

JUSTITIA ET PACE
INSTITUT DE DROIT INTERNATIONAL

Session of Strasbourg - 1997

Responsibility and Liability under International Law for Environmental Damage

(Eighth Commission, Rapporteur : Mr Francisco Orrego Vicuña)

(The English text is authoritative. The French text is a translation.)

The Institute of International Law,

Recalling the “Declaration on a Programme of Action on the Protection of the Global Environment” adopted at the 65th Session of the Institute in Basle ;

Mindful of the increasing activities that entail risks of environmental damage with transboundary and global impacts ;

Taking into account the evolving principles and criteria governing State responsibility, responsibility for harm alone and civil liability for environmental damage under both international and national law ;

Noting in particular Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration on the responsibility of States to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction ;

Realizing that both responsibility and liability have in addition to the traditional role of ensuring restoration and compensation that of enhancing prevention of environmental damage ;

Seeking to identify, harmonize and to the necessary extent develop the principles of international law applicable to responsibility and liability in the context of environmental damage ;

Desiring to make useful recommendations for the negotiation and management of regimes on responsibility and liability for environmental damage established under international conventions in furtherance of the objectives of adequate environmental protection (environmental regimes) ;

Realizing that international environmental law is developing significant new links with the concepts of intergenerational equity, the precautionary approach, sustainable development, environmental security and with human rights law, as well as with the principle of shared but differentiated responsibility, thereby also influencing the issues relating to responsibility and liability ;

Adopts this Resolution :

Basic Distinction on Responsibility and Liability

Article 1

The breach of an obligation of environmental protection established under international law engages responsibility of the State (international responsibility), entailing as a consequence the obligation to reestablish the original position or to pay compensation.

The latter obligation may also arise from a rule of international law providing for strict responsibility on the basis of harm or injury alone, particularly in case of ultra-hazardous activities (responsibility for harm alone).

Civil liability of operators can be engaged under domestic law or the governing rules of international law regardless of the lawfulness of the activity concerned if it results in environmental damage.

The foregoing is without prejudice to the question of criminal responsibility of natural or juridical persons.

Article 2

Without precluding the application of rules of general international law, environmental regimes should include specific rules on responsibility and liability in order to ensure their effectiveness in terms of both encouraging prevention and providing for restoration and compensation. The object and purpose of each regime should be taken into account in establishing the extent of such rules.

International Responsibility

Article 3

The principles of international law governing international responsibility also apply to obligations relating to environmental protection.

When due diligence is utilized as a test for engaging responsibility it is appropriate that it be measured in accordance with objective standards relating to the conduct to be expected from a good government and detached from subjectivity. Generally accepted international rules and standards further provide an objective measurement for the due diligence test.

Responsibility for Harm Alone

Article 4

The rules of international law may also provide for the engagement of strict responsibility of the State on the basis of harm or injury alone. This type of responsibility is most appropriate in case of ultra-hazardous activities, and activities entailing risk or having other similar characteristics.

Failure of the State to enact appropriate rules and controls in accordance with environmental regimes, even if not amounting as such to a breach of an obligation, may result in its responsibility if harm ensues as a consequence, including damage caused by operators within its jurisdiction or control.

The use of methods facilitating the proof required to substantiate a claim for environmental damage should be considered under such regimes.

Civil Liability

Article 5

While fault-based, strict and absolute standards of civil liability are provided for under national legislation, environmental regimes should prefer the strict liability of operators as the normal standard applicable under such regimes, thereby relying on the objective fact of harm and also allowing for the appropriate exceptions and limits to liability. This is without prejudice to the role of harmonization of national laws and the application in this context of the standards generally prevailing under such national legislation.

Article 6

Environmental regimes should normally assign primary liability to operators. States engaged in activities *qua* operators are governed by this rule.

This is without prejudice to the questions relating to international responsibility which may be incurred for failure of the State to comply with the obligation to establish and implement civil liability mechanisms under national law, including insurance schemes, compensation funds and other remedies and safeguards, as provided for under such regimes.

An operator fully complying with applicable domestic rules and standards and government controls may be exempted from liability in case of environmental damage under environmental regimes. In such case the rules set out above on international responsibility and responsibility for harm alone may apply.

