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## The International Law Commission's Study of International Liability for Nonprohibited Acts as It Relates to Developing States

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# THE INTERNATIONAL LAW COMMISSION'S STUDY OF INTERNATIONAL LIABILITY FOR NONPROHIBITED ACTS AS IT RELATES TO DEVELOPING STATES

Daniel Barstow Magraw\*

It is now generally accepted that the international community is highly interdependent—economically, ecologically, politically, even culturally—and that such interdependence will likely intensify. That close interrelationship, together with increasing industrialization and ever-growing demands on the world's natural resources,<sup>1</sup> has produced a variety of serious problems involving more than one state. Among these problems are acid rain and other forms of acid deposition,<sup>2</sup> the international debt crisis, allocation of accountability in situations such as the Bhopal disaster,<sup>3</sup> depletion of the world's genetic resources, risks associated with genetic engineering, the use and pollution of international groundwater resources, and the disposal of nuclear and other toxic wastes, to name but a few. It is widely acknowledged that resolution of these problems must be international in scope.<sup>4</sup>

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I would like to take this opportunity to say a few words about Ted Stein. An ancient Tamil proverb, from the *Thirukkural*, comes to mind: "Rain produces food, and is itself food." Ted was one of those rare and most valuable of colleagues who not only are prolific in their scholarship but also are unselfish and effective in stimulating and assisting others to be more productive. Whenever I discussed the law with Ted, my knowledge or ideas were enriched. We will miss him in ways we will never know.

I wish to thank Steve McCaffrey and Kilaparti Ramakrishna for comments relating to this Article and Theresa Ketler-Brown, Lisa Smith and Lucky Smith for research assistance.

1. For example, the world's population, currently approximately five billion, is not projected to stabilize below eleven billion unless new measures are taken to prevent growth. McNamara, *Time Bomb or Myth: The Population Problem*, 62 FOREIGN AFF. 1107, 1115 (1984). Moreover, regardless of the growth rate, the world's people will undoubtedly demand higher living standards. Both effects will increase the pressures on natural resources.

2. The term "acid deposition" includes all forms of acid precipitation (rain, snow, mist, fog, dew, and frost) and dry deposition of sulfur and nitrogen compounds (sulfur dioxide, nitrogen oxides, and sulfate and nitrate particles) that form acids when they contact surface water. Wetstone & Rosencranz, *Transboundary Air Pollution: The Search for an International Response*, 8 HARV. ENVTL. L. REV. 89, 89 n.2 (1984).

3. For a general discussion of the Bhopal disaster, see *The Bhopal Tragedy: Social and Legal Issues*, 20 TEX. INT'L L.J. 267 (1985).

4. Not all commentators, of course, take the view that international solutions are required. See, e.g., Smith, *The United Nations and the Environment: Sometimes a Great Notion?*, 19 TEX. INT'L L.J. 335, 337 (1984) (arguing that the United Nations Environmental Programme "would do well to cease its work and return to the member states the inherent responsibility for determining on their own initiative both the nature of environmental issues and the extent to which action will be taken"). The need for action on the international level should be obvious, however. For example, it is wholly unrealistic to expect decisionmakers in one state to take account of the international externalities (i.e., the costs experienced in other states) of the state's pollution-creating activities in the absence of any international legal structure providing at least some assurance that other states' decisionmakers will

The International Law Commission of the United Nations is engaged in studying a topic that at least some have argued should encompass aspects of many or all of the issues mentioned above. That topic is titled "International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law" (hereinafter "international liability"). Part I of this Article briefly describes the Commission's current approach to international liability. Part II examines that approach in detail as it relates to developing states.

## I. OVERVIEW OF THE COMMISSION'S STUDY OF INTERNATIONAL LIABILITY FOR NONPROHIBITED ACTS

The International Law Commission has actively studied international liability since 1978.<sup>5</sup> As the first special rapporteur for the study, Robert Quentin-Baxter in 1982 submitted to the Commission a schematic outline to guide the Commission's study,<sup>6</sup> and, two years later, five draft articles.<sup>7</sup> The draft articles were under consideration at the time of Quentin-Baxter's death in 1984. The schematic outline, subject to changes proposed by Quentin-Baxter in 1983,<sup>8</sup> received what may be described as tentative general tacit approval in the Sixth Committee (the law committee) of the General Assembly.<sup>9</sup> The new special rapporteur, Julio Barboza, who was appointed in 1985, has stated that he will use the schematic outline as the "most important raw material" in his review of the Commission's study.<sup>10</sup>

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take into account externalities arising from their own pollution-creating activities. *Cf. infra* note 93 and accompanying text. It seems certain, in fact, that global international solutions—in contrast to regional international solutions—will be required to resolve many current and future international problems, such as the international debt crisis and acid deposition. Similarly, developing states may require foreign financial and technical aid to achieve a domestically desired standard of nonpollution. *see infra* text accompanying notes 60–63, which would necessarily involve international cooperation.

5. For a detailed discussion of the Commission's study, including its history, see Magraw, *Transboundary Harm: The International Law Commission's Study of "International Liability,"* 80 AM. J. INT'L L. 305 (1986).

6. *Schematic Outline, Third Report on International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law*, U.N. Doc. A/CN.4/360/Corr.1, at 24–30 (1982) [hereinafter *Schematic Outline*].

7. *Fifth Report on International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law*, U.N. Doc. A/CN.4/383/Add.1 (1984) [hereinafter *Quentin-Baxter's Fifth Report*].

8. *Fourth Report on International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law*, U.N. Doc. A/CN.4/373/Corr.1, at 48–49 (1983) [hereinafter *Quentin-Baxter's Fourth Report*].

