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

Statement of the Chairman of the Drafting Committee

2 June 2006

Mr. Roman A. Kolodkin

Mr. Chairman,

It gives me pleasure this time to introduce the second report of the Drafting Committee for the fifth-eighth session of the Commission. This report is contained in document A/CN.4/L.686 and it deals with the topic "International liability for injurious consequences arising out of acts not prohibited by international law (International liability in case of loss from transboundary harm arising out of hazardous activities)."

The Commission at its 2875th Plenary meeting, on 12 May 2006, decided to refer the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, adopted by the Commission on first reading, in 2004, to the Drafting Committee to complete the second reading of the text, taking into account the comments

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and observations of Governments, suggestions by the Special Rapporteur and the debate in plenary. The Drafting Committee considered the draft principles in 6 meetings on 17, 18, 22, 23 and 26 May 2006.

Before I proceed to introduce the Committee's report, I would wish to pay tribute to the Special Rapporteur, Mr. Pemmaraju Sreenivasa Rao, whose mastery of the subject, perseverance and positive disposition greatly facilitated the task of the Drafting Committee. It would also be remiss if I did not express my gratitude to the other members of the Committee for their active participation in the deliberations and their valuable contributions. I would also like to express my appreciation to Mr. Mansfield who chaired a meeting of the Drafting Committee in my absence.

Mr. Chairman,

I shall now turn to the report. You have before you a preamble and 8 draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities. The question of the final form of instrument remains one on which different views have been articulated at different stages of consideration of this topic, including in plenary during the current session of the Commission. While some members continue to prefer a binding instrument, the preponderant view favours casting the outcome in the form of principles. The Drafting Committee proceeded on that basis.

The draft principles have retained the same title and structure as adopted on first reading. The Drafting Committee was not unmindful of the

fact that some of the principles such as draft principle 1, on scope of application, draft principle 2, on the use of terms would not qualify as principles in the strict sense of the term. It is not the first time that the Commission has adopted a text cast as principles. In 1950, it adopted the text of Principles of International Law recognized by the Charter of the Nurnberg Tribunal and in the judgments of the Tribunal. In the present instance, it was decided to retain the term "principle" without attributing to it any meaning other than a reflection of the Commission's wish to present a non-legally binding text which has some internal coherence and consistency in the usage of the term.

In dealing with the formulation of the draft principles, the Drafting Committee was conscious that through these draft principles the Commission is attempting to set out a coherent set of standards of conduct and practice which all States are expected to fulfill. Some aspects of the draft principles may represent existing or developing customary international law. But the focus of the work of the Drafting Committee was on the formulation of the substance of the draft principles. The Committee did not consider in depth and assess the current status of different principles or of the various aspects of the principles in international law - whether they are already part of customary international law or rather belong to the realm of progressive development. That is why the wording of the draft principles including the modalities of verbs used does not reflect such consideration or assessment.

I will now address the draft principles on a principle-by-principle basis, starting with the preamble.

Preamble

The Committee proceeded to consider the preamble on the basis of the draft adopted on first reading and it adopted a number of changes, to which I shall now turn.

The first change was in the first preambular paragraph. It was viewed necessary to retain in the first preambular paragraph the specific references to Principles 13 and 16 of the Rio Declaration on Environment and Development rather than a general reference to the Rio Declaration. Principles 13 and 16 provide a general background rationale for the current exercise. A change was thereby introduced, replacing the word "recalling" with the more affirmative "reaffirming".

The second change was in the third preambular paragraph. In order not to prejudge the outcome of work of the General Assembly, which remains seized with the draft articles on Prevention of Transboundary Harm from Hazardous Activities, the reference to the provisions of the draft articles on the Prevention was changed to reflect the general need for compliance by a State with its obligations concerning prevention of transboundary harm.

