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Second report on international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities)

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I. Questions raised in the 1998 report of the International Law Commission

1. On the subject of international liability, the International Law Commission submitted to the General Assembly at its fifty-third session, in 1998, a complete set of draft articles and commentaries thereto on prevention of transboundary damage from hazardous activities and also raised the following questions for comments by States:[1]

(1) Should the duty of prevention still be treated as an obligation of conduct? Or should failure to comply be subjected to suitable consequences under the law of State responsibility or civil liability or both where the State of origin and the operators are both involved? If the answer to the latter question is in the affirmative, what types of consequences are appropriate or applicable?

(2) What form should the draft articles take? A convention, a framework convention or a model law?

(3) What kind or form of dispute settlement procedure is most suitable for disputes arising from the application and interpretation of the draft articles?

II. Views expressed by Member States during the fifty-third session of the General Assembly

2. While participating in the debate on the report of the International Law Commission in the Sixth Committee, several delegations attempted to respond to these questions. A summary of their views is presented below.

3. The question whether non-compliance with the duty of due diligence should entail any legal consequences gave rise to different responses. China noted that failure to comply with the duty of due diligence in the absence of damage would not entail any liability. However, once damage occurred, State responsibility or civil liability or both might come into play. Where a State complied with its duties of due diligence and damage occurred despite such compliance, the operator must pay and accept the liability. [2]

4. A breach of the duty of due diligence, according to United Kingdom of Great Britain and Northern Ireland and Austria, could give rise to consequences in the field of State responsibility.[3] Japan noted that the obligation of prevention was one of conduct, not of result, and failure to comply with that obligation fell into the realm of State responsibility. A distinction should be made between international liability for significant transboundary harm and State responsibility, although in some cases such harm could be partially attributed to failure to comply with the obligation of prevention.[4]

5. The United Republic of Tanzania and Mongolia felt that treatment of the duty of prevention separately from the issue of liability was a cause for worry or perplexity as it was difficult to envisage legal consequences in the absence of any damage.[5] Switzerland and

[1] *Official Records of the General Assembly, Fifty-third session*, Supplement No. 10 (A/53/10), para. 31–34.

[2] A/C.6/53/SR.14, para. 43.

[3] Ibid., para. 7 (United Kingdom) and A/C.6/53/SR.15, para. 6 (Austria).

[4] A/C.6/53/SR.14, para. 18.

[5] A/C.6/53/SR.13, para. 59 (United Republic of Tanzania) and A/C.6/53/SR.15, para. 40 (Mongolia).

Greece felt that more time was required to reflect upon the problem.[6] Germany took the view that it was difficult at the current stage to answer all the questions put to Governments by the Commission and that the latter should proceed with caution in this connection. It also stressed that other rules and developments in the area of transboundary damage from hazardous activities should be studied. Reference was made in this respect to draft article 6 which makes it clear that the draft articles are without prejudice to the existence, operation or effect of any other rule of international law.[7]

6. Guatemala and Mongolia felt that it was not possible to avoid the question of liability from being reintroduced into the draft articles. It was pointed out that, according to the regime proposed by the International Law Commission, failure to comply with the proposed obligations of conduct would entail State responsibility towards the affected State.[8] Guatemala felt, however, that such responsibility was different from the liability originally envisaged, in that the State of origin did not commit an act not prohibited by international law but rather an act prohibited by international law.[9] It was observed that, under the earlier version of the draft articles, a State could be both liable and responsible: the former, if it harmed another State despite compliance with its obligation of prevention, the latter, if had failed to comply and the harm was attributable exclusively to that non-compliance.

7. Several delegations also emphasized that the Commission should not lose sight of the originally conceived task of elaborating rules on liability proper.[10] Mexico cited the following reasons for taking a similar view: First, there was otherwise a risk of weakening obligations of conduct. If prevention was better than cure, it was essential to establish rules governing the consequences of non-compliance, whether or not damage occurred. Secondly, questions that should be addressed together would be otherwise separated. In determining the consequences of non-compliance, consideration should also be given to the effect when damage occurred. Separation also had the effect of determining the consequences of liability at a time when the Commission was meant to be dealing solely with prevention and thus distorted the decision taken at the forty-ninth session that the issues of prevention and liability should be dealt with separately.[11]

8. Chile suggested that the notion of prevention should be linked to the obligations of response action and rehabilitation, which should also apply to the operator of the activity. Further, failure to comply with those obligations could give rise to international liability, regardless of the damage caused. At the same time, the impact of the damage should be taken into account in assessing the liability incurred. It was important, according to this view, that the operator should be linked more directly to a liability regime together with the State, insurance carriers, special funds and so on.[12] While Bulgaria and Bahrain shared this view, [13] Austria disagreed: since duties of prevention were couched in terms of obligations upon

[6] A/C.6/53/SR.13, para. 67 (Switzerland) and A/C.6/53/SR.22, para. 43 (Greece).

[7] A/C.6/53/SR.15, para. 79.

[8] A/C.6/53/SR.13, para. 53 (Guatemala) and A/C.6/53/SR.15, para. 40 (Mongolia).

[9] A/C.6/53/SR.13 para. 53.

[10] A/C.6/53/SR.15 para. 7 (Austria); A/C.6/53/SR.16, para. 44 (New Zealand); A/C.6/53/SR.17 para. 1 (Sweden, on behalf of the Nordic countries); A/C.6/53/SR.18, para. 42 (Libyan Arab Jamahiriya); A/C.6/53/SR.18, para. 50 (Cuba); A/C.6/53/SR.20, para. 28 (Portugal); A/C.6/53/SR.21, para. 12 (Bahrain); A/C.6/53/SR.22, paras. 22–23 (Sri Lanka) and A/C.6/53/SR.17, para. 44 (statement of the Secretary-General of AALCC).

[11] A/C.6/53/SR.16, para. 6.

[12] A/C.6/53/SR.14, paras. 25 and 28.

[13] A/C.6/53/SR.16, para. 24 (Bulgaria); A/C.6/53/SR.21, para. 12 (Bahrain).

States, it felt there was no need for the Commission to address issues relating to the civil liability of the private operator involved in any given context.[14]

9. According to the United States of America, effective implementation of the draft articles was doubtful in federal States, where regulatory authority was shared, as the said articles appeared to have been premised upon the existence of a highly centralized State with comprehensive regulatory powers.[15]

10. Israel believed that, in cases involving a private operator, State responsibility and civil liability would not adequately protect legitimate environmental interests. The duty of prevention should therefore be regarded as an obligation of conduct that was inspired by a detailed and universally applicable code of conduct comprising the standards already embodied in the current international conventions on the environment and other related matters.[16]

11. The Czech delegation dealt with the issue of legal consequences at some length and observed that, if damage occurred as a result of a breach of the obligation of prevention or of other obligations of the State of origin, the latter's international responsibility was engaged and full compensation was due, provided that a causal link could be established between the wrongful act or omission and the damage. Where such causal link was difficult to establish, the resulting situation might often be similar to one where there was no material or moral damage because of the breach of an obligation. In such a case, responsibility would entail merely the obligation of cessation of the wrongful conduct and, perhaps, elements of satisfaction. These issues, however, should be dealt with not in the framework of prevention, but under the topic of State responsibility. If obligations were not fulfilled but no damage was caused, then there was still, strictly speaking, room for State responsibility, which was defined in broader terms than the notion of responsibility in a number of domestic legal systems.[17]

12. Argentina took the view that it was important to clarify and establish the consequences of international law in cases where substantial transboundary damage was caused, even when the State of origin had complied with all the rules of prevention. Given the unique nature of the obligation to make reparation in such cases, it was noted that the relevant rules should embody certain principles supplementary to those governing responsibility for unlawful acts. In cases of liability in the strict sense, even full compliance with due diligence did not exempt the State.[18]

13. According to Bangladesh, the principle of due diligence had an objective element, traceable to the fact that hazardous activities carried, as it were, the seeds of their own physical consequences, which could be foreseen with a degree of certitude and precision. In that sense, "result" defined the duty of care, although that might be an "obligation of conduct". It was emphasized that considerations governing liability were not identical to those governing the measure of damages. Accordingly, higher limits of tolerance in developing countries did not

[14] A/C.6/53/SR.15, para. 6.

[15] A/C.6/53/SR.14, para. 44. See also Julyan Reid, "the Harmonization of Federal and Provincial Policies and Norms and Intergovernmental Cooperation" in Nicole Duple, ed., *Le droit à la qualité de l'environnement: un droit en devenir, un droit à définir* (Quebec, 1988), pp. 357–368; François Chevrette, "Fédéralisme et protection de l'environnement", in ibid., pp. 339–356; Jean Piette, "L'harmonisation des politiques et des normes fédérales et provinciales et lat coopération intergouvernementale", in ibid., pp. 371–379.

[16] A/C.6/53/SR.15, para. 19.