9. *See, e.g., Preliminary Report on International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law*, U.N. Doc. A/CN.4/394, at 4 (1985) [hereinafter *Barboza's Preliminary Report*].

10. *Id.* at 6. *See also id.* at 4.

The Commission's approach to the issue of international liability, as reflected in the schematic outline and in the five draft articles, has been based on the general principle *sic utere tuo ut alienum non laedas*, i.e., the duty to exercise one's rights in ways that do not harm the interests of other subjects of law. This principle is, in Quentin-Baxter's view, "a necessary ingredient of any legal system."<sup>11</sup> As a principle of international law, it imposes a duty on a state to exercise its rights in a manner that does not unreasonably harm the interests of other states, which, significantly, includes a state's duty to regulate activities within its own territory. Such a duty potentially conflicts with another principle of international law: the sovereign right of a state to be free to engage in activities within its own territory and with respect to its own nationals. The broad goal that has resulted from that dichotomy is to allow as much freedom of choice to states as is compatible with adequately protecting the interests of other states.<sup>12</sup>

That goal has proven difficult to realize. The Commission's approach thus far<sup>13</sup> has been to propose rules that encourage establishing conventional (treaty) regimes to deal with specific transboundary-injury situations and that assert, in the absence of such a regime, a fourfold duty—referred to as a "compound 'primary' obligation"—to prevent (or avoid), to inform, to negotiate, and to repair.<sup>14</sup> That fourfold duty, which is based in large part on the concepts of good faith, cooperation, and *bon voisinage* between the "acting state" (also referred to as the "source state") and the "affected state" (i.e., the state that is being or may be harmed),<sup>15</sup> is summarized

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11. *Report of the International Law Commission to the General Assembly*, 35 U.N. GAOR Supp. (No. 10) at 1, U.N. Doc. A/35/N (1980), reprinted in [1980] 2 Y.B. INT'L L. COMM'N (Pt. 2) 1, 159, U.N. Doc. A/CN.4/SER.A/1980/Add. 1 (Part 2) [hereinafter *1980 Commission Report*].

12. Schematic Outline, *supra* note 6, § 5, art. 1.

13. The Commission's approach can always change, of course. New Special Rapporteur Barboza has indicated that he will entirely review the Commission's study and that "certain basic questions remain open." Barboza's Preliminary Report, *supra* note 9, at 6, 8. This indicates that suggestions for change may be forthcoming shortly. Also, although international liability for nonprohibited acts has met with increasing approval, substantial disagreement has been evident among members of the Commission and the Sixth Committee. *E.g.*, Quentin-Baxter's Fourth Report, *supra* note 8, at 45.

14. Quentin-Baxter's Fourth Report, *supra* note 8, at 29. The series of duties has also been referred to as the duty to "prevent [or avoid], minimize and repair." *See, e.g., id.* at 48. The description in the text is more informative.

15. The Commission has based its work on the usual examples of state practice, including conventions such as the 1967 Outer Space Treaty, Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 705; Court decisions such as the *Corfu Channel* case, 1949 I.C.J. 4 (U.K. v. Alb.); arbitral decisions such as the *Trail Smelter* award, 3 R. Int'l Arb. Awards 1905 (1938 & 1941) (U.S. v. Can.); and United Nations declarations such as the *Report of the United Nations Conference on the Human Environment, Stockholm*, U.N. Sales No. E.73.II.A.14, pt. 1, chap. I at 5–16 (1972) (particularly articles 21, 22, and 23) [hereinafter *Stockholm Declaration*].

below.

The first level of duty—which is actually a continuing duty—requires the source state to take “measures of prevention that as far as possible avoid a risk of loss or injury” to other states.<sup>16</sup> The second level of duty—which is also continuing in nature—requires a source state to provide the affected state with “all relevant and available information” when an activity occurring within the source state’s territory or control gives or may give rise to harm to the affected state (and under certain other circumstances).<sup>17</sup> A partial exception permits withholding information if “necessary” for national or industrial security.<sup>18</sup> There is a related provision for advisory fact-finding machinery, the cost of which is to be borne by each state on an equitable basis.<sup>19</sup> The third level of duty requires, under certain circumstances, the source and affected states to “enter into negotiations” at the request of any concerned state regarding the necessity and form of a conventional regime to deal with the situation, taking into consideration numerous “principles,” “factors,” and “matters” identified in sections 5, 6, and 7, respectively, of the schematic outline.<sup>20</sup> If an agreement is reached, the source state’s obligations with respect to international liability are satisfied in accordance with the agreement.<sup>21</sup>

The failure to fulfill the duties to prevent, to inform, or to negotiate is not wrongful under the rules of the schematic outline and does not give rise to a right of action under those rules.<sup>22</sup> Nonetheless, the failure to take steps to prevent, to inform, and to negotiate may work against the source state in determining the amount of reparations the source state is to make.<sup>23</sup> In addition, to the extent that the source state has failed to provide information, the affected state is to be given “liberal recourse” to inferences of fact and circumstantial evidence to establish whether the activity has given or may give rise to harm; such “liberal recourse” appears to be a step towards a *res ipsa loquitur* approach.<sup>24</sup>

The fourth, and final, level of duty requires, if no conventional regime has been agreed upon and if a loss or injury occurs, the states to negotiate in good faith to determine the “rights and obligations” of the states in respect

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16. Schematic Outline, *supra* note 6, § 5, art. 2.

17. *Id.* § 2, arts. 1–2.

18. *Id.* § 2, art. 3.

19. *Id.* § 2, art. 7.