Article 7

A causal nexus between the activity undertaken and the ensuing damage shall normally be required under environmental regimes. This is without prejudice to the establishment of presumptions of causality relating to hazardous activities or cumulative damage or long-standing damages not attributable to a single entity but to a sector or type of activity.

Article 8

Subsidiary State liability, contributions by the State to international funds and other forms of State participation in compensation schemes should be considered under environmental regimes as a back-up system of liability in case that the operator who is primarily liable is unable to pay the required compensation. This does not prejudice the question of the State obtaining reimbursement from operators under its domestic law.

Limits to Responsibility for Harm Alone and Civil Liability

Article 9

In accordance with the evolving rules of international law it is appropriate for environmental regimes to permit for reasonable limits to the amount of compensation resulting from responsibility for harm alone and civil liability, bearing in mind both the objective of achieving effective environmental protection and ensuring adequate reparation of damage and the need to avoid discouragement of investments. Limits so established should be periodically reviewed.

Insurance

Article 10

States should ensure that operators have adequate financial capacity to pay possible compensation resulting from liability and are required to make arrangements for adequate insurance and other financial security, taking into account the requirements of their respective domestic laws. Where insurance coverage is not available or is inadequate, the establishment of national insurance funds for this purpose should be considered. Foreseeability of damage in general terms of risk should not affect the availability of insurance.

Apportionment of Liability

Article 11

Apportionment of liability under environmental regimes should include all entities that legitimately may be required to participate in the payment of compensation so as to ensure full repair of damage. To this end, in addition to primary and subsidiary liability, forms of several and joint liability should also be considered particularly in the light of the operations of major international consortia.

Such regimes should also provide for product liability to the extent applicable so as to reach the entity ultimately liable for pollution or other forms of environmental damage.

Collective Reparation

Article 12

Should the source of environmental damage be unidentified or compensation be unavailable from the entity liable or other back-up sources, environmental regimes should ensure that the damage does not remain uncompensated and may consider the intervention of special compensation funds or other mechanisms of collective reparation, or the establishment of such mechanisms where necessary.

Entities engaged in activities likely to produce environmental damage of the kind envisaged under a given regime may be required to contribute to a special fund or another mechanism of collective reparation established under such regime.

Preventive Mechanisms Associated with Responsibility and Liability

Article 13

Environmental regimes should consider the appropriate connections between the preventive function of responsibility and liability and other preventive mechanisms such as notification and consultation, regular exchange of information and the increased utilization of environmental impact assessments. The implications of the precautionary principle, the “polluter pays” principle and the principle of common but differentiated responsibility in the context of responsibility and liability should also be considered under such regimes.

Response Action

Article 14

Environmental regimes should provide for additional mechanisms which ensure that operators shall undertake timely and effective response action, including preparation of the necessary contingency plans and appropriate restoration measures directed to prevent further damage and to control, reduce and eliminate damage already caused.

Response action and restoration should be undertaken also to the extent necessary by States, technical bodies established under such regimes, and by private entities other than the operator in case of emergency.

Article 15

The failure to comply with the obligations on response action and restoration should engage civil liability of operators, the operation of back-up liability mechanisms and possible international responsibility. Compliance with the obligations should not preclude responsibility for harm alone or civil liability for the ensuring damage except to the extent that it has eliminated or significantly reduced such damage.

Article 16

States and other entities undertaking response action and restoration are entitled to be reimbursed by the entity liable for the costs incurred as a consequence of the discharge of these obligations. While claims for these costs can be made independently of responsibility for harm alone or civil liability, they may also be consolidated with other claims for compensation for environmental damage.

Activities Engaging Responsibility for Harm Alone or Strict Civil Liability

Article 17

Environmental regimes should define such environmentally hazardous activities that may engage responsibility for harm alone or strict civil liability, taking into account the nature of the risk involved and the financial implications of such definition.

Specific sectors of activity, lists of dangerous substances and activities, or activities undertaken in special sensitive areas may be included in this definition.

Article 18

If more than one liability regime applies to a given activity, the regime prepared later in time should provide criteria to establish an order of priority. The standard most favorable to the environment or for the compensation of the victim should be adopted for this purpose.

Degree of Damage

Article 19

Environmental regimes should provide for the reparation and compensation of damage in all circumstances involving the breach of an obligation. In the case of a regime providing for responsibility for harm alone, the threshold above which damage must be compensated must be clearly established.