[17] A/C.6/53/SR.15, paras. 61–62 (Czech Republic). See also A/C.6/53/SR.16, paras. 47–48 (New Zealand); A/C.6/53/SR.17, para. 33 (Nigeria); and A/C.6/53/SR.20, para. 7 (Islamic Republic of Iran).

[18] A/C.6/53/SR.15, para. 94.

argue for a higher threshold of liability, only a possibly lower measure of damages. If a State permitted hazardous activities in its territory, it must be presumed to be able to take care of the potential consequences thereof. Therefore such presumption applied irrespective of the level of economic development of a State.[19]

14. Algeria also felt that, while international law created obligations for States whose activities were harmful to the environment of other States, the specific situation of the developing countries, which were the most vulnerable in that respect,[20] should however be taken into account as regards compensation payable for damages.

15. Endorsing the concept of prevention as an obligation of conduct, Italy made the point that the draft articles should not call for penalties in cases where States failed to comply with their obligation of prevention, whether or not transboundary damage had occurred. In its view, the purpose of the international legal system was not to punish, but to correct, violations. As the obligation of prevention applied specifically to transboundary harm and therefore, by implication, to violations of the sovereignty of another State, in cases where no violation had taken place there could be no justification for the imposition of penalties.[21]

16. India, China, Cuba and Egypt were of the view that the concept of prevention as proposed by the Commission did not place it sufficiently within the broader realm of sustainable development, so as to give considerations of environment and development equal and due weight. It was felt that several other important principles should also have been considered as relating to the concept of prevention. Moreover, there should be no penalties for non-compliance with obligations by a State or operator, which, while willing, lacked the capacity to comply. The differences between the levels of economic and technological development of a State and the shortage of financial and other resources in developing countries were cited in support of this position. It was further observed that the concept of due diligence did not lend itself to codification.[22]

17. In the light of the discussion in the Sixth Committee, an attempt is made below to deal, first, with the legal consequences of failure to implement the duty of prevention; and, second, with the future course of action open to the Commission on the subject of liability.

III. Implementation of the obligation of due diligence

A. The concept of due diligence: some salient features

18. The duty of prevention, which is an obligation of conduct, is essentially regarded as a duty of due diligence. Any question concerning implementation or enforcement of the duty of prevention would necessarily have to deal with the content of the obligation and hence the degree of diligence which should be observed by States.

19. The notion of due diligence, which became well known in international law after the American civil war and particularly with the *Alabama* case,[23] has given rise to different

[19] A/C.6/53/SR.16, paras. 4–5.

[20] A/C.6/53/SR.20, para. 63.

[21] A/C.6/53/SR.15, paras. 68–69.

[22] A/C.6/53/SR.15, paras. 85–86 and 91 (India); A/C.6/53/SR.14, para. 42 (China); A/C.6/53/SR.18, para. 51 (Cuba); and A/C.6/53/SR.22, para. 18 (Egypt).

[23] *The Geneva Arbitration (The Alabama case)*, in J. B. Moore, *History and Digest of the International Arbitrations to which the United States has been a Party,* vol. I (Washington, D.C., Government Printing Office, 1898), p. 495.

interpretations as regards the standard of care involved. For example, in that instance, Great Britain urged a restrictive interpretation of due diligence, according to which lack of due diligence meant a failure to use, for the prevention of an act which the Government was bound to endeavour to prevent, such care as Governments ordinarily employed in their domestic concerns and might reasonably be expected to exert in matters of international interest and obligation. However, the United States, which was the complainant in the case, favoured a more active diligence test, which would be commensurate with the magnitude of the results of negligence. The award itself favoured the test of due diligence advanced by the United States.[24]

20. The application of the due diligence test also arose in connection with State responsibility for acts of private persons in peacetime, which involved faulty conduct of its organs, i.e., normally the omission to use due diligence to prevent and repress acts committed by private persons. In this connection, the commentary to article 10 of the Harvard Law School draft of 1929 stated that:

> "The phrase due diligence implies ... jurisdiction to take measures of prevention as well as opportunity for the State to act, consequent upon knowledge of impending injury or circumstances which would justify an expectation of a probable injury."[25]

It was also clarified that due diligence was a standard and not a definition.[26]

21. According to García Amador, the first Special Rapporteur on the subject of State responsibility, due diligence involved: due care in taking measures normally undertaken in the particular circumstances of the case, foreseeability of the injurious acts and the possibility of preventing their commission with the resources available in the State, necessary exercise of authority in apprehending the individuals who committed injurious acts and giving the alien the opportunity to bring a claim against such individuals.[27] He also noted that:

> "The learned authorities are in almost unanimous agreement that the rule of 'due diligence' cannot be reduced to a clear and accurate definition which might serve as an objective and automatic standard for deciding, regardless of the circumstances, whether a State was 'diligent' in discharging its duty of vigilance and protection".[28]

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[24] For a mention of the positions of the United Kingdom and the United States in the *Alabama* case, see Horst Blomeyer-Bartenstein, "Due Diligence", in R. Bernhardt, ed., *Encyclopedia of Public International Law*, vol. 10 (Amsterdam, Elsevier Science Publishers, 1987), pp. 138–139. Max Huber observed in the Spanish Zone of Morocco Claims (Great Britain/Spain) case that a minimal degree of vigilance and employment of infrastructure and monitoring of activities in its territory was a natural attribute of any Government. Huber also found that the degree of diligence which must be exercised in a specific case was a function of the available means, the deployment of which depended upon the circumstances of the case and the nature of the interests to be protected (United Nations, *Reports of International Arbitral Awards*, vol. II, p. 644). The House of Lords of the United Kingdom had an occasion to deal with applicable due diligence standards in the *Donoghue v. Stevenson* case. It was pointed out that reasonable care must be taken to avoid acts or omissions which could be reasonably foreseen as likely to injure a neighbour (see [1932] A.C., p. 580 (H.L. (Sc)).

[25] Harvard Research in International Law, "The Law of Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners", *American Journal of International Law*, vol. 23 (1929) (Supplement), p. 187.

[26] Ibid.

[27] *Yearbook ... 1961*, vol. II, p. 46, draft article 7, document A/CN.4/134, addendum.

[28] *Yearbook ... 1957*, vol. II, p. 122, para. (7) of the commentary to article 12, document A/CN.4/106. However, when the study of the subject of State responsibility was expanded to cover more general rules, the Commission decided to strictly limit the draft articles to secondary rules. According to this scheme, due diligence was considered as an element of an obligation, i.e., a primary rule, and hence excluded from the draft. Even a milder, indirect reference to the concept of due diligence made by the Special Rapporteur Ago in his draft article 11, paragraph 2 (*Yearbook* ... 1972, vol. II, p. 126,

22. The principle of due diligence was also considered in the context of the International Law Commission's work on international watercourses. The matter was dealt with specifically for the first time in McCaffrey's fourth report. In relation to draft article 16 on pollution of international watercourses, he indicated that the obligation of due diligence should not be interpreted as resulting in the strict liability of a State for any harm caused by pollution.[29] He identified the following elements of the obligation of due diligence:

(a) Exercise of the degree of care that could be expected of a good Government. In other words, a Government or a State should possess "on a permanent basis, a legal system and material resources sufficient to ensure the fulfilment of [its] international obligations under normal conditions".[30] In particular, the State must have established, and maintain, an administrative apparatus that is minimally sufficient to permit it to fulfil those obligations;

(b) Use of the infrastructure with a degree of vigilance adapted to the circumstances;

(c) Conduct giving rise to the transfrontier pollution damage, as well as the damage itself, must have been foreseeable. In other words, the higher the degree of the inadmissible transfrontier water pollution, the greater would be the duty of care to prevent such pollution on the part of the State. Similarly, use of dangerous technologies or industries imposes on States a higher degree of responsibility to exercise vigilance, irrespective of the extent of their general development.[31]

23. The reaction within the Commission to the proposals of McCaffrey was mixed.[32] One member expressed doubts regarding the propriety of linking the concept of due diligence with an international minimum standard to be expected of a "good Government" or a "civilized State", a doctrine propounded by Dupuy that was reminiscent of the controversial international minimum standard doctrine of traditional international law. Accordingly, he felt that the

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document A/CN.4/264 and Add.1), was also later dropped. The article finalized in 1979 was drafted essentially as a saving cause. Further, the set of draft articles on State responsibility did not incorporate the element of fault, and wrongfulness of an international act was defined as a breach of international obligation, unless objective circumstances could be shown to exclude the same. See Blomeyer-Bartenstein, op. cit. (footnote 24 above), pp. 141–142. It appears that, during the second reading of these draft articles, the Commission may drop article 11 altogether, so as to eliminate unnecessary negative formulations. *Official Records of the General Assembly, Fifty-third session, Supplement No. 10* (A/53/10), paras. 421 and 425.

[29] *Yearbook ... 1988*, vol, II (Part One), p. 238, para. (6), document A/CN.4/412 and Add.1 and 2.

[30] P. Dupuy, "Due Diligence in the International Law of Liability", OECD, *Legal Aspects of Transfrontier Pollution* (Paris, 1977), p. 373.