20. *Id.* § 3, arts. 1(c), 2. *See id.* §§ 5–7.

21. *Id.* § 3, art. 3.

22. Quentin-Baxter’s Fourth Report, *supra* note 8, at 53; *Third Report on International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law*. U.N. Doc. A/CN.4/360/Corr. 1, at 16 (1982) [hereinafter Quentin-Baxter’s Third Report].

23. Schematic Outline, *supra* note 6, § 7, art. 1.4; *see id.* § 3, art. 3 (“remedial measures”); Quentin-Baxter’s Third Report, *supra* note 22, at 15–16.

24. Schematic Outline, *supra* note 6, § 5, art. 4.

of the loss or injury.<sup>25</sup> Reparations shall be made unless “it is established” that making reparations for that type of harm is not in accordance with the “shared expectations” of the states involved.<sup>26</sup> Reparations are to be determined according to a balance-of-interests test, taking into consideration: the shared expectations of the states; the “principles,” “factors,” and “matters” enumerated in the schematic outline; and the states’ actions with respect to the duties to prevent, to inform, and to negotiate.<sup>27</sup> The duty to make reparations thus is not equivalent to a rule of strict liability, but it approaches, and may be identical to, strict liability if the harm is unpredictable or if the harm is predictable and the source state completely ignores the first three duties.

The ultimate failure to make the required reparations in the event of harm engages the international responsibility of the source state for wrongfulness, i.e., only at this stage would a violation of the schematic outline’s rules result in an act prohibited by international law (the failure to make reparations).<sup>28</sup>

The scope of international liability—i.e., under what circumstances does the fourfold duty apply—has been the source of considerable contention; and, although it appears that agreement has been reached on some aspects of this issue, Special Rapporteur Barboza was probably correct in referring to scope as an “open” question.<sup>29</sup> One aspect that remains largely unanswered is what constitutes transboundary harm. This aspect is of particular importance because international liability potentially extends to the large universe of lawful activities and because so many such activities have effects of some kind in other states.<sup>30</sup> A second aspect concerns the degree to which states are to be accountable for the activities of private persons. Thus far, it seems that states are to be accountable for virtually all private activities within their territory or control. This accountability is

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25. *Id.* § 4, art. 1.

26. *Id.* § 4, art. 2.

27. Quentin-Baxter’s Third Report, *supra* note 22, at 16.

28. *Id.* Quentin-Baxter states:

The distinctive feature of the present topic is that no deviation from the rules it prescribes will engage the responsibility of the State for wrongfulness, except ultimate failure, in case of loss or injury, to make the reparation that may then be required. In a sense, therefore, the whole of this topic, up to that final breakdown which at length engages the responsibility of the State for wrongfulness, deals with a conciliation procedure, conducted by the parties themselves or by any person or institution to whom they agree to turn for help.

*Id.*

Obligations or rights arising from sources other than the rules in the schematic outline are not affected by those rules. *E.g.*, Schematic Outline, *supra* note 6, at § 8. The rules provided in the schematic outline thus are not a substitute for specific conventional or customary international law rules that engage the responsibility of the state.

29. Barboza’s Preliminary Report, *supra* note 9, at 8.

30. For a more complete discussion of this issue, see Magraw, *supra* note 5, at 322–23.

based on the state's duty to regulate private activities and possibly on its ability to require private actors to obtain insurance or financial security.<sup>31</sup> A third crucial aspect concerns what type of activities are to be covered (assuming there is transboundary harm and that the actor is one for whose activities the state is accountable).

Based on the Commission's and Sixth Committee's responses to his Third and Fourth Reports, Quentin-Baxter concluded that he had been given the sense of those bodies to limit international liability to physical activities giving rise to physical transboundary harm. Quentin-Baxter's draft article 1—which Barboza stated “so far appears to have attracted a certain consensus”—embodies that limit:<sup>32</sup> international liability covers “activities and situations which are within the territory or control of a State, and which do or may give rise to a physical consequence affecting the use or enjoyment of areas within the territory or control of any other State.”<sup>33</sup> The important element of “physical consequence” requires that the activity or situation in question must have a physical effect, the activity or situation must have a physical quality, and the effect must flow from that quality via a “physical linkage.”<sup>34</sup> The physical-linkage criterion apparently requires that the transboundary effect occur via natural physical media, such as atmosphere, water, or earth, rather than via economic, political, international-trade, or cultural media.<sup>35</sup>

In summary, although basic questions remain unanswered, and although its scope is subject (at least as currently envisaged) to significant limitations, international liability for nonprohibited acts potentially encompasses a wide variety of activities and may affect states' behavior or result in liability in a myriad of contexts.

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31. See, e.g., *Survey of State Practice Relevant to International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law*, U.N. Doc. ST/LEG/15, at 211 (1984) (prepared by U.N. Secretariat). There may be two minor limits on state liability for private activities. See Magraw, *supra* note 5, at 323.

32. Barboza's Preliminary Report, *supra* note 9, at 7–8. See Quentin-Baxter's Fourth Report, *supra* note 8, at 9, 48. The limit described in the text is somewhat broader than that initially proposed by Quentin-Baxter (use or management of the physical environment) and is much less broad than that advocated by some Commission and Sixth Committee members (economic, regulatory, and monetary policies and activities, generally). See Magraw, *supra* note 5, at 323–24.

33. Quentin-Baxter's Fifth Report, *supra* note 7, at 1. See Schematic Outline, *supra* note 6, § 1, art. 1; Quentin-Baxter's Third Report, *supra* note 6, at 48; Draft article 2 of Quentin-Baxter's Fifth report contains a definition of the important concept of “territory or control,” but defines only a portion of the periphery of that concept. Quentin-Baxter's Fifth Report, *supra* note 7, at 1.

