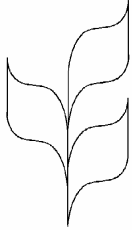




CBD



**CONVENTION ON
BIOLOGICAL
DIVERSITY**

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12 January 2006

ORIGINAL: ENGLISH

OPEN-ENDED AD HOC WORKING GROUP OF LEGAL
AND TECHNICAL EXPERTS ON LIABILITY AND
REDRESS IN THE CONTEXT OF THE CARTAGENA
PROTOCOL ON BIOSAFETY

Second meeting

Montreal, 20-24 February 2006

**COMPILATION OF RELEVANT DOCUMENTS FROM THE WORK OF THE
INTERNATIONAL LAW COMMISSION**

Note by the Executive Secretary

The Executive Secretary is circulating herewith, for the information of participants in the second Open-ended Working Group of Legal and technical Experts on Liability and Redress in the context of the Cartagena Protocol on Biosafety, a compilation of relevant documents from the work of the International Law Commission.

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For reasons of economy, this document is printed in a limited number. Delegates are kindly requested to bring their copies to meetings and not to request additional copies

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**A/RES/56/83 RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL
ACTS**



General Assembly

Distr.: General

28 January 2002

Fifty-sixth session

Agenda item 162

Resolution adopted by the General Assembly
[on the report of the Sixth Committee (A/56/589 and Corr.1)]

56/83. Responsibility of States for internationally wrongful acts

The General Assembly,

Having considered chapter IV of the report of the International Law Commission on the work of its fifty-third session,¹ which contains the draft articles on responsibility of States for internationally wrongful acts,

Noting that the International Law Commission decided to recommend to the General Assembly that it should take note of the draft articles on responsibility of States for internationally wrongful acts in a resolution and annex the draft articles to that resolution, and that it should consider at a later stage, in the light of the importance of the topic, the possibility of convening an international conference of plenipotentiaries to examine the draft articles with a view to concluding a convention on the topic²

Emphasizing the continuing importance of the codification and progressive development of international law, as referred to in Article 13, paragraph 1 (a), of the Charter of the United Nations,

Noting that the subject of responsibility of States for internationally wrongful acts is of major importance in the relations of States,

1. *Welcomes* the conclusion of the work of the International Law Commission on responsibility of States for internationally wrongful acts and its adoption of the draft articles and a detailed commentary on the subject;
2. *Expresses its appreciation* to the International Law Commission for its continuing contribution to the codification and progressive development of international law;
3. *Takes note* of the articles on responsibility of States for internationally wrongful acts, presented by the International Law Commission, the text of which is annexed to the present resolution, and commends them to the attention of Governments without prejudice to the question of their future adoption or other appropriate action;
4. *Decides* to include in the provisional agenda of its fifty-ninth session an item entitled "Responsibility of States for internationally wrongful acts".

¹ *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 and corrigendum (A/56/10 and Corr.1).*

² *Ibid.*, paras. 72 and 73.

*85th plenary meeting
12 December 2001*

Annex

RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS

PART ONE

THE INTERNATIONALLY WRONGFUL ACT OF A STATE

Chapter I

General principles

Article 1

Responsibility of a State for its internationally wrongful acts

Every internationally wrongful act of a State entails the international responsibility of that State.

Article 2

Elements of an internationally wrongful act of a State

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

- (a) Is attributable to the State under international law; and
- (b) Constitutes a breach of an international obligation of the State.

Article 3

Characterization of an act of a State as internationally wrongful

The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.

Chapter II

Attribution of conduct to a State

Article 4

Conduct of organs of a State

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

Article 5

Conduct of persons or entities exercising elements of governmental authority

The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be

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considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

Article 6

Conduct of organs placed at the disposal of a State by another State

The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.

Article 7

Excess of authority or contravention of instructions

The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.

Article 8

Conduct directed or controlled by a State

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

Article 9

Conduct carried out in the absence or default of the official authorities

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.

Article 10

Conduct of an insurrectional or other movement

1. The conduct of an insurrectional movement which becomes the new government of a State shall be considered an act of that State under international law.

2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law.