[31] *Yearbook ... 1988* vol. II (Part One), pp. 239–240, paras. (7)–(9), document A.CN.4/412 and Add.1 and 2. In arriving at these conclusions, McCaffrey relied on the studies and conclusions of Professors Dupuy and Lammers. According to Dupuy, "Due diligence is the diligence to be expected from a 'good government', i.e. from a government mindful of its international obligations .... It is both the counterpart to the exclusive exercise of territorial jurisdiction and the limiting factor to international liability flowing from failure to act in accordance with it." (op. cit. (footnote 30 above), pp. 369–370). He also pointed out that "the behaviour required from a State whose economic resources supply it with the means to increase the extent of its control cannot be the same as that required from a State whose administration is sparse and relatively ineffective for want of material resources" (ibid., p. 376). While the standard of vigilance may vary according to a State's degree of development, Dupuy emphasized that the minimum rules concerning the attributes of a good government, as outlined above, "cannot be the subject of any compromise" (ibid.). Lammers concluded that due care or due diligence obligation could only be said to have been violated by a State "if the public organs of the State knew or should have known that certain conduct on their part or on the part of private persons or entities would give rise to inadmissible transfrontier water pollution." (J.G. Lammers, *Pollution of International Watercourses* (The Hague, Martinue Nijhoff, 1984), p. 349).

[32] For a summary of the views of members of the Commission, see *Yearbook ... 1988*, vol. II (Part Two), paras. 163–168.

obligation to exercise due diligence would be more acceptable to States as a whole if it was linked to vigilance consonant with a State's degree of development.[33] Another member observed that the burden of proof on the discharge of the obligation of conduct should rest on the source State.[34] Yet another member believed that, as a matter of pragmatism, the degree of due diligence required depended upon the circumstances. He also considered that the activity which was likely to cause harm, and the harm itself, should be foreseeable, namely, the State had to know or should have known that the given activity might result in harm. He also agreed that the degree of diligence might depend upon the level of development of the State in question.[35]

24. The duty of due diligence was also a central part of draft article 7 on the law of the non-navigational uses of international watercourses adopted by the International Law Commission on second reading. In that context, due diligence was defined to mean "'a diligence proportioned to the magnitude of the subject and to the dignity and strength of the power which is to exercise it'; and 'such care as Governments ordinarily employ in their domestic concerns' ... It [was] not intended to guarantee that in utilizing an international watercourse significant harm would not occur"[36]. A breach of the due diligence obligation could be presumed only in cases when a State had intentionally or negligently caused the event which had to be prevented or had intentionally or negligently not prevented others in its territory from causing that event or had abstained from abating it.[37] Therefore, under the article, a "State may be responsible for not enacting necessary legislation, for not enforcing its laws ..., or for not preventing or terminating an illegal activity, or for not punishing the person responsible for it".[38] Further, according to the Commission, a watercourse State could be deemed to have violated its due diligence obligation if it knew or ought to have known that the particular use of an international watercourse could cause significant harm to other watercourse States.[39]

25. However, as noted by the International Court of Justice in the *Corfu Channel* case, "it cannot be concluded from the mere fact of control exercised by a State over its territory and waters that that State necessarily knew, or ought to have known, of any unlawful act perpetrated therein, nor yet that it necessarily knew or should have known the authors."[40] It is obvious that "control" in this context actually refers to jurisdiction and not control of the specific activity.[41]

26. Article 7 of the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses[42] refers to the obligation of the State to adopt "appropriate measures" to prevent the causing of significant harm to other watercourse States. This formula was suggested by Canada, Switzerland and a few other States. The due diligence obligation involved in this respect is to be interpreted in the light of the above-mentioned commentary of the Commission.

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[33] Statement by Mr. Shi, ibid., vol. I, 2064th meeting, pp. 140–141, para. 16.

[34] Statement by Mr. Arangio-Ruiz, ibid., p. 141, para. 24.

[35] Statement by Mr. Barsegov, ibid., pp. 144–145, paras. 44–45.

[36] *Yearbook ... 1994,* vol. II (Part Two), p. 103, para. (4) of the commentary to draft article 7.

[37] Ibid.

[38] Ibid., citing *Restatement of the Law, Third, Foreign Relations Law of the United States*, vol. 2 (St. Paul, Minn., American Law Institute Publishers, 1987), sect. 601, comment (d), p. 105.

[39] Ibid., para. (8).

[40] *I.C.J. Reports 1949*, p. 18.

[41] See also the view of Barboza, who was convinced that the concepts of control and jurisdiction were more appropriate for the definition of the scope of the draft articles on international liability than was territory (*Yearbook ... 1988*, vol. II (Part Two), paras. 60–61).

[42] General Assembly resolution 51/229, annex.

27. Consideration of the concept of due diligence by the Commission in connection with its work on the duty of prevention drew inspiration largely from its study of the draft articles on the law of the non-navigational uses of international watercourses. Quentin-Baxter and Barboza conceived the standard of due diligence applicable with regard to the principle of prevention to be proportional to the degree of risk of transboundary harm in a particular case. Quentin-Baxter also stated that the standards of adequate protection should be determined with due regard to the importance of the activity and its economic viability. He further observed that the standards of protection should take into account the means at the disposal of the acting State and the standards applied in the affected State and in regional and international practice.[43]

28. The commentary to article 4 entitled "prevention" recommended by the Commission's Working Group in 1996 referred to the obligation of the State to take the legislative, administrative or other action necessary for enforcing the laws, administrative decisions and policies that the State had adopted. It was also indicated that the due diligence standard must be directly proportional to the degree of risk or harm. The size of the operation, its location, special climatic conditions and the materials used in the activity were some of the factors that must be taken into consideration in determining the applicable standards. However, note was taken of principle 11 of the Rio Declaration, according to which standards applied by some countries may be inappropriate and of unwarranted economic and social costs to other countries, in particular to developing countries.[44]

29. The importance of the concept of due diligence is constantly growing beyond the field of injury to foreign private persons on the territory of a State. The need to define liability or State responsibility for acts or risk of damage involved in the conduct of hazardous activities is a current concern.

30. The whole issue of due diligence has also been considered in relation to different sectors of environmental management and was the subject of a recent analysis of the United Nations Environment Programme (UNEP), which noted that its conceptualization has proved highly difficult. It was observed that, while certain specific duties of environmental impact assessment and duties of precaution were adequately articulated, several underlying issues related to international risk assessment, State or economic actor responsibility and international liability continued to be addressed and evaluated. The latter were among the most difficult areas in international environmental law. However, due diligence did not imply that a State or economic actor was an absolute guarantor in the prevention of harm. Furthermore, there was considerable flexibility in the manner in which a State could discharge its duty of due diligence. That flexibility was related, for example, to the employment of different environmental control measures in relation to the severity of the threat; the resources available for developing countries; and the nature of the specific activity. Moreover, it had been suggested that, as part of due diligence procedures, industry should follow agreed minimum international environmental and associated standards. Some such standards had been elaborated in international forums like the International Standards Organization, the World Health Organization and the International Maritime Organization.[45]

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[43] See P.S. Rao, First Report on prevention of transboundary damage from hazardous activities, A/CN.4/487, para. 55 (f).

[44] *Official Records of the General Assembly, Fifty-first session, Supplement No. 10* (A/51/10), annex I, part two, paras. (9)–(11) of the commentary to draft article 4.

[45] Informal note of the UNEP secretariat on international due diligence, prepared for the UNEP Executive Director's Advisory Group on Banking and Environment, October 1993 (on file with the Special Rapporteur).

31. On the basis of the above analysis, we may conclude that the obligation of due diligence involved in the duty of prevention of transboundary damage from hazardous activities can be said to entail the following elements: The degree of care in question is that expected of a good Government. In other words, the Government concerned should possess, on a permanent basis, a legal system and material resources sufficient to ensure the fulfilment of its international obligations.[46] To that end, the State must also establish and maintain an adequate administrative apparatus. However, it is understood that the degree of care expected of a State with well-developed economic, human and material resources and with highly evolved systems and structures of governance is not the same as for States which are not in such a position.[47] But even in the latter case, a minimal degree of vigilance, employment of infrastructure and monitoring of hazardous activities in the territory of the State, which is a natural attribute of any Government, is expected.[48]

32. The required degree of care is also proportional to the degree of hazardousness of the activity involved.[49] Moreover, the degree of harm itself should be foreseeable and the State must know or should have known that the given activity has the risk of causing significant harm. In other words, the higher the degree of inadmissible harm, the greater would be the duty of care required to prevent it.

33. In this connection, it is worth recalling the various principles considered in the Special Rapporteur's first report, such as the need for prior authorization, environmental impact assessment and the taking of all necessary and reasonable precautionary measures.[50] As activities become more hazardous, the observance of procedural obligations becomes more important and the quality of the measures to prevent and abate significant transboundary environmental harm must be higher.[51]

34. It is also believed that, in connection with the discharge of the duty of due diligence, the State of origin would have to shoulder a greater degree of the burden of proof that it had complied with relevant obligations than had the States or other parties which are likely to be affected.

