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WORKING GROUP ON INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW

(INTERNATIONAL LIABILITY FOR FAILURE TO PREVENT LOSS FROM TRANSBOUNDARY HARM ARISING OUT OF HAZARDOUS ACTIVITIES)

Report of the Working Group

Introduction

1. At the current session, the Commission established a Working Group,[1] chaired by Mr. Pemmaraju Sreenivasa Rao, which held seven meetings, on 27 and 30 May, on 23, 24 and 29 July and on 1 August 2002.

2. In light of the fact that the Commission completed the draft articles on prevention, the Working Group started consideration of the second part of the topic, in accordance with operative paragraph 3 of General Assembly resolution 56/82. It was also significant that the

[1] The Working Group was composed as follows: Mr. J. Baena Soares, Mr. I. Brownlie, Mr. E. Candioti, Mr. C. Chee, Ms. P. Escarameia, Mr. Z. Galicki, Mr. M. Kamto, Mr. J. Kateka, Mr. M. Koskenniemi, Mr. W. Mansfield, Mr. D. Opertti, Mr. P.S. Rao, Mr. R. Rosenstock, Ms. H. Xue, Mr. C. Yamada and Mr. V. Kuznetsov (ex-officio).

Commission had completed its work on State responsibility. It was understood that failure to perform duties of prevention addressed to the State in terms of the earlier draft articles on prevention entails State responsibility.

3. The Working Group, recognizing that harm could occur despite faithful implementation of the duties of prevention and for the purpose of the examination of the remainder of the topic, assumed that such duties have been fulfilled. Harm in such cases could occur for several reasons not involving State responsibility, such as situations where the preventive measures were followed but in the event prove inadequate or where the particular risk that causes harm was not identified at the time and appropriate preventive measures were not taken.

4. In case harm occurs despite compliance by the State with its duties, international liability would arise. Accordingly, it was important that the task of the Commission in addressing the remainder of the topic concerning significant transboundary harm arising out of hazardous activities was better dealt with as allocation of loss among different actors involved in the operations, such as, for instance, those authorizing, managing or benefiting from them. They could, for example, share the risk according to specific regimes or through insurance mechanisms.

5. It was generally recognized that States should be reasonably free to permit desired activities within their territory or under their jurisdiction or control despite the possibility that they may give rise to transboundary harm. However, it was equally recognized that they should ensure that some form of relief, for example compensation, be made available if actual harm occurs despite appropriate preventive measures. Otherwise, potentially affected States and the international community are likely to insist that the State of origin prevent all harm caused by the activity in question, which might result in the activities themselves having to be prohibited.

SCOPE

6. The Working Group reviewed different possibilities to cover the scope of the topic. In this connection, it recognized that harm arising out of creeping pollution and pollution from multiple sources or harm done to the environment in the areas beyond national jurisdiction have their own particular features. For that reason, the Working Group recommended to continue to limit the scope of the remainder of the topic to the same activities which were covered under the topic of prevention. Such an approach would also effectively link the present exercise to the previous one and complete the topic.

7. As regards the scope, it is understood that:

(i) Activities covered are the same as those included within the scope of the topic on prevention of transboundary harm from hazardous activities;

(ii) A threshold would have to be determined to trigger the application of the regime on allocation of loss caused;[2]

(iii) Loss to (a) persons (b) property, including the elements of State patrimony and national heritage, and (c) environment within the national jurisdiction should be covered.

ROLE OF THE OPERATOR AND OF THE STATE IN THE ALLOCATION OF LOSS

8. The Working Group had a preliminary exchange of views on the different models and rationales to bring about or justify different ways to allocate loss among the relevant actors.

9. There was agreement on certain considerations. First, the innocent victim should not, in principle, be left to bear the loss. Secondly, any regime on allocation of loss must ensure that there are effective incentives for all involved in a hazardous activity to follow best practice in prevention and response. Thirdly, such a regime should cover widely the various relevant actors, in addition to States. These actors include private entities such as operators, insurance companies and pools of industry funds. In addition, States play an important role in devising and participating in loss-sharing schemes. Much of the topic would have to do with the detailed distribution of loss between such actors. In the debates, the following considerations were highlighted.

A. The role of the operator

10. The operator, having direct control over the operations, should bear the primary liability in any regime of allocation of loss. The operator's share of loss would involve costs that it needs to bear to contain the loss upon its occurrence, as well as the cost of restoration and compensation. In arriving at these costs, particularly the cost concerning restoration and compensation, the considerations concerning compliance with the duties of prevention and proper management of the operation would be relevant. Other considerations, like third party

[2] There were different views in the Working Group on this issue. One view is that "significant harm" be retained as a trigger. The other view is that this threshold, while suitable for the prevention regime, was inappropriate and therefore a higher threshold was necessary for the current endeavour.

involvement, force majeure, non-foreseeability of the harm, and non-traceability of the harm with full certainty to the source of the activity, would also need to be kept in view.

11. The Working Group also considered the usefulness of developing proper insurance schemes, having mandatory contributions to funding mechanisms by the operators belonging to the same industry and having the State earmark funds to meet emergencies and contingencies arising from significant harm resulting from hazardous activities.

12. It was also recognized that the insurance industry does not always cover harm arising out of many hazardous activities, particularly those which are considered to be ultra-hazardous. In such cases, the practice of States providing national funding or incentives for such insurance to be available is to be noted. In this regard, some States have undertaken to promote suitable insurance schemes with appropriate incentives.

13. In any regime on allocation of loss, the operator's share cannot be conceived to be full and exhaustive if the costs of restoration and compensation exceed the limits of available insurance or his own resources, which are necessary for his survival as an operator. Accordingly, the operator's share of loss in case of major incidents could be limited. It was also noted that the operator's share would generally be limited where his liability to pay is either strict or absolute. The remainder of the loss then would have to be allocated to other sources.

B. The role of the State

14. The Working Group discussed the role of the State in the sharing of the loss arising out of harm caused by hazardous activities. It was agreed that States played a crucial role in designing appropriate international and domestic liability schemes for the achievement of equitable loss allocation. In this connection, a view was expressed that these schemes should be devised to ensure that operators internalize all the costs of their operations and, accordingly, that it should be unnecessary for public funds to be used to compensate for loss arising from such hazardous activities. In case the State itself acted as an operator, it too should be held liable under such schemes. However, it was also agreed that cases might arise when private liability might prove insufficient for attaining equitable allocation. The position was then expressed by some members of the Working Group that the remainder of the loss should in such cases be allocated to the State. Other members felt that while that alternative could not be completely excluded, any residual State liability should arise only in exceptional circumstances. It was noted that in some cases, as in the case of damage caused by space objects, States have accepted a primary liability.

15. The Working Group also discussed the problem that would arise if there were to be residual State liability for transboundary harm caused by hazardous activities: in such case it was not self-evident which State should participate in loss-sharing. In some cases the State of origin might be held liable. It was pointed out that the State authorizing and monitoring the operation, or receiving benefits from it, should also participate in bearing the loss. In other cases liability might fall on the State of nationality of the relevant operator. The degree of State control, as well as the role of the State as a beneficiary of the activities, might be taken into account when determining the State's role in loss allocation.

ADDITIONAL ISSUES

16. Matters for consideration in this area include inter-State or intra-State mechanisms for consolidation of claims, issues arising out of the international representation of the operator, the processes for assessment, quantification and settlement of claims, access to the relevant forums and the nature of available remedies.