3. This article is without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of articles 4 to 9.

Article 11

Conduct acknowledged and adopted by a State as its own

Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.

Chapter III

Breach of an international obligation

Article 12

Existence of a breach of an international obligation

There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.

Article 13

International obligation in force for a State

An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.

Article 14

Extension in time of the breach of an international obligation

1. The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.
2. The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.
3. The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.

Article 15

Breach consisting of a composite act

1. The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.
2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.

Chapter IV

Responsibility of a State in connection with the act of another State

Article 16

Aid or assistance in the commission of an internationally wrongful act

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

- (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and
- (b) The act would be internationally wrongful if committed by that State.

Article 17

Direction and control exercised over the commission of an internationally wrongful act

A State which directs and controls another State in the commission of an internationally wrongful act by the latter is internationally responsible for that act if:

- (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and
- (b) The act would be internationally wrongful if committed by that State.

Article 18

Coercion of another State

A State which coerces another State to commit an act is internationally responsible for that act if:

- (a) The act would, but for the coercion, be an internationally wrongful act of the coerced State; and
- (b) The coercing State does so with knowledge of the circumstances of the act.

Article 19

Effect of this chapter

This chapter is without prejudice to the international responsibility, under other provisions of these articles, of the State which commits the act in question, or of any other State.

Chapter V

Circumstances precluding wrongfulness

Article 20

Consent

Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.

Article 21

Self-defence

The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.

Article 22

Countermeasures in respect of an internationally wrongful act

The wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State in accordance with chapter II of part three.

Article 23

Force majeure

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to force majeure, that is the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.
2. Paragraph 1 does not apply if:
 - (a) The situation of force majeure is due, either alone or in combination with other factors, to the conduct of the State invoking it; or
 - (b) The State has assumed the risk of that situation occurring.

Article 24

Distress

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the act in question has no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care.
2. Paragraph 1 does not apply if:
 - (a) The situation of distress is due, either alone or in combination with other factors, to the conduct of the State invoking it; or
 - (b) The act in question is likely to create a comparable or greater peril.

Article 25

Necessity

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:

- (a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
- (b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:

/...

- (a) The international obligation in question excludes the possibility of invoking necessity; or
- (b) The State has contributed to the situation of necessity.

Article 26

Compliance with peremptory norms

Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.

Article 27

Consequences of invoking a circumstance precluding wrongfulness

The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to:

- (a) Compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists;
- (b) The question of compensation for any material loss caused by the act in question.

PART TWO

CONTENT OF THE INTERNATIONAL RESPONSIBILITY OF A STATE

Chapter I

General principles

Article 28

Legal consequences of an internationally wrongful act

The international responsibility of a State which is entailed by an internationally wrongful act in accordance with the provisions of part one involves legal consequences as set out in this part.

Article 29

Continued duty of performance

The legal consequences of an internationally wrongful act under this part do not affect the continued duty of the responsible State to perform the obligation breached.

Article 30

Cessation and non-repetition

The State responsible for the internationally wrongful act is under an obligation:

- (a) To cease that act, if it is continuing;

(b) To offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

Article 31

Reparation

1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

Article 32

Irrelevance of internal law

The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this part.

Article 33

Scope of international obligations set out in this part

1. The obligations of the responsible State set out in this part may be owed to another State, to several States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.
2. This part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.

Chapter II

Reparation for injury

Article 34

Forms of reparation

Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter.

Article 35

Restitution

A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

- (a) Is not materially impossible;
- (b) Does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.

*Article 36**Compensation*

1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.
2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

*Article 37**Satisfaction*

1. The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.
2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.
3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State.

*Article 38**Interest*

1. Interest on any principal sum due under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.
2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.

*Article 39**Contribution to the injury*

In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.

Chapter III**Serious breaches of obligations under peremptory norms of general international law***Article 40**Application of this chapter*

1. This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.

/...

2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.

Article 41

Particular consequences of a serious breach of an obligation under this chapter

1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.
2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.
3. This article is without prejudice to the other consequences referred to in this part and to such further consequences that a breach to which this chapter applies may entail under international law.

