question of adopting draft articles on prevention. While one view suggested that the draft articles and the draft principles be treated independently, another noted that the draft principles ought to be adopted in conjunction with the draft articles on prevention.