34. Quentin-Baxter's Fifth Report, *supra* note 7, at 12.

35. *Id.* at 12–14.

## II. SPECIAL CONSIDERATION FOR DEVELOPING STATES

At various times during their discussions of international liability, members of the Commission and the Sixth Committee have expressed the opinion that special account should be taken of the problems confronting developing states.<sup>36</sup> A notable and recent example is Special Rapporteur Barboza's statement in his Preliminary Report that he "will give careful attention to the concern repeatedly expressed in those bodies about the interests of developing countries."<sup>37</sup> With rare exceptions, those comments have not suggested the specific form such consideration should take.<sup>38</sup>

As evidenced below, the expressions of concern about developing states exemplify a tension within the Commission's and Sixth Committee's deliberations of international liability. On the one hand is the view that developing states cannot protect themselves; on the other is the view that a developing state has a duty to regulate within its territory and that the liability rules should take into account that duty and the fact that developing states do regulate in certain areas. That tension has yet to be resolved.

### A. *The "Grey Triangle"*

Before examining the doctrinal and practical bases for providing special consideration to developing states and the treatment accorded by the schematic outline to developing states, it is useful to describe an example of current international behavior that illustrates some of the implications and complexities of the issues to be discussed. The "Grey Triangle" is a set of three copper smelters located approximately fifty-five miles apart along the Mexico-United States border—two in the Mexican state of Sonora and one in Arizona. Of special concern are the smelter scheduled to begin production in early 1986 in Nacozari, Mexico (the "Nacozari Smelter")<sup>39</sup> and the smelter located immediately adjacent to the border in Douglas, Arizona

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36. See, e.g., Summary Records of the 39th Session of the Sixth Committee, U.N. Doc. A/C.6/39/SR.46, at 7 (1984) (remarks of representative of the Syrian Arab Republic).

37. Barboza's Preliminary Report, *supra* note 9, at 8.

38. One specific suggestion that may be viewed as giving special consideration to developing states is the suggestion that the state of which a multinational corporation is a national should be liable when dangerous industries are "exported" to developing states and harm results. See, e.g., Quentin-Baxter's Third Report, *supra* note 6, at 9–11. Quentin-Baxter disagreed with that suggestion and there was no apparent consensus in the Commission or the Sixth Committee supporting the suggestion, however, so it is highly unlikely that the schematic outline effectuates the suggestion. For a discussion of the issue, see *infra* text accompanying notes 74 and 99–102.

39. CONG. RESEARCH SERV., LIBRARY CONG., THE NACOZARI, MEXICO, COPPER SMELTER: AIR POLLUTION IMPACTS ON THE U.S. SOUTHWEST I (1985) [hereinafter C.R.S. NACOZARI SMELTER REPORT].



(the "Douglas Smelter"), which has operated since 1913.<sup>40</sup> The term "Grey Triangle" refers to the smelters' emission into the atmosphere of massive quantities of sulphur dioxide, which causes transboundary acid deposition<sup>41</sup> in northwestern Mexico and the western United States.

The Douglas Smelter is allowed—until 1988—to operate without pollution controls but must comply with the ambient air quality standards of the Clean Air Act within the United States.<sup>42</sup> Apparently as a result of the inapplicability of those standards in Mexico and the absence of any equivalent Mexican standards, the Douglas Smelter reportedly releases much of its pollutants at night when the wind blows toward Mexico.<sup>43</sup>

The Nacozari Smelter is owned by a Mexican joint venture, which is owned 44% by the Mexican government and 56% by private interests.<sup>44</sup> At least some of the private portion is indirectly owned by a United States corporation. The smelter was financed in part by a loan from the Japanese Export-Import Bank, a Japanese government institution.<sup>45</sup> In addition, a Japanese company was hired in 1983 to provide engineering services and to supervise the construction of the plant, as a replacement for a United States firm that had initially managed the project.<sup>46</sup> The smelter will emit even more sulfur dioxide than does the Douglas Smelter—approximately 1260 tons per day<sup>47</sup>—a large volume of which is expected to migrate to the United States.<sup>48</sup> Estimates of the amount of such pollution vary,<sup>49</sup> but it is clear that the smelter will significantly increase the amount of sulfur

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40. *A Mexican Smelter Has the Southwest All Fired Up*, BUS. WEEK, July 22, 1985, at 70 [hereinafter *All Fired Up*]. The third smelter, in Cananea, Mexico, operates without pollution controls and emits approximately 300 tons of sulfur dioxide per day. Plans have been made to triple production, though the smelter's owners have said they will not do so until pollution controls are installed. "*Triangle of Gray*" *Looms Over Border*, L.A. TIMES, Aug. 24, 1984, at 24, cols. 4-5 [hereinafter *Triangle of Gray*].

41. See *supra* note 2. For a description of the effects of acid deposition on lakes such as those in the western United States mountain region, see Schindler, Mills, Malley, Findlay, Shearer, Davies, Turner, Linsey & Cruikshank, *Long-Term Ecosystem Stress: The Effects of Years of Experimental Acidification on a Small Lake*, 228 SCIENCE 1396 (1985) [hereinafter Schindler].

42. Clean Air Act, 42 U.S.C. § 7419 (1982).

43. *Triangle of Gray*, *supra* note 40. The smelter emits, on the average, approximately 900 tons of sulfur dioxide per day, *Acid Rain Starting to Affect Environment and Politics in West*, N.Y. TIMES, Mar. 30, 1985, at 6, col. 2, i.e., one-third more than any other United States smelter, *Triangle of Gray*, *supra* note 40. Current law requires that the smelter install pollution controls and reduce emissions by 90% in 1988. *Id.* The owner, however, asserts that compliance would cost approximately \$500,000,000 and has applied for a waiver. *All Fired Up*, *supra* note 40.