PART THREE

THE IMPLEMENTATION OF THE INTERNATIONAL RESPONSIBILITY OF A STATE

Chapter I

Invocation of the responsibility of a State

Article 42

Invocation of responsibility by an injured State

A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to:

- (a) That State individually; or
- (b) A group of States including that State, or the international community as a whole, and the breach of the obligation:
 - i. Specifically affects that State; or
 - ii. Is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.

Article 43

Notice of claim by an injured State

1. An injured State which invokes the responsibility of another State shall give notice of its claim to that State.
2. The injured State may specify in particular:

/...

- (a) The conduct that the responsible State should take in order to cease the wrongful act, if it is continuing;
- (b) What form reparation should take in accordance with the provisions of part two.

Article 44

Admissibility of claims

The responsibility of a State may not be invoked if:

- (a) The claim is not brought in accordance with any applicable rule relating to the nationality of claims;
- (b) The claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted.

Article 45

Loss of the right to invoke responsibility

The responsibility of a State may not be invoked if:

- (a) The injured State has validly waived the claim;
- (b) The injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.

Article 46

Plurality of injured States

Where several States are injured by the same internationally wrongful act, each injured State may separately invoke the responsibility of the State which has committed the internationally wrongful act.

Article 47

Plurality of responsible States

1. Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.
2. Paragraph 1:
 - (a) Does not permit any injured State to recover, by way of compensation, more than the damage it has suffered;
 - (b) Is without prejudice to any right of recourse against the other responsible States.

Article 48

Invocation of responsibility by a State other than an injured State

1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:

- (a) The obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or
- (b) The obligation breached is owed to the international community as a whole.

2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State:

- (a) Cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and
- (b) Performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.

3. The requirements for the invocation of responsibility by an injured State under articles 43, 44 and 45 apply to an invocation of responsibility by a State entitled to do so under paragraph 1.

Chapter II

Countermeasures

Article 49

Object and limits of countermeasures

1. An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under part two.
2. Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State.
3. Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.

Article 50

Obligations not affected by countermeasures

1. Countermeasures shall not affect:

- (a) The obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations;
- (b) Obligations for the protection of fundamental human rights;
- (c) Obligations of a humanitarian character prohibiting reprisals;

(d) Other obligations under peremptory norms of general international law.

2. A State taking countermeasures is not relieved from fulfilling its obligations:

(a) Under any dispute settlement procedure applicable between it and the responsible State;

(b) To respect the inviolability of diplomatic or consular agents, premises, archives and documents.

Article 51

Proportionality

Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.

Article 52

Conditions relating to resort to countermeasures

1. Before taking countermeasures, an injured State shall:

(a) Call upon the responsible State, in accordance with article 43, to fulfil its obligations under part two;

(b) Notify the responsible State of any decision to take countermeasures and offer to negotiate with that State.

2. Notwithstanding paragraph 1 (b), the injured State may take such urgent countermeasures as are necessary to preserve its rights.

3. Countermeasures may not be taken, and if already taken must be suspended without undue delay if:

(a) The internationally wrongful act has ceased; and

(b) The dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties.

4. Paragraph 3 does not apply if the responsible State fails to implement the dispute settlement procedures in good faith.

Article 53

Termination of countermeasures

Countermeasures shall be terminated as soon as the responsible State has complied with its obligations under part two in relation to the internationally wrongful act.

Article 54

Measures taken by States other than an injured State

This chapter does not prejudice the right of any State, entitled under article 48, paragraph 1, to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of

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the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached.

PART FOUR GENERAL PROVISIONS

Article 55

Lex specialis

These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.

Article 56

Questions of State responsibility not regulated by these articles

The applicable rules of international law continue to govern questions concerning the responsibility of a State for an internationally wrongful act to the extent that they are not regulated by these articles.

Article 57

Responsibility of an international organization

These articles are without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization.

Article 58

Individual responsibility

These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State.

Article 59

Charter of the United Nations

These articles are without prejudice to the Charter of the United Nations.

