

Prevention of Transboundary Harm from Hazardous Activities

– A sub-topic of international liability –

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At its 53rd session, the International Law Commission (ILC) completed, on second reading, a set of draft articles on the subject of prevention of significant transboundary harm from hazardous activities. Since 1978, the ILC has been considering the subject of international liability for injurious consequences arising out of acts not prohibited by international law.¹ The liability topic originated from the Commission's discussion on State responsibility, particularly on draft Article 35 (now 27) of Part I. It was placed on the agenda of the ILC in 1978. Between 1980 and 1984, Mr Quentin-Baxter, the first Special Rapporteur, submitted five reports. After the death of Mr Quentin-Baxter, Mr Julio Barboza was appointed as the Special Rapporteur. He prepared 12 reports between 1985 and 1996. Remedial measures were understood to include those designated for mitigation of harm, restoration of what was harmed, and compensation for harm caused.² It was also decided that the decision whether to proceed with the next stage of remedial measures would be decided only upon completion of the first stage on prevention.

In 1994-95 a Commission provisionally adopted, on first reading, several articles.³ In 1996 a new Working Group submitted a report containing a complete discussion not only on the issue of prevention but also including liability for compensation or other relief in the form of draft Articles with commentaries.⁴ In pursuance of its earlier decision, in 1997 the Commission decided to divide the topic of liability into the topics of prevention and liability. It further decided to postpone consideration of liability and concentrate on prevention. It appointed the present author as Special Rapporteur for this topic.

The ILC adopted a set of draft Articles on the sub-topic of prevention at its first reading and submitted the same to be considered by the General Assembly and for the comments of Member States.⁵ In 1999, the Rapporteur submitted his second report, which addressed the obligation of due diligence and reviewed the treatment of the topic of liability in the work of the ILC. Also in 1999, the ILC reviewed three options for its future work and chose to finish work on prevention rather than terminating the work or proceeding with work on liability. The Commission received the Special Rapporteur's third report in May 2000, which contained, in an Annex, revisions to the text of draft Articles adopted on first reading. This text was considered in 2001 on the basis of the recommendations made by the Drafting Committee, and adopted a set of revised draft Articles on its second reading.

The Commission also recommended that the entire product could be adopted in the form of a Framework Convention.⁶

The third report also contained an analysis of the scope of the topic, limiting it to activities not prohibited by international law. Article 1 of the draft states that the present Articles apply to activities not prohibited by international law, which involve a risk of causing significant transboundary harm. This definition of the topic became necessary in order to distinguish it from obligations of States for consequences arising from internationally wrongful acts, which are subject to State responsibility. It was argued that the topic of prevention was essentially concerned with management of risk and is, therefore, unrelated to categorisation of activities not prohibited by international law. On the other hand, the view was taken that any deletion of the phrase might necessitate a review of the entire text of the draft Articles, which may broaden the scope, requiring fresh approval by States in the Sixth Committee of the UN General Assembly. It was pointed out that the retention of the phrase was essential to indicate the link between the sub-topics of prevention and liability.

Regarding deleting the phrase 'activities not prohibited by international law', neither the members of the ILC nor States who discussed the matter later in 2000 in the Sixth Committee could agree on any conclusion. Opinion was divided.⁷

At the end of its session in 2001, the Commission adopted on second reading a set of 19 draft Articles. New Articles 16 and 17 were added in response to suggestions made by States on planning for emergencies and notification of emergencies.

Article 3 is the central Article dealing with the concept of prevention which is essentially an obligation of due diligence.⁸ The standard of due diligence against which the conduct of State of origin should be examined is that which is generally considered to be appropriate and proportional to the degree of risk of transboundary harm in any particular instance. It involved a duty on the part of the State to inform itself of factual and legal components that relate in a foreseeable manner to the contemplated procedure and to take appropriate responsive measures in a timely fashion. In this connection it may be noted that the economic level of a State is one of the factors to be taken into account in determining whether a State has complied with its obligation of due diligence. However, a State's economic level cannot be used to exempt a State from its obligation under the present Articles. In other words, even in the case of a developing country, a necessary degree of vigilance, employment of infrastructure and monitoring of hazardous activities in the territory of the State (a natural attribute of any government) is expected. The operator of the activity is expected to bear

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the cost of prevention to the extent that he is responsible for the operation.

Articles 6 to 11 provide for the obligation of State of origin first to authorise any hazardous activity prior to its commencement. Such an authorisation should be based on an assessment of the risk involved. Where the risk involved is likely to cause significant transboundary harm, the State of origin is required to provide notification and information to the States likely to be affected. Articles 9 to 13 provide for engagement between the State of origin and the States likely to be affected. Such an engagement could result in setting out the conditions under which the activities could be authorised. It could also provide for joint management of the risk and the project itself. Article 13 is an important Article and provides for the obligation to inform the population(s) likely to be exposed to the risk involved, to ascertain their views. The State of origin owes this obligation not only to its own population but also to peoples in other States likely to be affected. Article 15 provides for protection, or other appropriate redress, to all persons in accordance with the judicial or other procedures and the legal system of the State of origin. Access to the system of redress is to be provided to all natural or judicial persons who may be or are exposed to the risk of significant transboundary harm, without any discrimination on the basis of nationality or residence or place where the injury may have occurred.