44. *All Fired Up*, *supra* note 40.

45. C.R.S. NACOZARI SMELTER REPORT, *supra* note 39, at 7.

46. *Id.*

47. *Id.* at 9-10.

48. See *id.* at 10; *All Fired Up*, *supra* note 40.

49. Compare *All Fired Up*, *supra* note 40 (western sulfur dioxide pollution outside California will increase by 25%) with *Triangle of Gray*, *supra* note 40 (desert air will be three times as polluted if the Nacozari Smelter opens and the Cananea Smelter, see *supra* note 40, triples production).

dioxide pollution and the amount of acid deposition in the western mountain region of the United States, thereby causing considerable harm to that region.<sup>50</sup>

A 1983 executive agreement between Mexico and the United States (the "La Paz Agreement") provides a framework for negotiations to establish air-pollution regulatory standards in the 100 kilometers (approximately 62.5 miles) on either side of the border.<sup>51</sup> Negotiations under the La Paz Agreement resulted in an agreement, dated July 19, 1985, to control emissions from the smelters, including: (1) the Nacozari Smelter is to install pollution controls by January 1988; and (2) the Douglas Smelter is to comply with the Clean Air Act by January 2, 1988.<sup>52</sup> It is not clear that the July 19, 1985, agreement will be effectively implemented, *inter alia*, because the agreement appears not to be legally binding,<sup>53</sup> because Mexico's environmental law lacks the enforceability of the United States Clean Air Act,<sup>54</sup> and because Mexico, as a developing state, has possibly overriding priorities for developing the border area.<sup>55</sup>

*B. The Doctrinal and Practical Bases for Providing Special Consideration to Developing States.*

The doctrinal basis<sup>56</sup> for providing special consideration to developing states, and indeed a basis of the schematic outline's balance-of-interests test more generally, may be found in Principle 23 of the Stockholm Declaration of the United Nations Conference on the Human Environment:<sup>57</sup>

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50. See Schindler, *supra* note 41 (documenting harm resulting from acidification of mountain lakes in Ontario, Canada). Even after the currently required installation of pollution controls at the Douglas Smelter, the Grey Triangle is expected to account for 80% of the total sulfur dioxide output in the western United States. C.R.S. NACOZARI SMELTER REPORT, *supra* note 39, at 12.

51. Agreement Between the United States of America and the United Mexican States on Cooperation for Protection and Improvement of the Environment in the Border Area, 19 WEEKLY COMP. PRES. DOC. 1137 (Aug. 14, 1983).

52. *U.S. and Mexico Plan to Curb Pollution by Copper Smelters*, N.Y. Times, July 23, 1985, at A8, col. 1.

53. *Id.*

54. C.R.S. NACOZARI SMELTER REPORT, *supra* note 39, at 36.

55. *Triangle of Gray*, *supra* note 40, at 24, col. 1.

56. See, e.g., *Preliminary Report on International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law*, U.N. Doc. A/CN.4/334/ Add.1-2 (1980), reprinted in [1980] 2 Y.B. INT'L L. COMM'N (Pt. 1) 247, 260, U.N. Doc. A/CN.4/SER.A/1980; *Report of the International Law Commission to the General Assembly*, 36 U.N. GAOR Supp. (No. 10) at 1, U.N. Doc. A/36/10 (1981) [hereinafter 1981 Commission Report], reprinted in [1981] 2 Y.B. INT'L L. COMM'N (Pt. 2) 1, 152, U.N. Doc. A/CN.4/SER.A/1981; *Topical Summary of the Discussion Held in the Sixth Committee of the General Assembly During Its 36th Session*, U.N. Doc. A/CN.4/L.339, at 47 (1982) [hereinafter 1981 Topical Summary].

57. Stockholm Declaration, *supra* note 15, at 5.

Without prejudice to such criteria as may be agreed upon by the international community, or to standards which will have to be determined nationally, it will be essential in all cases to consider the systems of values prevailing in each country, and the extent of the applicability of standards which are valid for the most advanced countries but which may be inappropriate and of unwarranted social cost for the developing countries.

It has also been suggested that reducing damages because of the poverty of the tortfeasor may be a general principle of law, within the meaning of article 38(1)(c) of the Statute of the International Court of Justice.<sup>58</sup> Such a general principle would obviously support providing special consideration to developing states. In addition, and more broadly, special consideration for developing states is consistent with, and derives support (at least in a policy sense) from, the movement for the New Economic Order, which has affected many developments in international law over the past two decades.<sup>59</sup>

On a practical level, Commission or Sixth Committee members raised the following difficulties that particularly affect developing states: (1) a developing state may not have sufficient information to predict the potential for transboundary harm created by activities within its territory of foreign or foreign-owned entities because the developing state may not receive full information from these entities;<sup>60</sup> (2) a developing state may not have sufficient technical expertise to evaluate complex technological proposals or to monitor ongoing performance, especially where control of the day-to-day operations is effectively foreign;<sup>61</sup> (3) a developing state may lack regulatory and administrative skills necessary to effectuate pollution-control laws;<sup>62</sup> (4) a developing state's pollution-control laws may inadvertently be inadequate (e.g., because of less expertise);<sup>63</sup> and (5) the need to develop may force, or at a minimum prompt, a developing state to accept foreign (or domestic) investment that carries with it a high risk of transboundary harm.<sup>64</sup> Each of those five possibilities, for example, might

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58. Brownlie, *A Survey of Customary Rules of Environmental Protection*, 13 NAT. RES. J. 179, 188 (1973).