**A/56/10 DRAFT ARTICLES ON PREVENTION OF TRANSBOUNDARY HARM ARISING
FROM HAZARDOUS ACTIVITIES**

Draft articles on

Prevention of transboundary harm from hazardous activities

adopted by the
International Law Commission
at its fifty-third session (2001)

(extract from the Report of the International Law Commission on the work of its Fifty-third session,
Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10,
chp.V.E.1)

November 2001

E. Text of the draft articles on Prevention of Transboundary Harm from Hazardous Activities

1. Text of the draft articles

97. The text of the draft preamble and draft articles adopted by the Commission at its fifty-third session are reproduced below.

PREVENTION OF TRANSBOUNDARY HARM FROM HAZARDOUS ACTIVITIES

The States Parties,

Having in mind Article 13, paragraph 1 (a) of the Charter of the United Nations, which provides that the General Assembly shall initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification,

Bearing in mind the principle of permanent sovereignty of States over the natural resources within their territory or otherwise under their jurisdiction or control,

Bearing also in mind that the freedom of States to carry on or permit activities in their territory or otherwise under their jurisdiction or control is not unlimited,

Recalling the Rio Declaration on Environment and Development of 13 June 1992,

Recognizing the importance of promoting international cooperation,

Have agreed as follows:

Article 1

Scope

The present articles apply to activities not prohibited by international law which involve a risk of causing significant transboundary harm through their physical consequences.

Article 2

Use of terms

For the purposes of the present articles:

(a) "Risk of causing significant transboundary harm" includes risks taking the form of a high probability of causing significant transboundary harm and a low probability of causing disastrous transboundary harm;

(b) "Harm" means harm caused to persons, property or the environment;

(c) "Transboundary harm" means harm caused in the territory of or in other places under the jurisdiction or control of a State other than the State of origin, whether or not the States concerned share a common border;

(d) "State of origin" means the State in the territory or otherwise under the jurisdiction or control of which the activities referred to in article 1 are planned or are carried out;

(e) "State likely to be affected" means the State or States in the territory of which there is the risk of significant transboundary harm or which have jurisdiction or control over any other place where there is such a risk;

(f) "States concerned" means the State of origin and the State likely to be affected.

Article 3

Prevention

The State of origin shall take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof.

Article 4

Cooperation

States concerned shall cooperate in good faith and, as necessary, seek the assistance of one or more competent international organizations in preventing significant transboundary harm or at any event in minimizing the risk thereof.

Article 5

Implementation

States concerned shall take the necessary legislative, administrative or other action including the establishment of suitable monitoring mechanisms to implement the provisions of the present articles.

Article 6

Authorization

1. The State of origin shall require its prior authorization for:

(a) Any activity within the scope of the present articles carried out in its territory or otherwise under its jurisdiction or control;

(b) Any major change in an activity referred to in subparagraph (a);

(c) Any plan to change an activity which may transform it into one falling within the scope of the present articles.

2. The requirement of authorization established by a State shall be made applicable in respect of all pre-existing activities within the scope of the present articles. Authorizations already issued by the State for pre-existing activities shall be reviewed in order to comply with the present articles.

3. In case of a failure to conform to the terms of the authorization, the State of origin shall take such actions as appropriate, including where necessary terminating the authorization.

Article 7

Assessment of risk

Any decision in respect of the authorization of an activity within the scope of the present articles shall, in particular, be based on an assessment of the possible transboundary harm caused by that activity, including any environmental impact assessment.

Article 8

Notification and information

1. If the assessment referred to in article 7 indicates a risk of causing significant transboundary harm, the State of origin shall provide the State likely to be affected with timely notification of the risk and the assessment and shall transmit to it the available technical and all other relevant information on which the assessment is based.

2. The State of origin shall not take any decision on authorization of the activity pending the, receipt, within a period not exceeding six months, of the response from the State likely to be affected.

Article 9

Consultations on preventive measures

1. The States concerned shall enter into consultations, at the request of any of them, with a view to achieving acceptable solutions regarding measures to be adopted in order to prevent significant transboundary harm or at any event to minimize the risk thereof. The States concerned shall agree, at the commencement of such consultations, on a reasonable time-frame for the consultations.
2. The States concerned shall seek solutions based on an equitable balance of interests in the light of article 10.
3. If the consultations referred to in paragraph 1 fail to produce an agreed solution, the State of origin shall nevertheless take into account the interests of the State likely to be affected in case it decides to authorize the activity to be pursued, without prejudice to the rights of any State likely to be affected.