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[46] In its decision of 27 January 1999 in the *Andhra Pradesh Pollution Control Board v. Prof. M.V. Nayudu (retired) and others* case, the Supreme Court of India reviewed various concepts concerning the polluter-pays principle, the precautionary principle, as well as the principle of placing the burden of proof on the person or entity proposing the activity to show that his action is environmentally friendly. In this context, the judgement of Justices Mazumdar and Jagannath Rao also highlighted the importance of good governance through the establishment of appellate authorities or tribunals consisting of judicial as well as technical personnel who are versed well in environmental law to monitor and implement environmental regulations. The decision also emphasized the need to provide for regular appeal to the Supreme Court from such environmental courts. It is also noteworthy that the Supreme Court in that case drew upon the work of the International Law Commission in arriving at its conclusions. *Judgement Today*, vol. 1 (1999), pp. 162–175.

[47] According to Lefeber, this introduces a subjective element because particular characteristics, such as the state of development and geographical features, must be deemed to affect the means a State has at its disposal. The operation of these variables makes the due diligence concept elusive. This also derives from the dynamic nature of the concept, as the degree of diligence which must be exercised varies with changing social, economic and political values. See R. Lefeber, *Transboundary Environmental Interference and the Origin of State Liability* (The Hague, Kluwer, 1996), p. 65.

[48] See also the observations of Max Huber, (footnote 24 above).

[49] See Lefeber, op. cit. (footnote 47 above), p. 68, note 50.

[50] P.S. Rao, First Report on prevention of transboundary damage from hazardous activities, A/CN.4/487/Add.1.

[51] Lefeber, op. cit. (footnote 47 above), p. 68.

B. Implementation of the due diligence obligation: some reflections

35. An emphasis upon the implementation of the duty of due diligence has the advantage of providing the parties likely to be affected by the operation of hazardous activities with an opportunity to seek remedies in case of failure to perform those duties, even before any damage or harm has occurred. These remedies could be in the nature of requiring specific performance of the various components of the duty of due diligence. This is in addition to the obligation of the State of origin to consult, notify and engage in dispute avoidance and settlement in respect of activities which are likely to cause significant harm. Further, other remedies like cessation of the activity, satisfaction and payment of damages or compensation could also come into play, depending upon the degree of State responsibility.

36. Apart from the question of available remedies, in case of failure of performance of duties of due diligence, of equal importance is the matter of enhancing the culture of compliance and encouraging more voluntary enforcement obligations. In this connection, the Special Rapporteur has already identified several useful steps in his first report. These are relevant and still valid.[52]

37. According to studies conducted on issues concerning compliance with and enforcement of international environmental agreements, the effectiveness of such compliance or enforcement depends upon several factors: precision of the obligations involved; administrative capacity of a country; endowment of financial and other infrastructural facilities to institute and monitor compliance procedures; economic factors, including per capita gross national product; production techniques; engagement in international trade; sharing of authority among different political units of the country, including delegation and decentralization of authority and power; role of non-governmental organizations; and leadership exercised by individuals. However, the more proximate important variables identified are administrative capacity, leadership, non-governmental organizations and knowledge and information.[53]

38. Suggested strategies for strengthening compliance have been differentiated depending upon the position of the country. In this regard, two dimensions have been considered to be particularly important, namely, intention to comply and ability to comply.[54] Based on a matrix, countries could be separated into six categories: intends to comply and can comply; has not thought through the obligations of compliance, but could comply; does not intend to comply, but could comply; intends to comply, but cannot comply; has not thought through the

[52] A/CN.4/487/Add.1, para. 53.

[53] See Edith Brown Weiss and Harold K. Jacobson, ed., *Engaging Countries: Strengthening Compliance with International Environmental Accords* (Cambridge, Mass., MIT Press, 1997), chap. 15, pp. 5–16 (draft of the chapter with the Special Rapporteur). See also Michael Bothe, "The Evaluation of Enforcement Mechanisms in International Environmental Law: An Overview" in R. Wolfrum, ed., *Enforcing Environmental Standards: Economic Mechanisms as Viable Means?* (Berlin, Springer, 1996), pp. 13–38. Bothe came to the following conclusions: There is a conflict between the unilateral and bilateral approaches to compliance by other States. Unilateral sanctions are important, but problematic. Enforcing international obligations at the bilateral level through the mechanism of international State responsibility is declining. The role of traditional dispute settlement procedures is of limited significance. True multilateral implementation procedures are developing, namely, reporting systems, systematic reviews of national resources, new non-compliance procedures, and financial instruments, in particular a system of remunerated compliance. Enforcing compliance with environmental agreements is still largely done through diplomatic instruments. Greater access for non-governmental organizations and less reliance on intergovernmental processes is also being encouraged. Ibid., p. 36.

[54] Brown Weiss and Jacobson, op. cit., p. 17.

obligations of compliance and could not comply; does not intend to comply and could not comply.[55]

39. Accordingly, three strategies of compliance have been articulated in respect of international environmental agreements: the sunshine approach, incentives to comply, or sanctions. The first two approaches, it has been suggested, are dominant; sanctions are used only as a "last resort".[56] This is in contrast to the trade field, where sanctions are the primary strategy for compliance, or human rights law, where the sunshine approach coupled with sanctions prevails.

40. In the view of another commentator,[57] while efficient reporting mechanisms and procedures under a multilateral convention to promote better knowledge of each State's practices is without doubt useful, compliance is likely to be more forthcoming from the developing countries "if they are assisted in pursuing alternative technologies and in building up their implementation capacity and the capacity to internalize the new behaviour in their local cultures." In addition, "implementing international conventions often requires States to build institutions, adopt domestic regulations and develop and implement national environmental plans for sound environmental conditions. Political will to meet these requirements is necessary but not sufficient; Governments must have the necessary means to carry out their obligations".[58]

41. The sunshine approach consists of a series of measures that are intended to bring the behaviour of parties and targeted actors into the open. These include regular national reporting, peer scrutiny of reports, establishment of special secretariats, regional and international bodies, access to information by non-governmental organizations, participation of non-governmental organizations in compliance monitoring, on-site monitoring, transparency of information and regular monitoring of behaviour through national and regional forums, workshops, corporate or private-sector networks or consultants working on site.[59]

42. Some illustrations are presented below. Thus, article 8 of the Montreal Protocol on Substances that Deplete the Ozone Layer provides for a non-compliance procedure, which was adopted in 1992.[60] According to this procedure, information concerning non-compliance can be reported to the Implementation Committee established under paragraph 5 thereof. This

[55] Ibid., p. 18.

[56] Ibid., p. 22. For the view that, in the face of non-compliance, coercive sanctions are rare, ineffective and inherently unsuitable for cooperative regimes by which States regulate major common problems, see also A. H. Chayes, A. Chayes and R. B. Mitchell, "Active Compliance Management in Environmental Treaties", in Winfried Lang, ed., *Sustainable Development and International Law* (London, Graham and Trotman, 1995), p. 77. See P.M. Dupuy, "International Liability for Transfrontier Pollution", in Michael Bothe, Ed., *Trends in Environmental Policy and Law* (IUCN Environmental policy and law paper, No. 15, 1980), p. 379, for an analysis of arrangements that could be considered for compensation procedures which could be worked out by bilateral or multilateral negotiations.

[57] Ibrahim Shihata, "Implementation, Enforcement and Compliance with International Environmental Agreements — views from the World Bank", paper presented to UNEP Expert Meeting on Implementation and Compliance with International Environmental Agreements, Washington, D.C., 20–21 May 1996 (copy on file with the Special Rapporteur).

[58] Ibid., p. 4.

[59] Brown Weiss and Jacobson, op. cit. (footnote 53 above), pp. 22–23. See also Kamen Sachariew, "Promoting Compliance with International Environmental Legal Standards: Reflections on Monitoring and Reporting Mechanisms", *Yearbook of International Environmental Law*, vol.2 (1991), pp. 31–52.