The third change relates to the fifth preambular paragraph. Since the preambular paragraph has a purposive intent, the language was made stronger by deleting the phrase "as far as possible", a change also sought by some governments, and by changing the phrase "should be able to obtain" to "are able to". Moreover, the word "Emphasizing" was introduced instead of

"Concerned" to avoid repetition, since that latter word is used in the subsequent paragraph.

The fourth change entails the addition of a new paragraph, now the sixth preambular paragraph, that points to an aspect also covered in the present draft principles, namely the need for appropriate response measures in the event of an incident occurring.

The fifth change is in the seventh preambular paragraph (formerly sixth). Instead of a forward looking "shall be", "that States are responsible for their prevention obligations" has been employed.

The sixth change was to delete the former seventh preambular paragraph, simply for the convenience of economy of words than any desire to cast doubt on the importance of international cooperation among States.

The seventh and last change was to introduce specificity to the eighth preambular paragraph. It thus recalls the significance of existing agreements covering specific hazardous activities and stresses the importance of the conclusion of further such agreements.

Principle 1. Scope of Application

I will now turn to draft principle 1, **Scope of Application**. It will be recalled that there is a general understanding that the present draft principles have the same scope of application as the draft articles on prevention in that they are intended to cover "activities not prohibited by international law

which involve a risk of causing significant transboundary harm through their physical consequences".

During the first reading, this was achieved by aligning the language of the draft principle with the corresponding language in the draft articles on prevention. During the second reading the Drafting Committee found this wording too verbose. In the present formulation, the Drafting Committee sought to overcome this lack of elegance in drafting without losing the essential connection to the draft articles on prevention. Thus, the formulation of the draft principle has been simplified without changing its substantive scope. The phrase "transboundary damage of hazardous activities not prohibited by international law" still embraces four essential elements prominent in the draft articles on prevention, namely (a) such activities are not prohibited by international law; (b) such activities involve a risk of causing significant harm; (c) such harm must be transboundary; and (d) such transboundary harm must be caused by such activities through their physical consequences.

The first and the second element – the human causation and risk elements – have been captured in the present reformulation and partly by the definition of hazardous activity in draft principle 2(c). The third element– the territorial element – is now reflected in the notion of "transboundary" and the consequent definition of "transboundary damage" in draft principle 2(e). The fourth element – the physical element – has been deleted from the text with the clear understanding that it will be reflected in the commentary. The draft principles still apply to hazardous activities involving a risk of causing transboundary harm through their physical consequences. Thus,

transboundary harm caused by State policies in monetary, socio-economic or similar fields are excluded from the scope of the draft principles. It should be noted that "transboundary damage" is used for purposes of the draft principles except where it is necessary to describe a hazardous activity, namely an activity which involves a risk of causing significant transboundary harm. The stress on transboundary damage is simply intended to draw attention to the emphasis in the liability phase to the damage actually caused.

Principle 2. Use of terms

I will now turn to draft principle 2, **Use of terms**. Let me note first that some paragraphs have been renumbered because of the introduction of two additional terms that were considered necessary to define for the purposes of the draft principles: These are "State of origin" and "victim".

The definition of damage in paragraph (a) remains unchanged. It is directed at three essential objects, namely persons, property or the environment and it is understood that damage to property may include State property. However, there was a brief discussion as to whether the tautology in the definition, namely "damage" means "significant damage" could be removed by some other wording such as "significant harm". It was however felt that "damage" has a particular meaning in the context of the present principles which seeks to distinguish the current phase of work from that of the prevention draft articles. The meaning of "damage" as "significant damage" has therefore been retained. It is understood that the commentary would seek to clarify that the threshold of "significant" is also designed to avert frivolous or vexatious claims.

The definition of environment in paragraph (b) has also remained unchanged.

There has been a slight change in the definition of "hazardous activity" in paragraph (c), which was previously paragraph (d). As a result of the change to draft principle 1, the original reference at the end of the paragraph to "through its physical consequences" has been suppressed, it being understood that the commentaries would clarify that the hazardous activities implicated by the draft principles are those that have a risk of causing transboundary harm through their physical consequences.