Article 10

Factors involved in an equitable balance of interests

In order to achieve an equitable balance of interests as referred to in paragraph 2 of article 9, the States concerned shall take into account all relevant factors and circumstances, including:

- (a) The degree of risk of significant transboundary harm and of the availability of means of preventing such harm, or minimizing the risk thereof or repairing the harm;
- (b) The importance of the activity, taking into account its overall advantages of a social, economic and technical character for the State of origin in relation to the potential harm for the State likely to be affected;
- (c) The risk of significant harm to the environment and the availability of means of preventing such harm, or minimizing the risk thereof or restoring the environment
- (d) The degree to which the State of origin and, as appropriate, the State likely to be affected are prepared to contribute to the costs of prevention;
- (e) The economic viability of the activity in relation to the costs of prevention and to the possibility of carrying out the activity elsewhere or by other means or replacing it with an alternative activity;
- (f) The standards of prevention which the State likely to be affected applies to the same or comparable activities and the standards applied in comparable regional or international practice.

Article 11

Procedures in the absence of notification

1. If a State has reasonable grounds to believe that an activity planned or carried out in the State of origin may involve a risk of causing significant transboundary harm to it, it may request the State of origin to apply the provision of article 8. The request shall be accompanied by a documented explanation setting forth its grounds.
2. In the event that the State of origin nevertheless finds that it is not under an obligation to provide a notification under article 8, it shall so inform the requesting State within a reasonable time, providing a documented explanation setting forth the reasons for such finding. If this finding does not satisfy that State, at its request, the two States shall promptly enter into consultations in the manner indicated in article 9.
3. During the course of the consultations, the State of origin shall, if so requested by the other State, arrange to introduce appropriate and feasible measures to minimize the risk and, where appropriate, to suspend the activity in question for a reasonable period.

Article 12

Exchange of information

While the activity is being carried out, the States concerned shall exchange in a timely manner all available information concerning that activity relevant to preventing significant transboundary harm or at any event minimizing the risk thereof. Such an exchange of information shall continue until such time as the States concerned consider it appropriate even after the activity is terminated.

Article 13

Information to the public

States concerned shall, by such means as are appropriate, provide the public likely to be affected by an activity within the scope of the present articles with relevant information relating to that activity, the risk involved and the harm which might result and ascertain their views.

Article 14

National security and industrial secrets

Data and information vital to the national security of the State of origin or to the protection of industrial secrets or concerning intellectual property may be withheld, but the State of origin shall cooperate in good faith with the State likely to be affected in providing as much information as possible under the circumstances.

Article 15

Non-discrimination

Unless the States concerned have agreed otherwise for the protection of the interests of persons, natural or juridical, who may be or are exposed to the risk of significant transboundary harm as a result of

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an activity within the scope of the present articles, a State shall not discriminate on the basis of nationality or residence or place where the injury might occur, in granting to such persons, in accordance with its legal system, access to judicial or other procedures to seek protection or other appropriate redress.

Article 16

Emergency preparedness

The State of origin shall develop contingency plans for responding to emergencies, in cooperation, where appropriate, with the State likely to be affected and competent international organizations.

Article 17

Notification of an emergency

The State of origin shall, without delay and by the most expeditious means, at its disposal, notify the State likely to be affected of an emergency concerning an activity within the scope of the present articles and provide it with all relevant and available information.

Article 18

Relationship to other rules of international law

The present articles are without prejudice to any obligation incurred by States under relevant treaties or rules of customary international law.

Article 19

Settlement of disputes

1. Any dispute concerning the interpretation or application of the present articles shall be settled expeditiously through peaceful means of settlement chosen by mutual agreement of the parties to the dispute, including negotiations, mediation, conciliation, arbitration or judicial settlement.
2. Failing an agreement on the means for the peaceful settlement of the dispute within a period of six months, the parties to the dispute shall, at the request of any of them, have recourse to the establishment of an impartial fact-finding commission.
3. The Fact-finding Commission shall be composed of one member nominated by each party to the dispute and in addition a member not having the nationality of any of the parties to the dispute chosen by the nominated members who shall serve as Chairperson.
4. If more than one State is involved on one side of the dispute and those States do not agree on a common member of the Commission and each of them nominates a member, the other party to the dispute has the right to nominate an equal number of members of the Commission.