59. See, e.g., Quentin-Baxter's Fourth Report, *supra* note 8, at 20; cf. *Charter of Economic Rights and Duties of States*, art. 3, Dec. 12, 1974, G.A. Res. 3281 (xxix), 29 U.N. GAOR Supp. (No. 31) at 50, U.N. Doc. A/9631 (1975), reprinted in 14 I.L.M. 251 (1975).

60. Quentin-Baxter's Third Report, *supra* note 6, at 13.

61. *Report of the International Law Commission to the General Assembly*, 37 U.N. GAOR Supp. (No. 10) at 1, U.N. Doc. A/37/10 (1982), reprinted in [1982] 2 Y.B. INT'L L. COMM'N (Pt. 2) 1, 36 U.N. Doc. A/CN.4/SER.A/1982/Add.1 [hereinafter 1982 Commission Report]; Quentin-Baxter's Fourth Report, *supra* note 8, at 13.

62. 1981 Topical Summary, *supra* note 56, at 47.

63. Quentin-Baxter's Third Report, *supra* note 22, at 20.

64. See generally, *Second Report on International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law*, U.N. Doc. A/CN.4/346/ Add.1-2 (1981). In recent

influence industrial-siting decisions of heavily polluting industries (such as chemicals or paper) toward locating in a particular state.

On one level, the problems identified in the immediately preceding paragraph can be viewed as relating to developing states as potential source states: those disabilities would make it more likely that activities giving rise to transboundary harm would occur within the territory or control of a developing state. Some of those problems might also be viewed as relating to developing states as affected states if the home state of a foreign investor is required to share liability or is held solely liable for harm caused to a developing state by activities of the foreign investor or its subsidiary within that developing state.<sup>65</sup> That situation might be present in the case of the Nacozari Smelter: it might be argued that Japan, on account of its governmental loan assistance or the participation of the private Japanese construction company, and the United States, because of the involvement of a private United States indirect investor, should share liability with Mexico for pollution damage in the United States, or should be jointly liable for pollution damage in Mexico.

A problem that was mentioned as potentially relating to developing states solely in their capacity as affected states was their unusually high risk of suffering transboundary harm from ill-planned or hazardous activities of their neighbors. This risk exists partly because the neighboring states are typically developing states themselves,<sup>66</sup> and partly because the governments and people of the affected developing states are not as aware of potential harm or as able to detect, monitor, or remedy such harm.<sup>67</sup> One example provided in the Sixth Committee concerned the transnational

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years, leaders of developing countries have demonstrated increased awareness of the fact that environmental damage can have significant adverse effects on economic development. Even given that increased sensitivity to the importance of environmental protection, however, short-term political considerations might easily predominate over longer-term environmental concerns. It is also possible, of course, that increased sensitivity to the importance of the environment might lead to refining the concepts of "development" and "modernization" in ways conducive to protecting the environment. See Ramakrishna, *Interest Articulation by the Developing Countries in the International Environmental Movement*, 1984 REV. CONTEMP. L. 44, 47.

It has also been argued that environmental-protection measures, for example measures designed to curb pollution created by the use of products in developed states, may disadvantage developing states' ability to compete internationally because of a lower capacity to meet those standards. See, e.g., *id.* For an empirical study of one aspect of those arguments, see C. PEARSON, IMPLICATIONS FOR THE TRADE AND INVESTMENT OF DEVELOPING COUNTRIES OF UNITED STATES ENVIRONMENTAL CONTROLS, U.N. Doc. TD/B/C.2/150/Add. 1/Rev.1 (1976). To the extent those arguments are valid, they provide a practical basis for increased concerns about developing states.

65. See *infra* text accompanying notes 69 and 100.

66. *Topical Summary of the Discussion Held in the Sixth Committee of the General Assembly During its 37th Session*, U.N. Doc. A/CN.4/L.352, at 44 (1983).

67. *Topical Summary of the Discussion Held in the Sixth Committee of the General Assembly during its 38th Session*, U.N. Doc. A/CN.4/L.369, at 145 (1984).

“trade in chemicals, pharmaceuticals and similar products of dangerous nature, the use of which was banned in the state where they were manufactured”;<sup>68</sup> another example was the “export” of dangerous industries from developed to developing countries.<sup>69</sup> Neither of those examples would result in international liability under the schematic outline, because the requisite “physical linkage” is absent.<sup>70</sup> As is discussed below,<sup>71</sup> that result seems proper. In the context of the Grey Triangle, however, the asserted disabilities most probably would harm Mexico as an affected state vis-a-vis the United States. It is at least arguable that Mexico and Mexicans are less attuned to the dangers of sulfur dioxide pollution in the case of copper smelters such as the Douglas and Nacozari Smelters than are the United States and the United States populace, though one suspects that Mexico was quite aware of the problem. It is much more plausible that Mexico is less able to monitor and remedy the harm than is the United States.

### C. *The Schematic Outline's Treatment of Developing States.*

The schematic outline does not expressly provide preferential treatment for developing states, and none of the “principles,” “factors,” and “matters” enumerated in the schematic outline apply, by their terms, only to developing states. Nevertheless, several of those criteria may have the effect of giving (and may have been intended to give) special consideration to concerns of developing states.