[60] For the text of the Protocol, see United Nations, *Treaty Series*, vol. 1522, p. 3. For further information on the implementation procedure, see UNEP, Information on non-compliance mechanisms in some international environmental conventions, UNEP/CHW/LSG/3/4 (25 May 1998), annex I, pp. 10–13.

can be done either by a State party which has reservations regarding another party's record of implementation of its obligations or by the Secretariat or by the party concerned, who has concluded that, despite its best bona fide efforts it is unable to comply fully with its obligations. The Implementation Committee will consider the matter further and attempt to secure an amicable solution. In order to fulfil its functions it may, where necessary and upon invitation of the party concerned, gather information in the latter's territory.[61] States parties to the Protocol, after considering the report and recommendations of the Implementation Committee, could decide upon and call for steps to bring about full compliance with the Protocol. The Meeting of States Parties may also issue, pending completion of the proceedings, an interim call and/or recommendations.[62] The aim of the non-compliance procedure under the Montreal Protocol is to secure "an amicable solution of the matter on the basis of respect for the provisions of the Protocol".[63]

43. The Convention on Nuclear Safety, which entered into force on 24 October 1996, provides for a reporting requirement under article 5.[64] This is essentially a "peer review mechanism" (PRM). Article 29 further stipulates that parties shall consult within the framework of a Meeting of the Contracting Parties with a view to resolving disagreements concerning the interpretation or application of the Convention. Disputes should be settled in an amicable manner and not be brought before any court. The PRM is conducted on the basis of: (a) guidelines regarding the review process; (b) guidelines regarding national reports; and (c) rules of procedure and financial rules for the review meetings of the Contracting Parties. While each Contracting Party is allowed a certain freedom and flexibility in preparing its report for submission to the PRM, the agreed guidelines provide for a structure to facilitate the international review. As such, these guidelines go beyond the "incentive character" of the Convention and add rigour to the reporting requirement and a certain internal transparency to the review process. The latter involves an opportunity for every Contracting Party to offer comments. For this purpose, two different country groups have been established. Contracting Parties are encouraged to discuss the safety-specific elements of their programme, and gaps therein can be more easily identified by others. At the end of each Review Meeting, a summary report is to be prepared and made available to the public in accordance with article 25 of the Convention.

44. The system of the Second Sulphur Protocol foresees cooperative measures such as assisting parties to comply with the Protocol. In addition, the functions of the Second Sulphur Protocol Implementation Committee include reviewing periodically complaints by parties with the reporting requirements of the Protocol and considering any submission or reference made to facilitate constructive solutions.[65]

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[61] A similar requirement is in place under article XIII(2) of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), which provides that an on-site inspection is permissible with the consent of the party in question (United Nations, *Treaty Series*, vol. 993, p. 243).

[62] For a similar procedure, see article 10(1) of the 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic, *International Legal Materials*, vol. 32 (1993), p. 1069.

[63] See a Secretariat note on the question of implementation measures under some relevant conventions submitted to the Intergovernmental Negotiating Committee for the elaboration of an international convention to combat desertification, ICCD/COP (2)/10, 23 October 1998, p. 4.

[64] *International Legal Materials*, vol. 33 (1994), p. 1514. See also UNEP, Information on non-compliance mechanisms, op. cit. (footnote 60 above).

[65] Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Further Reduction of Sulphur Emissions of 14 June 1994, *International Legal Materials*, vol. 33 (1994), p. 1540. See Desertification Convention Secretariat note on the question of implementation measures, op. cit. (footnote 63 above), pp. 4–5.

45. Similarly, the multilateral consultative process established under article 13 of the United Nations Framework Convention on Climate Change[66] is available to the parties for the resolution of questions regarding the implementation of the Convention. The aim of the procedure is to resolve such questions by providing advice and assistance to parties for overcoming difficulties of implementation and to promote understanding of the provisions of the Convention with a view to preventing disputes from arising. This multilateral consultative process is facilitative, non-confrontational, transparent, timely and non-judicial. Thus, problems are resolved by: (a) clarifying and resolving questions; (b) providing advice on the procurement of technical and financial resources for the resolution of these difficulties; and (c) providing advice on the compilation and communication of information.[67]

46. The incentive approach involves providing financial and technical incentives: funds established by the treaty, such as the Montreal Protocol Fund, the World Heritage Fund or the Bali Fund under the new International Tropical Timber Agreement; projects funded by the Global Environment Facility (GEF), multilateral development bank projects;[68] bilateral assistance from Governments; and technical assistance from the private sector, as is the case for the implementation of the Montreal Protocol.[69]

47. Sanctions may vary from a loss of special status under the agreement (such as article 5 status under the Montreal Protocol, which determines eligibility for funds) to prohibitions on trade with the offending country. The establishment of a body that can address issues of implementation and non-compliance and the development of non-compliance procedures that ultimately include sanctions may, for certain kinds of agreements, be useful even if the threat of sanctions serves only to deter non-compliance.[70]

48. The Special Rapporteur has revisited the concept of due diligence essentially with a view to establishing the type of duty that is required to be enforced. He has also considered various means and methods of enforcement or compliance. It is clear that mostly non-confrontational and transparent procedures would be more in order for encouraging and helping States to improve their record of compliance. This is, however, without prejudice to the invocation of private law remedies and principles of State responsibility.

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[66] *International Legal Materials*, vol. 31 (1992), p. 849.

[67] See Desertification Convention Secretariat note on the question of implementation measures, op. cit. (footnote 63 above), p. 5.

[68] On the role of international financial institution (IFIs), Shihata observed: "Through their policy dialogue and loans, especially concession ones. IFIs provide incentives for observance of environmental standards required by them. Their technical assistance also helps to set up institutions and establish appropriate legal and regulatory frameworks. They administer and facilitate the preparation of national environment plans. The GEF with its focus on additional concessional funding to meet incremental costs of projects of global benefits in the four focal areas of climate change, biological diversity, the ozone layer and international waters has a special and growing role. By providing an economic incentive for developing countries to comply with international environmental treaties, the GEF constitutes part of a global approach based on the principles of cooperation in a spirit of global partnership and common but differentiate responsibilities. The positive incentives provided through these different forms of financial assistance have their sanctional aspects too; assistance is suspended or cancelled in case of default under the loan or grant agreements. But flexibility is the key." (Shihata, op. cit. (footnote 57 above)). See also Constantin Christofidis, "The European Investment Bank and Environmental Protection — Policies and Activities", in International Bar Association, *Environmental Liability*, 7th Residential Seminar on Environmental Law, 9–13 June 1990, Montreux, Switzerland (London, Graham and Trotman, 1991), pp. 13–24.

[69] Brown Weiss and Jacobson, op. cit. (footnote 53 above), pp. 23–24.

[70] Ibid., p. 24. See also the chapter on enforcement in International Bar Association, op. cit (footnote 68 above), pp. 213–274, for the experience of New South Wales, Australia, and New Zealand in matters of enforcement and compliance.

49. It is also clear that matters of compliance and specific regimes of enforcement are subjects appropriate for negotiations between States parties to agreements on the operation of dangerous or hazardous activities. This is the procedure followed in respect of several important activities. As such, the matter of compliance may be considered to fall outside the realm of the preparation of the draft articles on prevention by the International Law Commission. If otherwise desired and mandated by the General Assembly, the Commission could prepare a separate protocol on compliance.

IV. Treatment of the topic of international liability

A. The work of the International Law Commission

50. When the Commission took up the topic early in 1978, the then Rapporteur Mr. Quentin-Baxter attempted to establish a conceptual basis or framework and suggested a schematic outline in his third report.[71] In this connection, he indicated the need to turn to the concept of strict liability, even as he was aware of the difficulties associated with it. He observed: "At the very end of the day, when all the opportunities of regime-building have been set aside — or, alternatively, when a loss or injury has occurred that nobody foresaw — there is a commitment, in the nature of strict liability, to make good the loss. The Special Rapporteur finds it hard to see how it could be otherwise, taking into account the realities of transboundary dangers and relations between States, and the existing elements of a developing chapter of international law".[72]

51. More importantly, according to Quentin-Baxter, the concept of liability and the duty to pay compensation were conditioned by his concept of shared expectations. As he explained, the vagueness of the latter concept was an advantage in that it allowed States to arrive at a mutually acceptable distribution of costs and benefits on a case-by-case basis. It may be recalled that, under section 4 (4) of the Schematic Outline, shared expectations included expectations which "(a) have been expressed in correspondence or other exchanges between the States concerned or, insofar as there are no such expressions, (b) can be implied from common legislative or other standards or patterns of conduct normally observed by the States concerned, or in any regional or other grouping to which they belong, or in the international community". This leaves open the possibility to settle a dispute by means of civil liability regimes. It is also possible that such shared expectations could decide and determine whether the loss should be compensated by the source State, should be shared between the source and the affected States or should lie where it falls.[73]

52. Barboza took the view that questions of liability should be settled by States through liability regimes concluded specifically for that purpose. Thereby, they are free to opt for a civil or State-to-State liability regime. The liability regime that he proposed was to operate only as a residual regime, functioning as a "safety net".[74] Barboza suggested that in case of

[71] *Yearbook ... 1982*, vol. II (Part One), p. 62, para. 53, document A/CN.4/360.

[72] Ibid., p. 60, para. 41. He also stated, with respect to the difficulties of dealing with the concept of strict liability: "[A]t the end of the journey, the monster of strict liability should be domesticated" (Second report, *Yearbook ... 1981*, vol. II (Part One), p. 123, para. 92, document A/CN.4/346 and Add.1 and 2). For his view that prevention and reparation form a continuum and together are to be treated as a compound obligation, see Rao, First Report, A/CN.4/487, para. 40.