5. If the members nominated by the parties to the dispute are unable to agree on a Chairperson within three months of the request for the establishment of the Commission, any party to the dispute may request the Secretary-General of the United Nations to appoint the Chairperson who shall not have the nationality of any of the parties to the dispute. If one of the parties to the dispute fails to nominate a member within three months of the initial request pursuant to paragraph 2, any other party to the dispute may request the Secretary-General of the United Nations to appoint a person who shall not have the nationality of any of the parties to the dispute. The person so appointed shall constitute a single-member Commission.

6. The Commission shall adopt its report by a majority vote, unless it is a single-member Commission, and shall submit that report to the parties to the dispute setting forth its findings and recommendations, which the parties to the dispute shall consider in good faith.

**A/59/10 DRAFT PRINCIPLES ON ALLOCATION OF LOSS IN THE CASE OF
TRANSBOUNDARY HARM ARISING OUT OF HAZARDOUS ACTIVITIES ADOPTED
BY THE COMMISSION ON FIRST READING**

A/59/10



United Nations

Report of the International Law Commission

**Fifty-sixth session
(3 May-4 June and 5 July-6 August 2004)**

General Assembly
Official Records
Fifty-ninth session
Supplement No. 10 (A/59/10)

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Report of the International Law Commission

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(3 May-4 June and 5 July-6 August 2004)



United Nations, New York, 2004

170. At its 2809th meeting, held on 3 June 2004, the Commission established a working group under the chairmanship of Mr. Pernmaraju Sreenivasa Rao to examine the proposals submitted by the Special Rapporteur, 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 Group held six meetings, on 4 June, and on 6, 7 and 8 July 2004. In its work the Working Group reviewed and revised the 12 draft principles submitted by the Special Rapporteur and it recommended that the 8 draft principles contained in its report (AICNA/661 and Corr. 1) be referred to the Drafting Committee.

171. At its 2815th meeting, held on 9 July 2004, the Commission received the oral report of the Chairman of the Working Group and decided to refer the eight draft principles to the Drafting Committee. The Commission also requested the Drafting Committee to prepare a text of a preamble.

172. At its 2822nd meeting, held on 23 July 2004, the Commission considered the report of the Drafting Committee and adopted on first reading a set of eight draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities (see section C below).

173. At its 2828th meeting, held on 4 August 2004, the Commission decided, in accordance with articles 16 and 21 of its statute to transmit the draft principles (see section C below), through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2006.

174. At its 2829th meeting, held on 5 August 2004, the Commission expressed its deep appreciation for the outstanding contribution the Special Rapporteur, Mr. Pernmaraju Sreenivasa Rao had made to the treatment of the topic through his scholarly research and vast experience, thus enabling the Commission to bring to a successful conclusion its first reading of the draft principles on the liability aspect of the topic.

C. Text of draft principles on the allocation of loss in the case of trans boundary harm arising out of hazardous activities adopted by the Commission on first reading

1. Text of the draft principles

175. The text of the draft principles adopted by the Commission on first reading is reproduced below.

Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities*

The General Assembly,

Recalling principles 13 and 16 of the Rio Declaration on Environment and Development,

Recalling also the Draft articles on the Prevention of Transboundary Harm from Hazardous Activities,

* The Commission reserves the right to reconsider the matter of the final form of the instrument at the second reading in the light of the comments and observations of Governments. In the event that the Commission has to prepare a draft framework convention, the exercise would entail some textual changes to draft principles 4 to 8 and a few additions, especially with regard to the resolution of disputes and the relationship between the draft convention and other international instruments.