Moreover, there was a brief discussion as to whether "significant harm" should be changed to significant "damage". It is understood that the phrase "activity which involves a risk of causing significant harm" has retained the conceptual baggage associated with the Commission's work on the topic over the years. Insofar as the activity itself is concerned, it is the element of risk of causing transboundary harm which separates it from other activities. It would encompass an activity with a "low probability of causing disastrous transboundary harm or a high probability of causing significant transboundary harm". The combined effect of the probability of occurrence of an accident and the magnitude of its injurious impact, makes "risk" and "harm" essential in defining the hazardous activity. In other words, the notion of "damage" in the present draft principles has been introduced to simply denote specificity to the transboundary harm, which occurs. Accordingly, "significant harm" has been retained.

The definition of “State of origin”, which is contained in paragraph (d), is the same as the definition in the draft articles on prevention, and has a similar import. The commentary will also clarify other terms such as “State affected”, “State likely to be affected” and “States concerned” that have been used in the text of the present draft principles, but the Drafting Committee decided not to specifically define in order to retain a certain balance in the text of the principles as a whole.

With regard to the meaning of “transboundary damage” in paragraph (e), which was previously paragraph (d), two changes have been introduced. First, a phrase has been inserted between “damage” and “in the territory” to clarify the sense in which the word “caused” is meant to be understood. In this case, it is clearly intended to mean “suffered”. Such insertion entails a repetition of the phrase “to persons, property or the environment” used in paragraph (a) after the word “caused”.

Secondly, as a consequence of the introduction of the definition of “State of origin”, the phrase “other than the State in the territory, or otherwise under the jurisdiction or control of which the activities referred to in principle 1 is carried out” has been deleted and replaced by the phrase “other than the State of origin”.

This formulation of transboundary harm is intended to cover damage that may be caused to, for example, the Exclusive Economic Zones, as evidenced in the provisions of some liability regimes, or to oil platforms.

A new paragraph (f) that defines “Victim” has been added. This came about in the consideration of a proposal made by the Special Rapporteur with respect to draft principle 3, which sought to clarify that for the purpose of the present draft principles, natural or legal persons, including States qualify as victims depending on the nature of damage that would be involved. Since it was considered that the formulation would suitably be placed in the use of terms provision than in draft principle 3, the Committee decided to define “victim” for the purposes of the draft principles.

Paragraph (g), formerly paragraph (e), which defines “operator” remains unchanged. The definition is a functional one and the phrase “at the time of the incident” is intended to establish a connection between the operator and the transboundary activity.

Principle 3. Purposes

Let me note at the outset that the title of the principle has been changed from “Objective” to “Purposes” to better reflect the essential rationale for developing the present draft principles.

As I indicated earlier when I introduced the new definition of “victim” in principle 2, the Committee proceeded in its consideration of this draft principle on the basis of a proposal by the Special Rapporteur that sought to separate the various elements covered in a previous text, which was densely formulated. These core issues were largely three. The first was the aim of the draft principles, which is to ensure prompt and adequate compensation for transboundary damage; the second was to identify that the transboundary damage covered by the present draft principles, included damage to the

environment; and thirdly to identify the victims of such damage. This latter aspect is now addressed in the “Use of terms” provision.

The new formulation captures the first and second core issues in two paragraphs which set forth the purposes of the draft principles, namely (a) to ensure prompt and adequate compensation to transboundary damage; and (b) to preserve and protect the environment. As borne out by the practice, the latter aim would be accomplished predominantly by taking response measures to mitigate the damage and by taking reasonable measures of restoration or reinstatement, terms which are defined in draft principle 2.

