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Codification of State liability for environmental damage resulting from acts not prohibited by International Law

1. INTRODUCTION

As an introduction, I would remind you that the emergence of this type of international responsibility is due to the ultra-dangerous nature of certain activities that are not prohibited by international law. I would therefore insist on three ideas: 1st) This is not international responsibility for a wrongful act. No international obligation is breached in these cases; 2nd) Ultrahazardous activities are considered to be those that may cause massive and serious damage to third parties; and 3rd) Because of the ultrahazardous nature of these activities, reparation must be guaranteed for any damage they may cause.

There is an unfinished process of codification of this subject by the International Law Commission. In 1978, the Commission began work on the codification of the topic "International liability for

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injurious consequences arising out of acts not prohibited by International Law". (2) In 1997, the Commission decided to focus solely on the prevention of transboundary harm caused by hazardous activities. Thus, on 1 August 2001, the International Law Commission adopted its draft articles on "Prevention of Transboundary Harm from Hazardous Activities"; and 3) From 2001, the Commission returned to the original topic of liability and compensation for losses resulting from transboundary harm arising out of hazardous activities. Thus, on 8 August 2006, the International Law Commission adopted its draft principles on "Allocation of loss in the case of transboundary harm arising out of hazardous activities".

I should point out, however, that in neither case have the drafts become binding international legal instruments. In other words, at present, both remain mere drafts.

2. THE 2001 DRAFT ARTICLES ON "PREVENTION OF TRANSBOUNDARY HARM FROM HAZARDOUS ACTIVITIES".

The scope of application of the 2001 Draft Articles on "Prevention of Transboundary Harm from Hazardous Activities" is limited to "activities not prohibited by international law which involve a risk of causing significant transboundary harm through their physical consequences" (Art. 1).

Three features of the Draft Articles are worth mentioning. The first feature is to emphasise the obligation to prevent, as States shall take "all appropriate measures to prevent significant transboundary harm or at any event to minimise the risk thereof" (Art. 3). Thus, there is a duty on States to take "the necessary legislative, administrative or other action including the establishment of suitable monitoring mechanisms" (Art. 5). The second feature is that this Draft requires the prior authorization of the State to carry out any activity that may cause significant transboundary harm (Art. 6). In this sense, the State's prior authorization will be conditioned to the prior completion of an environmental impact assessment (Art. 7). The third and last feature to be highlighted is the obligation to notify and consult the States and the public potentially affected by the carrying out of the activity likely to cause significant transboundary damage (Arts. 8-13).

The Draft Articles can be criticised for being conservative and retrograde, since, on the one hand, they do not include the precautionary principle and, on the other hand, they exclude transboundary damage caused to areas beyond national jurisdiction.

3. THE 2006 DRAFT PRINCIPLES ON THE "ALLOCATION OF LOSS IN THE EVENT OF

TRANSBOUNDARY HARM ARISING OUT OF HAZARDOUS ACTIVITIES

The 2006 Draft Principles on "Allocation of loss in the case of transboundary harm arising out of hazardous activities" will apply "to transboundary damage caused by hazardous activities not prohibited by international law" (Principle 1).

Two main features of this Draft should be highlighted. The first feature consists of affirming the right of victims to receive "prompt and adequate compensation" (Principle 4). We must bear in mind that: 1) It is a strict liability, as there is no need to prove fault; and 2) It is not necessarily an absolute liability, covering all the damage caused.

The second characteristic to highlight in this Project is the tendency to replace the public liability of the State with private liability, either of the operator of the activity, who is required to have private insurance; or of the economic activity in question as a whole, as a national financial compensation fund may be created by the companies in the sector; or of both.

This Draft deserves negative criticism, as it is even more conservative and more retrograde than the previous one, since: 1) It turns what should be a draft of articles into a draft of principles. The result finally reached will never be legally binding; (2) It does not expressly affirm the "polluter pays" principle; (3) It also excludes transboundary

damage caused to areas beyond national jurisdiction; and (4) It does not affirm the existence of strict liability on an absolute basis.