[73] Preliminary report, *Yearbook ... 1980*, vol. II (Part One), p. 261, para. 47, document A/CN.4/334 and Add.1 and 2.

[74] Sixth report, *Yearbook ... 1990*, vol. II (Part One), p. 95, para. 48, document A/CN.4/428 and Add.1.

transboundary harm not arising out of an internationally wrongful act, the State of origin should be bound by the duty to negotiate with the affected State or States "to determine the legal consequences of the harm, bearing in mind that the harm must, in principle, be fully compensated for".[75] Only failure to comply with the duty to negotiate would give rise to State responsibility.[76]

53. Barboza also indicated that his concept of liability did not require proof of the source State's failure to adopt adequate measures of prevention and abatement. Similarly, it also did not require that the conduct involved should be treated as wrongful. Draft article 9 proposed in 1990 also left open the possibility of limiting the liability in amount and in time.[77] Moreover, unlike Quentin-Baxter, who chose the concept of shared expectations to mitigate the rigours of the concept of strict liability, Barboza relied upon factors limiting liability[78] and on exonerations or exceptions to such liability.[79] He further observed:

> "[T]he norm set forth in this article [draft article 21][80] is based on strict liability, which means that if there is no doubt about the causal relationship between the activity and the transboundary harm in question compensation should, in principle, be paid. Negotiations would start from that premise and would focus more on the 'quantum' of the compensation".[81]

54. While he had earlier argued in favour of State liability, in the latter part of his work he began to mix that concept and that of the operator's civil liability. In his seventh report, in response to various suggestions for dealing with the question of liability by giving greater weight to domestic or private law remedies, Barboza proposed that civil liability should be primary and State liability should be residual.[82] In this regard, State liability would only replace civil liability if the private person who is liable cannot fully compensate the harm or if that person cannot be identified or located. Further, victims should be entitled to choose between the domestic channel and the diplomatic channel to pursue their claim.[83] Even this mixed approach did not receive much support. Consequently, in his tenth report, Barboza proposed that States should not be held liable for harm covered by the draft articles unless they have committed an internationally wrongful act.[84] In that connection he noted different possibilities for holding the State liable: (a) situations where there is no State liability for a wrongful act; (b) situations where the State bears both strict liability and liability for a wrongful act; (c) situations where there is strict liability on the part of the State but it is subsidiary to the operator's civil (also strict) liability for the payment of compensation in respect of incidents resulting from the dangerous activity; and (d) situations where there is State liability for a wrongful act, but such liability is subsidiary to the operator's civil liability for harm caused by the dangerous activity.

55. He came to the conclusion that none of the foregoing alternatives seemed to be entirely suited to the purposes of the draft articles, although alternative (d) appeared to him as an option to be considered. Under the circumstances, it appeared simplest to him "not to impose

[75] Ibid., p. 108, draft article 21.

[76] Ibid., pp. 94–95, para. 43.

[77] Ibid., p. 95, para. 44, and annex, p. 106.

[78] Ibid., annex, pp. 108–109, draft articles 23 and 27.

[79] Ibid., p. 108, draft article 26.

[80] For the text, see ibid., p. 108.

[81] Seventh report, *Yearbook ... 1991*, vol. II (Part One), p. 86, para. 56, document A/CN.4/437.

[82] Ibid., p. 85, para. 50, see also p. 78, para. 23.

[83] Ibid., p. 85, para. 51.

[84] Tenth Report, A/CN.4/459, para. 30.

any form of strict liability on the State and to draw the sharpest possible distinction between its liability for its failure to fulfil its obligations (liability for wrongful acts) and strict liability for harm caused by incidents resulting from the risk involved in the activity in question". He hoped that such a system would be more acceptable to States and would simplify the relationship between State liability and the liability of private parties. It would also, in his view, simplify the procedural aspects, since only domestic courts would be competent and such thorny issues as that of a State appearing before a court in a case involving a private party, particularly if it had to do so in the domestic courts of another State, would not arise.[85]

56. The draft articles adopted by the Working Group of the Commission in 1996 dealt with the subject of liability in article 5. The commentary to that article stated that "the principle of liability is without prejudice to the question of: (a) the entity that is liable and must make reparation; (b) the forms and the extent of reparation; (c) the harm that is subject to reparation; and (d) the basis of liability".[86]

57. The reaction of the General Assembly to the proposals of the Working Group was mixed. On the one hand, there was a group of States which believed that the draft articles did not sufficiently focus on the principle of liability and compensation. It was felt that a fuller and more comprehensive regime of liability and compensation should be developed in the interest of finding a proper balance between profits derived by entities pursuing dangerous or hazardous activities and the burden caused to third parties because of the risk of harm such activities posed. It was noted that only draft articles 5 and 21 dealt with the issue of international liability. Moreover, the text contained no provision concerning the nature of the liability or the measure of compensation and also failed to make any distinction between the concepts of responsibility and liability. In the light of such considerations, it was suggested that the Commission should approach the draft articles as a text concerning an environmental protection regime rather than international liability. It was observed that the duty of compensation arising out of such liability could be performed directly by the operator or by way of a two- or three-tier system based on the establishment of a compensation fund and other means (through the polluter-pays principle, which was not applicable in all cases, or through a regime of civil or State liability or through a combination of both).[87]

58. Another group of delegations felt that the concept of liability incorporated in the draft articles of the Working Group was not properly defined and that its elements were left without any specific content. In this connection, it was noted that the draft articles were both ambiguous and troubling as they left open the question of precisely who (or what) was liable. It could also be assumed that they sought to impose obligations only on States, not on private entities. The United States did not believe that "under customary international law, States are generally liable for significant transboundary harm caused by private entities acting on their territory or subject to their jurisdiction or control". It added that, "from a policy point of view, a good argument exists that the best way to minimize such harm is to place liability

[85] Ibid., paras. 26–29.

[86] *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10), p. 272, para. (6) of the commentary to article 6.

[87] See the statement of the delegation of Austria, A/C.6/51/SR.37, paras. 17 and 19. For similar views, see the statements of Portugal (A/C.6/51/SR.39, para. 66), Australia (A/C.6/51/SR.40, paras. 2–3), Ireland (indicating that it was prepared to accept the exclusion of "absolute liability" or even "strict liability" provided that it was accepted that no-fault liability was not also excluded, ibid., paras. 6 and 8), the Republic of Korea (A/C.6/51/SR.41, para. 53), Cuba (appearing to support State liability, ibid., para. 57), New Zealand (supporting the polluter-pays principle, A/C.6/51/SR.39, para. 5), Venezuela (ibid., paras. 18–21) and Brazil (ibid., para. 26).

on the person or entity that causes such harm, rather than on the State".[88] France argued that the Working Group had not defined the characteristics of liability. The liability of the State could be conceived only residually vis-à-vis the liability of the operator of the activity at the origin of the transboundary harm. Recognition of the residual liability of States for harm caused by lawful activities would itself constitute a very considerable development of international law. States would be unlikely to accept such a development in a general form. To date, they had accepted it only in specific treaties, such as the Convention on International Liability for Damage Caused by Space Objects of 29 March 1972. There, however, the States originating the Convention had considered space activities as activities reserved exclusively to States, which would clearly not be the case for all the activities engaged in in the draft articles under consideration. It would therefore be preferable to make the draft articles a sort of compendium of principles, to which States could refer when establishing specific regimes of liability. That would be a realistic, pragmatic and constructive approach to the topic.[89] India took the view that jurisdictional control or sovereignty over a territory did not per se constitute a basis for the international liability of States, and what was crucial was the actual control of operations taking place within the territory of a State. Therefore, international liability for transboundary harm must be imputed to the operator who was in direct physical control of the activity.[90] The United Kingdom demanded that the Commission should cease considering the topic, given the burden it imposed on it as it was "devoid of substance".[91]

59. A Working Group of the Commission which reviewed the matter in 1997, for its part, was not convinced that there was enough clarity on the scope and content of the topic. It also felt that the Commission should await further comments from States before it could take any decision on the subject of international liability. As an interim measure, it agreed that the topic of liability for damage should be separated from the topic of prevention.[92]

B. The status of ongoing negotiations on international liability

60. The view of the Commission's Working Group was corroborated by the fact that, except for the case of liability involving space objects and a few other instances,[93] many of the

[88] See the written comments submitted by the United States of America to the International Law Commission, A/CN.4/481, para. 24. See also the statement of that delegation in the Sixth Committee, A/C.6/51/SR.39, paras. 31–33. See also David Jacoby and Abbie Eremich, "Environmental Liability in the United States of America", in International Bar Association, op. cit. (footnote 68 above), pp. 63–93.

[89] A/C.6/51/SR.37, para. 25. For the statement of the Nordic countries, which also wished it to be made clear that it was primarily incumbent on the operator to provide compensation and that the liability of the State, if any, was residual, see ibid., para. 40.

[90] A/C.6/51/SR.41, para. 63.

[91] A/C.6/51/SR.38, para. 19.

[92] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), paras. 165 and 167.