Principle 4. Prompt and adequate compensation

Draft principle 4 is essential to the scheme of allocation of loss. It has substantially remained as adopted on first reading. This draft principle reflects four important elements to the scheme for allocation of loss. These are: (a) the need for the establishment by the State of a liability regime at the domestic level which affords redress and compensation to victims of transboundary harm; (b) such liability regime should impose liability on the operator without requiring the proof of fault; (c) such liability may be subject to conditions, limitations or exceptions, which shall be consistent with the purposes of draft principle 3; (d) the need for the provision of a tiered scheme for ensuring that compensation is available to those that suffer damage. This tiered scheme would seek to integrate and harness, in as flexible a manner as possible depending on particular needs and interests, the various forms of securities, insurance and industry funding to provide sufficient financial guarantees for compensation. It bears noting that the notion of “liability without proof of fault” in paragraph 2 embraces the

various designations in various legal systems that are used in modern doctrine to describe “strict liability”. It is understood that the commentary would elaborate more on the meaning of “prompt and adequate”.

Some minor changes were introduced to draft principle 4. For example, as understood, paragraph 5 does not directly require the State of origin to set up government funds to guarantee prompt and adequate compensation. It requires that the State of origin should make sure that additional financial resources are made available. To clarify that the State in question is the State of origin that reference has been made explicit. Moreover, the words “are made available” was considered to be more felicitous than “are allocated”.

Principle 5. Response measures

It will be recalled that the provision adopted on first reading clubbed a series of notions together in a single paragraph. That provision has now undergone structural and substantive changes.

On the basis of a proposal submitted by the Special Rapporteur, the various levels of interaction anticipated upon the occurrence of an incident have been further accentuated with a higher degree of specificity. These elements are five. The first three, namely (a) notification; (b) response; (c) consultation and cooperation relate to the State of origin. The other two relating to (a) mitigation and (b) assistance apply to States that are affected or likely to be affected by the damage; and the States concerned, respectively. Expeditious response measures following the occurrence of an

incident are an important element in the mitigation of the overall damage that may arise from such an incident.

Principle 6. International and Domestic remedies

This draft principle has also undergone some structural changes, also on the basis of a proposal by the Special Rapporteur. It seeks to further highlight the principle of equal access to domestic remedies by reflecting in detail and separately its three constituent components; namely (a) participation in administrative hearings and judicial proceedings; (b) non-discrimination and (c) access to information. You will recall that initially these were lumped together in paragraph 3 of the previous principle 6. These are now covered in paragraphs 1, 2, 3 and 4.

The reference to international claims settlement procedures which was previously in paragraph 2 and captures a different remedial notion is retained and appears in paragraph 4. Such claims include mixed claims, commissions, negotiations for lump sum payments, etc. The international component does not preclude possibilities whereby a State of origin may make a contribution to the State affected to disburse compensation through a national claims procedure established by the affected State.

Principle 7. Development of specific international regimes

Draft principle 7 builds upon principle 22 of the Stockholm Declaration and principle 13 of the Rio Declaration. The change in the formulation of paragraph 1 seeks to strength the text by emphasizing the need to conclude such specific agreements which would deal with the three

main aspects of these present draft principles, namely (a) compensation, (b) response, and (c) remedies.

Paragraph 2 has also undergone some drafting modifications. The drafting has been tightened. The paragraph now provides that such agreements should, as appropriate, include arrangements for industry or State funds as a third tier of supplementary compensation. The word "losses" in the initial draft has been changed to the more precise word "damage" which is used in the present draft principles. The paragraph retains the flexibility that those involved in the negotiations of such agreements have in establishing arrangements that are suitable for the particular sector or activity.

Principle 8. Implementation

The changes introduced in this principle have been made to improve and tighten the language used, as well as to ensure clarity. The reference to nationality, domicile or residence is only intended to stress the circumstances in which discrimination frequently manifests itself in situations covered by the present draft principles without excluding other forms of discrimination.

The phrase "consistent with their obligations under international law" which was at the end of paragraph 3 has been deleted. It was both superfluous and imprecise for the draft principles. The key element that ought to be stressed is the duty to cooperate among States in the implementation of these draft principles.

Mr. Chairman,

This concludes my presentation of the second report of the Drafting Committee. I submit it with the recommendation that the Commission adopt the draft principles on second reading. I thank you for your attention.