Aware that incidents involving hazardous activities may occur despite compliance by the relevant State with the provisions of the Draft articles on the Prevention of Transboundary Harm from Hazardous Activities,

Noting that as a result of such incidents other States and/or their nationals may suffer harm and serious losses,

Concerned that appropriate and effective measures should be in place to ensure, as far as possible, that those natural and legal persons, including States, that incur harm or loss as a result of such incidents should be able to obtain prompt and adequate compensation,

Noting that States shall be responsible for infringements of their obligations of prevention under international law,

Recognizing the importance of international cooperation among States,

Recalling the existence of international agreements covering specific categories of hazardous activities,

Desiring to contribute to the further development of international law in this field;

Principle 1

Scope of application

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

Principle 2

Use of terms

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;

- (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) "Transboundary damage" means damage caused in the territory or in other places 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 draft principle 1 are carried out;
- (d) "Hazardous activity" means an activity which involves a risk of causing significant harm through its physical consequences;
- (e) "Operator" means any person in command or control of the activity at the time the incident causing transboundary damage occurs.

Principle 3

Objective

The present draft principles aim at ensuring prompt and adequate compensation to natural or legal persons, including States, that are victims of transboundary damage, including damage to the environment.

Principle 4

Prompt and adequate compensation

1. Each State should take necessary measures to ensure that prompt and adequate compensation is available for victims of transboundary damage caused by hazardous activities located within its territory or otherwise under its 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 not require proof of fault. Any conditions, limitations or exceptions to such liability should be consistent with draft principle 3.
3. These measures should also include the requirement on the operator or, where appropriate, other person or entity, to establish and maintain financial security such as insurance, bonds or other financial guarantees to cover claims of compensation.
4. In appropriate cases, these 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, the State should also ensure that additional financial resources are allocated.

Principle 5

Response measures

With a view to minimizing any transboundary damage from an incident involving activities falling within the scope of the present draft principles, States, if necessary with the assistance of the operator, or, where appropriate, the operator, should take prompt and effective response measures. Such response measures

should include prompt notification and, where appropriate, consultation and cooperation with all potentially affected States.

Principle 6

International and domestic remedies

1. States should provide appropriate procedures to ensure that compensation is provided in furtherance of draft principle 4 to victims of transboundary damage from hazardous activities.
2. Such procedures may include recourse to international claims settlement procedures that are expeditious and involve minimal expenses.
3. To the extent necessary for the purpose of providing compensation in furtherance of draft principle 4, each State should ensure that its domestic administrative and judicial mechanisms possess the necessary competence and provide effective remedies to such victims. These mechanisms should not be less prompt, adequate and effective than those available to its nationals and should include appropriate access to information necessary to pursue such mechanisms.

Principle 7

Development of specific international regimes

1. States should cooperate in the development of appropriate international agreements on a global, regional or bilateral basis in order to make arrangements regarding the prevention and response measures to be followed in respect of particular categories of hazardous activities as well as the compensation and financial security measures to be taken.
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 financial security measures, 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.

Principle 8

Implementation

1. Each State 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 any discrimination such as that 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.

2. Text of the draft principles with commentaries thereto

176. The text of the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities with commentaries thereto adopted by the Commission on first reading at its fifty-sixth session, are reproduced below.

Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities*

General commentary

- (1) The background to these draft principles, together with the underlying approach, is outlined in the preamble. It places the draft principles in the context of the relevant provisions of the Rio Declaration on Environment and Development but then specifically recalls the Draft articles on the Prevention of Transboundary Harm from Hazardous Activities.
- (2) It briefly provides the essential background that, even if the relevant State fully complies with its prevention obligations under those draft articles, accidents or other incidents may nonetheless occur and have transboundary consequences that cause harm and serious loss to other States and their nationals.
- (3) It is important, as the preamble records, that those who suffer harm or loss as a result of such incidents involving hazardous activities are not left to carry those losses and are able to obtain prompt and adequate compensation.
- (4) These draft principles establish the means by which this may be accomplished.

* The Commission reserves the right to reconsider the matter of the final form of the instrument at the second reading in the light of the comments and observations of Governments. In the event that the Commission has to prepare a draft framework convention, the exercise would entail some textual changes to draft principles 4 to 8 and a few additions, especially with regard to the resolution of disputes and the relationship between the draft convention and other international instruments.