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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 its 2808th meeting, on 3 June 2004, the Commission established a Working Group, under the chairmanship of Mr. Pemmaraju Sreenivasa Rao to examine the proposals submitted by the Special Rapporteur in his report (A/CN.4/540), taking into account the debate in the Commission, with view to recommending draft principles ripe for referral to the Drafting Committee, while also continuing discussions on other issues, including the form that work on the topic should take. The Working Group¹ held 6 meetings, on 4 June and on 6, 7 and 8 July 2004.

¹ The Working Group was composed as follows: Mr. P.S. Rao (Chairman), Mr. I. Brownlie, Mr. E. Candioti, Mr. C. Chee, Mr. R. Daoudi, Mr. C. Economides, Mr. G. Gaja, Mr. Z. Galicki, Mr. J. Kateka, Mr. R. Kolodkin, Mr. W. Mansfield, Mr. M. Matheson, Mr. D. Momtaz, Mr. C. Yamada and Mr. P. Commisário Afonso (ex-officio).

2. At the outset, there was a general understanding within the Working Group that issues concerning global commons were different and would require a separate mandate.
3. The Working Group reviewed all 10 draft principles proposed by the Special Rapporteur on a principle-by-principle basis and revised them as follows:

“Revised draft principles

1. Scope of application

The present draft principles apply in relation to damage caused by activities not prohibited by international law which involve a risk of causing significant transboundary harm through their physical consequences.

2. Use of terms²

For the purposes of the present draft principles:

(a) “Damage” means significant damage caused to persons, property or the environment; and includes:

- (i) Loss of life or personal injury;**
- (ii) Loss of, or damage to, property, including property which forms part of the cultural heritage;**
- (iii) Loss or damage by impairment of the environment;**
- (iv) The costs of reasonable measures of reinstatement of the property, or environment, including natural resources;**
- (v) The costs of reasonable response measures;**

² Commentary would retain as appropriate essence of the meanings of “State of origin”, “State likely to be affected”, “States concerned”. Commentary would also explain meaning of “State of injury”, and “measures of reinstatement”. Commentary in respect of draft principle 7 would address questions concerning “response measures”.

(b) **“Environment” includes: natural resources, both abiotic and biotic, such as air, water, soil, fauna and flora and the interaction between the same factors; and the characteristic aspects of the landscape;**

(c) **“Hazardous activity” means an activity that has a risk of causing significant harm;**

(d) **“Operator” means any person in command or control of the activity at the time the incident causing transboundary damage occurs;**

(e) **“Transboundary damage” means damage caused in the territory or in other places outside the territory but under the jurisdiction or control of a State other than the State in the territory or otherwise under the jurisdiction or control of which the activities referred to in principle 1 are carried out.**

3. Objective

The present draft principles aim at ensuring prompt and adequate compensation to victims of transboundary damage, including damage to the environment.³

4. Prompt and adequate compensation

- 1. States should take necessary measures to ensure that prompt and adequate compensation is available for victims of transboundary damage caused by hazardous activities located within their territory or in places under their jurisdiction or control.**
- 2. These measures should include the imposition of liability on the operator or, where appropriate, other person or entity. Such liability should**

³ The Commentary will also state other relevant objectives of the present principles and explain that “victim” for purposes of the draft principles includes States.

not require proof of fault but may be subject to appropriate legally prescribed conditions, limitations or exceptions, consistent with the objective of the present draft principles.

3. The measures should also include the requirement on the operator to establish and maintain financial security such as insurance, bonds or other financial guarantees to cover claims of compensation.

4. In appropriate cases, the measures should include the requirement for the establishment of industry wide funds at the national level.

5. In the event that the measures under the preceding paragraphs are insufficient to provide adequate compensation, States should also ensure that additional financial resources are allocated.

5. Response action

States, if necessary with the assistance of the operator, or, where appropriate, the operator, should take prompt and effective response action to any incident involving activities falling within the scope of the present principles with a view to minimizing any damage from the incident, including any transboundary damage. Such response action should include prompt notification, consultation and cooperation with all potentially affected States.⁴

6. Remedies

1. States should provide appropriate procedures to ensure that compensation is provided in furtherance of draft principle 4 to victims of transboundary harm from hazardous activities. This may include recourse to international procedures or forms of settlement.

⁴ The Commentary would reflect the definition of response measures as contained previously in principle 2 (h).

2. To the extent necessary for this purpose, States should ensure that their domestic administrative and judicial mechanisms possess the necessary competence and provide effective remedies to such victims. These remedies should not be less prompt, adequate and effective than those available to their nationals and would include appropriate access to information necessary to pursue such remedies.

7. Development of specific international regimes

1. States should cooperate in the development of appropriate international agreements on a global or regional basis in order to prescribe arrangements regarding the prevention and response measures to be followed in respect of particular class of hazardous activities as well as the compensation and insurance measures to be provided.

2. Such agreements may include industry and/or State funded compensation funds to provide supplementary compensation in the event that the financial resources of the operator, including insurance, are insufficient to cover the losses suffered as result of an incident. Any such funds may be designed to supplement or replace national industry based funds.

8. Implementation

1. States should adopt any legislative, regulatory and administrative measures that may be necessary to implement the present draft principles.

2. The present draft principles and any implementing provisions should be applied without discrimination based on nationality, domicile or residence.

3. States should cooperate with each other to implement the present draft principles consistent with their obligations under international law.”

4. The Working Group recommends that the eight draft principles be referred to the drafting Committee.

5. The Working Group proceeded on the basis that end product will for the time being take the form of recommendatory draft principles. Some members of the Working Group expressed preference for draft articles. It was considered important that the Commission should reserve the right to review the matter on the final form at the second reading in the light of comments and observations of States and the General Assembly. The Working Group also noted that provisions concerning relationship with other rules of international law and settlement of disputes would be necessary should the final form be other than draft principles.