[93] Some Conventions have attempted to incorporate the principle of strict State liability in one form or the other. The 1972 Convention on International Liability for Damage Caused by Space Objects (United Nations, *Treaty Series*, vol. 961, p. 187) makes the launching State "absolutely liable" for damage caused by space objects on the surface of the earth to aircraft in flight (article II). Although the fault standard was incorporated in article III for damage done to space objects in flight as a result of collision between space objects in outer space or in the air, the Convention could still be treated as a modified regime of liability *sine delicto*. The abandonment of the no-act-of-the-State and the non-availability of due diligence exemptions as well as the accepted interpretation about the disconnection of liability and internationally wrongful act would appear to support this view. Like the 1972 Space Liability Convention, the 1987 CMEA Convention on Liability for Damage Caused by Radiological

international conventions dealing with transboundary damage or damage to the global environment have not so far succeeded in putting into place any regime of liability. Most of the conventions have only indicated the need for development of suitable protocols on liability and most of these protocols have been under negotiation for a considerable amount of time without any resolution of or consensus on the basic issues involved.[94] A review of the status of some of these negotiations is presented below.

61. The Antarctic Treaty Consultative Meeting has been attempting to develop an annex or annexes on environment liability and for this purpose established a Group of Legal Experts, which has been meeting both during the Antarctic Treaty Consultative Meetings and inter-sessionally since 1993. The deliberations of the Group have taken place on the basis of "offerings" prepared by the Chairman, Prof. R. Wolfrum. At the last meeting, the Group had before it the Chairman's Eighth Offering. The United States delegation also proposed an alternative.[95] The issues under consideration are: scope of application, definition of the notion of damage, response measures or remedial measures, standard of liability, exemption and limits, rules concerning the quantum of damage, State responsibility, insurance, as well as implementation of the annex or annexes, including dispute settlement. The Group came to an understanding on some of these issues, but on others it was only possible to identify alternatives. For example, it was agreed that the aim of an annex or annexes was a liability regime which would cover all activities under the Antarctic Treaty and its Protocol. However, it remains an open question whether this should be achieved in one comprehensive annex or in more than one annex. On the definition of damage, while it was agreed that it must meet certain conditions, different variations were favoured. According to article 3 of the Eighth Offering, the impact has to be "of a more than minor and more than transitory nature" or, alternatively, it has to be "significant and lasting". While some favour exclusion of impacts that have been assessed in environmental impact assessments and found acceptable by national authorities from the definition of damage, others were concerned that any form of environmental impact assessment would be used to avoid liability. Similarly, concerning the standard of liability, while all members favoured strict liability, doubts were expressed about distinctions to be made between activities of States and non-State entities or types of damage. Proposals for joint and several liability also raised questions as regards the compatibility with some national legal systems. Although all agreed that the operator should take reasonable precautionary measures to prevent the occurrence of incidents, it was pointed out that any

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Accidents in International Carriage of Irradiated Nuclear Fuel from Nuclear Power Plants also makes States primarily liable for nuclear damage under international law. Moreover, in respect of other nuclear activities, namely the use of nuclear power sources in outer space and nuclear testing, there is some evidence of abandonment of the no-act-of-the-State exemption and the due diligence exemption and of disregarding the condition of wrongfulness. See Lefeber, op. cit. (footnote 47 above), p. 160. Similar exemptions have also been ignored in the case of at least two bilateral treaties on international watercourses, ibid., p. 169.

[94] For an excellent summary of international practice dealing with remedies for transboundary harm caused by a hazardous activity to persons or property or the environment and for a mention of the different forms of liability and occasions of payment of compensation without any attribution of responsibility or liability along with examples of treaties and case law, see *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10), annex I, commentary to article 5 recommended by the Working Group, p. 270. For an analysis of some of the relevant Conventions and arguments involved, see also Mahnoush H. Arsanjani and W. Michael Reisman, "The Quest for an International Liability Regime for the Protection of the Global Commons", in *International Law: Theory and Practice: Essays in Honor of Eric Suy* (The Hague, Martinus Nijhoff, 1998), pp. 469–492.

[95] See generally the report of the Group of Legal Experts on work undertaken to elaborate an annex or annexes on liability for environmental damage in Antarctica, agenda item 9, XXII ACM/WP1 (November 1997), pp. 1–14.

such obligation could be treated as a new obligation not found in the Protocol. The question of payment of compensation to third parties which undertook remedial measures without prior authorization from the operator was also an important one. While the operator was to be generally held liable for damage, a problem arose in respect of a provision imposing on the operator an obligation of reasonable compensation for "unrepaired damage" or "irreparable harm" or where response action was not possible, not feasible or, for environmental or other reasons, not desirable.

62. There was general agreement within the Experts Group that the liability of the State, not acting as an operator, should only be invoked in narrowly defined circumstances. Accordingly, all members were in agreement that a liability annex or annexes should not create a new liability for States merely for the reason that damage has been caused by an operator within its jurisdiction. According to article 7 of the Eighth Offering, a State party could be liable for damage caused by an operator only if damage would not have occurred or continued if a State party had carried out its obligations under the Protocol and the annexes; but this is only the case to the extent that liability was not satisfied by the operator or otherwise. There was general agreement that State liability under a liability annex should not exceed State responsibility under general international law.

63. All members favoured including exemptions from liability for natural catastrophes and armed conflicts and terrorist acts. Compulsory insurance or other financial security for activities involving a risk to the environment was also provided in article 8 of the Eighth Offering. The question of limitation on liability, the establishment of an environmental protection fund and the dispute settlement mechanism have also given rise to discussions. The United States draft is based upon the principle of strict liability and in particular deals with response action obligations. The amount of compensation is to be calculated on the basis of the costs of the response action taken by other States. The draft also provides for exemptions and limits and the establishment of a fund.[96]

64. The need for a liability regime has also been considered in the context of transboundary movement of living modified organisms. On the basis of article 19 (3) of the Convention on Biological Diversity,[97] the Second Conference of Parties to the Convention decided to establish an open-ended Ad Hoc Working Group to develop a bio-safety protocol to deal with transboundary movement of living modified organisms. Although the protocol aims at the establishment of an advance informed agreement (AIA) procedure, the majority of developing countries have insisted that it should also deal with provisions on liability and redress.[98] Six meetings of the Working Group have been held, with the final meeting of the Group at Cartagena de Indias, Colombia, from 14 to 22 February 1999. On the liability and redress issue, countries had diverse positions, ranging from strict State liability to no liability. Developing countries of Asia and Africa supported the elaboration of liability and compensation provisions, but countries such as the United States, the Russian Federation and members of the European Union insisted that the time allotted for the negotiation was not sufficient to work out a detailed provision of liability and compensation in the protocol. Japan and Argentina were against any such provision. Although the negotiations failed on other contentious issues, there was a compromise to have an enabling provision on liability and

[96] See ibid., pp. 14–16.

[97] *International Legal Materials*, vol. 31 (1992), p. 818.

[98] UNEP/CBD/BSWG/1/4, dated 22 August 1996, p. 17. See also Dr. M. Gandhi's presentation entitled "Relationship between Discussions in the Bio-safety Negotiations and Work undertaken in relation to article 14 of CBD", at the Workshop hosted by the United Kingdom and the European Commission held in London, 30 June–2 July 1998 (copy on file with the Special Rapporteur).

compensation, work on which would be completed within three years from the date of coming into force of the protocol.[99]

65. A protocol on liability and compensation for damage resulting from the transboundary movement of hazardous wastes and their disposal has been under negotiation since the conclusion of the 1989 Basel Convention.[100] Eight meetings of the Working Group have so far been held and the negotiations on the protocol are said to be near completion. Although there appears to be no consensus on many aspects of the scope and the application of the protocol, there is agreement that it should apply to damage attributable to an incident occurring during a transboundary movement of hazardous wastes and other wastes or their disposal. In that connection, no decision has been taken as regards the liability of the State of export and/or the State of transit in respect of shipment of wastes which have left the territorial jurisdiction of the State of export. Similarly, the question of liability concerning illegal traffic in wastes is also left open. The problem of channelling the liability has further been the subject of controversy.[101] However, there was consensus at the last session that the "notifier" shall be liable for damage until the movement document is signed by the disposer. Thereafter, the disposer shall be liable for damage. If the State of export is the notifier or if no notification has taken place, the exporter shall be liable for damage until the movement document is signed by the disposer. Thereafter the disposer shall be liable for the damage. There is also disagreement as to the nature and purpose of a fund or funds to be established under the protocol. While developed countries would like a compensation fund to be established only for the purpose of meeting the expenses connected with emergency relief and clean-up, developing countries would like the compensation fund to cover claims on loss of property, persons and the environment, in addition to a separate emergency fund. The nature and the role of an insurance coverage in meeting the claims of compensation is also the subject of debate.[102]

66. In many other cases it did not appear to be possible even to seriously discuss the issue of liability.[103] The general trend appears to go against any formulation of the concept of State liability, and even more so, strict liability, even though it is regarded as more suitable to problems of transboundary pollution.[104] After reviewing the work of the International Law Commission and the views of Governments on the subject of international liability along with

[99] UNEP/CBD/ExCOP/1/2, draft article 25, p. 32.