Article 19 provides for compulsory fact-finding in the case of any dispute between States concerned and in the absence of any other obligatory applicable mechanism of peaceful dispute settlement, or a mechanism established by mutual agreement. It may be noted that this is a compromise proposal and takes a minimalist position avoiding the two extreme points of view. One such point of view demands a more comprehensive compulsory system of dispute settlement, and the other rejects a reference to any compulsory procedure including a compulsory fact-finding mechanism.

The draft Articles adopted on second reading contained a Preamble, which now does not need to refer to the right to development. However, it still attempts to find a balance between a country's need for development and its obligations to preserve and promote environmental safety and security. This is done by referring to both the principles of permanent sovereignty of States over their natural resources and the Rio Declaration on Environment and Development. It also emphasises a State's limits to freedom in authorising the carrying out of hazardous activities within its territory. The Preamble also refers to the requirement of seeking and the right to obtain international cooperation on the part of States concerned.

It may be noted that the draft Articles on prevention should be treated as a progressive development of international law, particularly in respect to obligations concerning the management of risk and engagement between States of origin and States likely to be affected. The obligation to inform the public (Article 13), the need to provide foreign nationals with access to domestic, judicial and quasi-judicial forums (Article 15) and on the settlement of disputes (Article 19) are examples of progressive development.

India, along with China and a number of other countries, has also emphasised the need to give priority to issues concerning development, transfer of technology and re-

sources, with a view to building the capacity of developing countries.⁹ The importance of differentiating between the standards applicable to developing countries and standards accepted by developed countries was also noted, since they may not be suitable or achievable by developing countries. In this regard, the need for the establishment of international funds was also emphasised. These countries welcomed the draft Articles on prevention but emphasised the need to place the entire effort of managing risks of hazardous activities in the overall context of the right to development.

The Preamble in the draft Articles on the legal regime concerning prevention attempts to accommodate the position taken by India, China and several other developing countries, who believed that the entire subject of prevention could only be seen in the broader context of the right to development and the obligations to promote, preserve and protect the environment. We may also note that the 'precaution' and 'polluter-pays' principles noted under Article 10 and in connection with the discharge of the duty of authorisation of any hazardous activity are principles of prudence to be observed in the interest of the State and its population. They are not suggested as strict legal obligations. In this connection, States concerned would be guided by their economic policies and priorities, the operator's availability of funds and the overall benefits sought to be maximised for its population without in any way disregarding their obligation to preserve, promote and protect the environment.

The completion of the Commission's work on prevention brings us to the question of consideration of the second part of the topic, namely liability. In view of the strong support extended for consideration of the topic by the ILC, the Sixth Committee of the General Assembly has recommended that the ILC resume its consideration of liability. It is expected that the Commission will examine the matter further in the light of comments already received from governments, and other relevant developments in international law.

Notes

¹ For the background to this topic and various issues that were considered by the reports submitted first by Mr Quentin-Baxter and Mr Julio Barboza, see the first report on prevention of transboundary damage from hazardous activities submitted by the third Rapporteur, Dr PS Rao, A/CN.4/87, 18 March 1998.

² See *Year Book of the International Law Commission*, 1992, Vol. II (Part II), p. 51, paras 344-349.

³ See *Year Book of the International Law Commission*, 1994, Vol. II (Part II), pp. 154, 159-178, paras 360 and 380.

⁴ *Official Records of the General Assembly*, 51st session, Supplement No. 10 (A/51/10), Annex 1.

⁵ For the text of the draft Articles on the regime of prevention along with commentaries adopted on first reading by the ILC, see the Report of the International Law Commission on the work of its 50th session, *UNGA Official Records*, Supplement No. 10 (A/53/10), pp. 18-19.

⁶ For the text of the draft Articles on prevention along with commentaries adopted on second reading by the ILC, see the Report of the International Law Commission on the work of its 53rd session, *UNGA Official Records*, Supplement No. 10 (A/66/10), pp. 370-436.

⁷ See the Topical Summary of the discussions held in the Sixth Committee of the UNGA during its 55th session, prepared by the Secretariat, document of the International Law Commission, 53rd session (A/CN.4/513), p. 65.

⁸ For the commentary on Article 3, and in particular on the obligation of due diligence, see the Report of the International Law Commission on the work of its 53rd session, *supra* note 6 at pp. 390-398.

⁹ For India's views, see the summary records of the Sixth Committee of the United Nations 55th General Assembly, document A/C.6/53/SR, para. 87. For China's views, see *ibid.*, A/C.6/53/SR.14 para. 42.