The factors listed in section 6 of the schematic outline include: the importance of the activity to the source state; the physical and technical capacities of the source state, e.g., in relation to its ability to take preventative measures, make reparation, or undertake alternative activities; and the extent to which assistance is available to the source state from third states or international organizations.<sup>72</sup> In addition, section 7 provides as a matter possibly relevant to the question of compensation: “A decision as to where primary and residual liability should lie, and whether the liability of some actors should be channeled through others.”<sup>73</sup> That matter may have been intended as a means of allocating liability to a developed state in which a transnational corporation is incorporated, where a branch or subsidiary of that corporation is located in a developing state and causes

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68. *Topical Summary of the Discussion Held in the Sixth Committee of the General Assembly during its 35th Session*, U.N. Doc. A/CN.4/L.326, at 99 (1981).

69. See, e.g., Quentin-Baxter's Third Report, *supra* note 22, at 9–11; see also *supra* text accompanying note 64; *infra* text accompanying notes 100–01.

70. See *supra* text accompanying note 35.

71. See *infra* text accompanying notes 99–102.

72. Schematic Outline, *supra* note 6, § 6, arts. 6, 9, 16.

73. *Id.* § 7, art. II.1.

harm to a third state or to the developing state itself.<sup>74</sup> A factor in section 6, “[t]he extent to which the affected State shares in the benefits of the activity,” may have a similar effect if the parent corporation is located in the affected state.<sup>75</sup> The principles in section 5 support the factors and matter just described.<sup>76</sup> Moreover, section 5 allows “liberal recourse” to inferences of fact and circumstantial evidence if “an acting State has not made available to an affected State information that is more accessible to the acting State,”<sup>77</sup> which may have been intended, in part, to deal with the possibility that developing states may not have access to the information necessary to plan or regulate adequately.<sup>78</sup>

*D. Analysis of the Schematic Outline with Respect to the Treatment of Developing States.*

The asserted disabilities of developing states (described above<sup>79</sup>) have potentially profound implications for the effect of the international-liability rules to be developed by the Commission. Those implications should be examined carefully. As a first step, it would be prudent to evaluate empirically certain of the assertions to determine the extent to which they are accurate.<sup>80</sup>

Assuming that many or all of the empirical assertions regarding the developing states’ disabilities and other difficulties are accurate, the question remains whether the approach adopted in the schematic outline is desirable. Applying the principles, factors, and matters enumerated in the schematic outline to the Nacozari Smelter illustrates some of the issues involved. For example, how should the “importance” of the Nacozari Smelter to Mexico, a factor from section 6, be measured—should importance be measured in terms of gross national product (GNP), export earnings, employment potential, political stability, or some combination of these and other elements?<sup>81</sup> If the measurement should be in terms of GNP, would it be reasonable to require less reparation from Mexico for harm to the United States from the Nacozari Smelter than the United States would

74. See *supra* note 38; *infra* text accompanying notes 99–102.

75. Schematic Outline, *supra* note 6, § 6, art. 12.

76. *Id.* § 5, arts. 2–3.

77. *Id.* § 5, art. 4.

78. See *supra* text accompanying notes 24, 60 and 67.

79. See *supra* text accompanying notes 60–71.

80. I have not investigated the extent to which related empirical studies exist. Some studies have been conducted that might aid an empirical analysis, however. See, e.g., Leonard, *Confronting Industrial Pollution in Rapidly Industrializing Countries: Myths, Pitfalls, and Opportunities*, 12 *ECOLOGY L.Q.* 779 (1985); Leonard & Morell, *Emergence of Environmental Concern in Developing Countries: A Political Perspective*, 17 *STAN. J. INT’L L.* 281 (1981); C. PEARSON, *supra* note 64.

81. See Schematic Outline, *supra* note 6, § 6, art. 6.

be required to make for harm to Mexico from the Douglas Smelter, solely because the Nacozari Smelter (presumably) represents a greater percentage of Mexico's GNP than the Douglas Smelter represents of the United States' GNP? Additionally, if Mexico's lower technical capability to take preventative measures results in less required reparation<sup>82</sup>—a result that is supported by the idea that a state should not be accountable for something it cannot prevent<sup>83</sup>—would not there be an incentive to Mexico to refrain from improving its technical capabilities? Also, is it possible to formulate nonarbitrary standards capable of principled application with respect to differences in technical capabilities? Further, assuming that the term “assistance,” in the factor allowing assistance to a source state to be taken into account,<sup>84</sup> includes monetary assistance, should the loan from Japan to Mexico to finance the Nacozari Smelter affect reparations determinations, or will that serve as a disincentive to potential donors generally or to Japan in this specific instance?

Another question of particular importance is whether the determination of reparations should be affected by the wealth of the source state.<sup>85</sup> Should there be a lower standard of reparations for the Nacozari Smelter than for Canada's Trail Smelter (which was the smelter involved in the case<sup>86</sup> that most specifically supports international liability<sup>87</sup>) or for the Douglas Smelter, simply on the ground of the economic disparities between Mexico, Canada, and the United States? The most recent multilateral convention relevant to that question is the 1982 Convention on the Law of the Sea.<sup>88</sup> That convention provides numerous preferences to developing states, but none of those preferences decreases the standard of care due by a developing state with respect to the environment. Of particular interest are articles 202 and 203, dealing with “Protection and Preservation of the Marine Environment,” which provide preferences to developing states with respect to financial and technical assistance but leave intact such states' duty to protect and preserve the environment. Such an approach is

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82. *Id.* § 6, art. 9.

83. 1981 Commission Report, *supra* note 56, at 142, ¶ 172.