Article 20

The submission of a given proposed activity to environmental impact assessment under environmental regimes does not in itself exempt from responsibility for harm alone or civil liability if the assessed impact exceeds the limit judged acceptable. An environmental impact assessment may require that a specific guarantee be given for adequate compensation should the case arise.

Exemptions from Responsibility and Civil Liability

Article 21

Exemptions from international responsibility are governed by the principles and rules of international law. Environmental regimes may provide for exemptions from responsibility for harm alone or civil liability, as the case may be, to the extent compatible with their objectives. The mere unforeseeable character of an impact should not be accepted in itself as an exemption.

Article 22

Without prejudice to the rules of international law governing armed conflicts, such an event as well as terrorism and a natural disaster of an irresistible character and other similar situations normally provided for under civil liability conventions may be considered as acceptable exemptions in environmental regimes, subject to the principle that no one can benefit from his or her own wrongful act.

Intentional or grossly negligent acts or omissions of a third party shall also normally be an acceptable exemption, but the third party should in such case be fully liable for the damage. Damage resulting from humanitarian activities may be exempted from liability if the circumstances so warrant.

Compensation and Reparation of Damage

Article 23

Environmental regimes should provide for the reparation of damage to the environment as such separately from or in addition to the reparation of damage relating to death, personal injury or loss of property or economic value. The specific type of damage envisaged shall depend on the purpose and nature of the regime.

Article 24

Environmental regimes should provide for a broad concept of reparation, including cessation of the activity concerned, restitution, compensation and, if necessary, satisfaction.

Compensation under such regimes should include amounts covering both economic loss and the costs of environmental reinstatement and rehabilitation. In this context, equitable assessment and other criteria developed under international conventions and by the decisions of tribunals should also be considered.

Article 25

The fact that environmental damage is irreparable or unquantifiable shall not result in exemption from compensation. An entity which causes environmental damage of an irreparable nature must not end up in a possibly more favorable condition than other entities causing damage that allows for quantification.

Where damage is irreparable for physical, technical or economic reasons, additional criteria should be made available for the assessment of damage. Impairment of use, aesthetic and other non-use values, domestic or international guidelines, intergenerational equity, and generally equitable assessment should be considered as alternative criteria for establishing a measure of compensation.

Full reparation of environmental damage should not result in the assessment of excessive, exemplary or punitive damages.

Access to Dispute Prevention and Remedies

Article 26

Access by States, international organizations and individuals to mechanisms facilitating compliance with environmental regimes, with particular reference to consultations, negotiations and other dispute prevention arrangements, should be provided for under such regimes.

In the event of preventive mechanisms being unsuccessful, expeditious access to remedies, as well as submission of claims relating to environmental damage, should also be provided for.

Article 27

Environmental regimes should make flexible arrangements to facilitate the standing of claimants, with particular reference to claims concerning the environment *per se* and damages to areas beyond the limits of national jurisdiction. This is without prejudice to the requirement of a direct legal interest of the affected or potentially affected party to make an environmental claim under international law.

Article 28

Environmental regimes should identify entities that would be entitled to make claims and receive compensation in the absence of a direct legal interest if appropriate. Institutions established under such regimes, including ombudsmen and funds, might be empowered to this end. A High Commissioner for the Environment might also be envisaged to act on behalf or in the interests of the international community.

Article 29

Dispute prevention might also be facilitated by the participation of qualified States and entities in the planning process of major projects of another State in the context of mechanisms of international cooperation. Domestic and regional environmental impact assessment should also be required for activities likely to have transboundary effects or affect areas beyond the limits of national jurisdiction.

**Remedies Available to Interested Entities and Persons
for Domestic and Transnational Claims**

Article 30

Environmental regimes should provide for equal access on a non-discriminatory basis to domestic courts and remedies by national and foreign entities and by all other interested persons.

Article 31

Environmental regimes should provide for the waiver of State immunity from legal process in appropriate claims. Arbitral awards and other decisions rendered by international tribunals under such regimes should have the same force as national decisions at the domestic level.

In cases having multinational aspects, environmental regimes should take into consideration existing rules on jurisdiction and choice of law and, if necessary, provide for such rules.

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(September 4, 1997)