[100] Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, *International Legal Materials*, vol. 28, p. 657.

[101] See the note prepared by Prof. G. Handl, "Comments on Draft Articles of a Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal" (UNEP/CHW.1/WG.1/5/L.1/Add.1).

[102] See the Draft Protocol on Liability and Compensation for Damage Resulting from the Transboundary Movement of Hazardous Wastes and their Disposal which emerged after the eighth meeting of the Ad Hoc Working Group of the Legal and Technical Experts of the Basel Convention to consider and develop a Draft Protocol on Liability and Compensation (UNEP/CHW.1/WG.1/8/5).

[103] Lefeber, op. cit. (footnote 47 above), p. 177.

[104] Generally, Argentina, Australia, Canada, Brazil (cautiously), the Democratic Republic of the Congo, Ireland, Jordan, the Nordic countries, Sierra Leone, Spain, Thailand, Trinidad and Tobago, Uruguay and Venezuela would appear to support the abandonment of the due diligence exemption. Further, Australia, Canada and the Nordic countries appear to favour strict liability. For an analysis of the views of the States, see ibid., pp. 178–189 (fn. 131 and 132). See also the above-mentioned views of States expressed in the Sixth Committee during the fifty-third session of the General Assembly. Some commentators appear to favour a strict liability concept in matters of transboundary harm borrowing from municipal law analogies. See, for example, M. Bedjaoui, "Responsibility of States: Fault and Strict Liability", in *Encyclopaedia of Public International Law*, op. cit. (footnote 24 above), vol. 10, p. 361. See also Oscar Schachter, *International Law in Theory and Practice* (Dordrecht, Martinus Nijhoff, 1991), p. 377.

existing State practice, one commentator recently came to the conclusion that "the search for sources in this connection has revealed that there are neither treaties in force nor other instances of consistent State practice that support the procedural approach to liability *sine delicto* as envisaged by the Special Rapporteurs".[105]

V. Future course of action on the topic of liability: options

67. In view of the above, the following options appear to be available in respect of the future course of action:

(a) To proceed with the topic of liability and finalize some recommendations. An abundance of material was surveyed by Quentin-Baxter and even more so later by Barboza. Draft articles were also prepared by a Working Group of the International Law Commission;

(b) Alternatively, the Commission could also suspend its work on the topic of international liability, at least for the time being, until the regime of prevention is finalized in its second reading. The Commission should further await developments in the negotiation of some of the protocols on liability;

[105] Lefeber, op. cit. (footnote 47 above), p. 226. For the views of other scholars, see ibid., pp. 184–187 (fn. 153–161). For example, Schachter observed that "international liability is an essential, though troubling, concept in regard to transborder environmental injury ... efforts have been made by international bodies to formulate general principles and procedures. International legal scholars have contributed many analytical and policy studies to this end. Governments, however, have moved cautiously. They have concluded only a few multilateral agreements prescribing principles of liability and compensation in regard to particular activities. State practice has been sparse and international adjudication rare." (op. cit. (footnote 104 above), p. 375). Further, alluding to the fact that several international lawyers argued in favour of strict State liability in cases of disastrous accidents, he observed that "it is true that municipal law has decoupled liability from wrongfulness in regard to some areas of environmental damage (especially ultra-hazardous acts), but Governments were not ready to do so as a general principle on the level of international liability" (ibid., p. 378). See also several papers on the legal position of countries such as Canada, Germany, South Pacific countries, Japan, South Africa, the United Kingdom and New Zealand regarding liability (International Bar Association, op. cit. (footnote 68 above)). See also Prue Taylor, *An Ecological Approach to International Law: Responding to Challenges of Climate Change* (London; New York, Routledge, 1998), p. 152. (There is some support for strict liability within State practice and among scholars. However it is probably the prevailing view that it is not a general norm of international law in the context of transboundary harm.)

(c) Of course, there is also another option. The Commission could decide to terminate its work on the topic of international liability,[106] unless a fresh and revised mandate is given by the General Assembly itself.

68. Of the three options, the Special Rapporteur would like to recommend the second alternative for consideration and approval. It is clear that much of the material surveyed and examined by Quentin-Baxter and Barboza on international liability has not been so far considered by the Commission as providing a sufficient basis to finalize any recommendations in this regard. The situation does not appear to have changed even now. The dominant trend among States is still against accepting any concept of strict State liability. Hence, the first alternative would not appear to be any more attractive today than it was a few years ago.

69. It is equally clear that it is not proper and appropriate to reject here and now the possibility of dealing with the topic of international liability. Such a categorical rejection would create more confusion in respect of the applicable law in case of actual damage or harm occurring across international borders or at the global level because of activities pursued or permitted by States within their territory or other areas under their exclusive jurisdiction and control. Such a view would also not do justice to the strong sentiment among a large group of States in favour of providing a balance between the interests of the State of origin of hazardous activities and the States likely to be affected. It would also not enable the Commission to take advantage of any further developments that are likely to take place on the subject.

70. If and when the Commission is in a position to take up the subject of international liability it would, however, need to take a stand on several issues in order to properly lay down a regime of liability: the activities to be covered, the form of their coverage, the definition

[106] See the review of literature on international liability by the Harvard Law Review and its conclusion that "no legitimate expectations about the consequences of action or inaction to prospective environmentally injurious States could be communicated" (Editors of the Harvard Law Review, "Trends in International Environmental Law", in L. Guruswamy, G. Palmer and B. Weston, eds., *International Environmental Law and World Order: A Problem-oriented Coursebook* (St. Paul, Minn., West Pub. Co., 1994), pp. 330–332). Prof. Brownlie, while commenting on the concept of liability for "lawful acts", felt that "it is fundamentally misconceived". "Moreover", he noted, "the nature of the misconception is such that the contagion may induce a general conclusion in respect of the principles of State responsibility, since the misunderstanding relates to those principles and is not confined to a certain area of problems. Much of State responsibility — as long accepted by Governments and tribunals — is concerned with categories of lawful activities which have caused harm ... The search for principles governing 'liability' for 'lawful activities' seems to fly in the face of all existing legal experience ... In any case, the practice of States and the jurisprudence of international tribunals fail to support the concept of liability for lawful activities." (Ian Brownlie, *System of the Law of Nations: State Responsibility*, Part I (Oxford, Clarendon Press, 1983), p. 50). See also A. B. Boyle, "State Responsibility and International Liability for Injurious Consequences of Acts not Prohibited by International Law: A Necessary Distinction?", *International and Comparative Law Quarterly*, vol. 39 (1990), pp. 1–26. Dupuy observed that one must "recall that in general international law, the use of the concept of 'due diligence' concerns unlawful omissions by a State ... International law only requires States to exercise 'sufficient diligence' or 'due diligence'. This is the measure of international responsibility" (op. cit. (footnote 56 above, pp. 369–370)). Judge Jiménez de Aréchega noted in his Hague Lecture that "the International Law Commission wisely decided not to codify the topic of State responsibility for unlawful acts and the rules concerning the liability for risks resulting from lawful activities simultaneously, for the reason that a joint examination of the two subjects could only make both of them more difficult to grasp. Several members urged the Commission to embark as soon as possible on the codification of State responsibility resulting from risks originating in lawful but hazardous conduct. The difficulty of making such a codification is that this type of responsibility only results from conventional law, has no basis in customary law or general principles and, since it deals with exceptions rather than general rules, cannot be extended to fields not covered by the specific instruments." (*Recueil des Cours, ... 1978–I*, vol. 159, p. 273). For other citations, see Lefeber, op. cit. (footnote 47 above), p. 191 (fn. 40).

of damage, the establishment of the measure of damages, the identification of the person or persons against whom the claim should be brought, the determination of who may bring a claim, the designation of the forum or forums before which claims will be brought, the determination of available remedies, the role of the State in payment of compensation, the conditions governing the operator's liability, the circumstances precluding liability, the requirement of insurance and other financial security, and dispute settlement procedures.

71. In conclusion, it may also be noted that the present report did not attempt to deal with the question of the final form the draft articles on prevention could take. Different suggestions have been made both within the Commission and within the General Assembly, ranging from a model law or guidelines to a full-fledged convention. A framework convention has also been suggested as an alternative. This is a question the Commission should only take up at the end of its exercise, and not now.

72. Similarly, the question concerning the most suitable procedure of settlement of disputes for the topic of prevention addressed by some States[107] would be fit for review in connection with the second reading of the draft articles on prevention.

[107] Switzerland, for example, felt that draft article 17 on the settlement of disputes was inadequate. According to that State, if a dispute could not be settled by means of a fact-finding commission, a State party should be entitled to embark on a judicial procedure leading to a binding decision (A/C.6/53/SR.13, para. 67).