84. See Schematic Outline, *supra* note 6, § 6, art. II.1; *supra* text accompanying note 72.

85. See Schematic Outline, *supra* note 6, § 6, art. 9; *cf.* Continental Shelf (Tunisia v. Libya), 1982 I.C.J. 18, reprinted in 21 I.L.M. 225 (1982) (holding that national wealth differences should not be considered in delimiting the continental shelf). Article 9 of section 6 expressly refers to “physical and technical capabilities” and the “ability to make reparation,” but the relationship between those abilities and wealth is likely to be very close.

86. Trail Smelter Award (U.S. v. Can.), 3 R. Int'l Arb. Awards 1905 (1938 & 1941).

87. See *Second Report on International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law*, U.N. Doc. A/CN.4/346 & Add.1-2, at 12-15 (1981) [hereinafter *Quentin-Baxter's Second Report*].

88. Law of the Sea Convention (1982), arts. 69(4), 70(4), 148, 202, 203.

supported by the facts that global pollution has reached serious proportions, that developing states' activities have the potential to worsen significantly that condition, and that it would be extremely difficult, if not impossible, to correlate wealth-levels with standards of care in any nonarbitrary manner. The approach adopted by the Law of the Sea Conference thus embodies the view that the appropriate way to aid developing states is to help them meet their duties of care rather than to decrease those duties.

Developing states have counterargued in the context of pollution outside the realm of the Law of the Sea Convention, however, that, regardless of how serious pollution problems currently are, the developed states created those problems by their past industrial activity and the developed states alone thus should bear the financial costs of remedying the situation or of not worsening it, at least until developing states have had an equal opportunity to pollute.<sup>89</sup> That logic would lead to the conclusion that developing countries should be allowed to pollute in order to modernize, at least to the same extent that the developed states have in the past. Furthermore, it has been argued that the developed countries are the true source of environmental damage—even that occurring initially in developing countries—because developed countries consume many more resources on both an absolute and a per capita basis, or that environmental damage is the fault of the rich, wherever they are.<sup>90</sup> Finally, it may be argued, a solution of the type in the Law of the Sea Convention is unrealistic and unworkable because the amount of aid required by that approach will almost certainly not be forthcoming.

The last-mentioned argument is supported generally by the inadequacy of the financial and technical aid that has been available to developing states over the past four decades. Specific support is provided by the aftermath of the 1972 United Nations Conference on the Human Environment. Developing states reportedly participated in that conference on the understanding that their interests would be taken into account,<sup>91</sup> and the Action Plan for the Human Environment adopted at the conclusion of the conference recommended that additional development assistance be available to meet the developing states' increased environmental requirements, to compensate for significant dislocations in developing states' exports, and to subsidize research in developing states' environmental problems.<sup>92</sup> Never-

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89. See, e.g., Note, *Economic Implications of Transfrontier Pollution: National Prerogative and Attribution of Responsibility*, 11 GA. J. INT'L & COMP. L. 519, 536 (1981).

90. See R. CLARKE & J. PALMER, *THE HUMAN ENVIRONMENT: ACTION OR DISASTER* 47–51 (R. Lamb ed. UNEP 1983).

91. Ramakrishna, *supra* note 63, at 46.

92. *Action Plan for the Human Environment, Recommendations 102–09*, in *Report of the United*



theless, the amount of development assistance in the environmental area over the past fourteen years has not been sufficient to meet those goals.

Although the arguments of the developing states are not without merit, the better strategy is to follow a "unified approach" that combines a uniform standard of care with assistance and a generous transition period to accommodate the realities facing developing states. This unified approach would involve: establishing one set of international-liability standards that would be equally applicable to all states, regardless of their economic status; establishing contemporaneously a meaningful aid program—including the participation of appropriate international aid organizations—to assist developing states in meeting those standards; and allowing developing states greater leeway during the short-term to alleviate any hardship that would be caused if the new standards were to apply without a transition period. This approach would do much to internalize to states making decisions regarding internationally harmful activities the externalities (i.e., the costs or detriments experienced by other states) associated with those activities.<sup>93</sup> It would also be more politically palatable to the developed states, and thus more likely to be realized, than would an approach that allowed unbridled pollution by developing states while at the same time requiring ever stricter and more expensive controls in developed states. Furthermore, because transboundary harm such as pollution is typically accompanied by domestic harm (as even the Douglas Smelter illustrates), the unbridled-pollution approach, favored by some developing states, would tend to result in neglect by developing states of their moral duty to protect their own nationals from harm. This approach would also more likely lead to barriers to international trade, as states sought to protect their domestic industries from foreign goods whose cost advantage is based partly on the lack of pollution-control or other safety costs.<sup>94</sup> Finally, it is not clear that meaningful standards capable of principled application could be devised on the basis of wealth differentials.

With the apparent exception of the references to the means at the disposal of the source state in article 3 of section 5, and to the source state's ability to

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*Nations Conference on the Environment—Stockholm*, 5–16 June 1972, at 25–27, U.N. Doc. A/Conf.48/14/Rev.1 (1973). Recommendation 109 concludes: "It should further be ensured that the preoccupation of developed countries with their own environmental problems should not affect the flow of assistance to developing countries, and that this flow should be adequate to meet the additional environmental requirements of such countries." The United States and several other countries said that the provision regarding compensating developing states for export declines was unacceptable, unworkable, or unclear; and the United States and several other countries also expressed reservations about the above quoted portion of Recommendation 109. See 1972 U.N.Y.B. 322–23.

93. See generally F. KIRGIS JR., *PRIOR CONSULTATION IN INTERNATIONAL LAW* (1983).

94. Cf. H.R. 15–20, 99th Cong., 1st Sess. (which would impose on imported copper a tariff equal to the cost differential required of United States manufacturers by virtue of environmental regulations).

make reparation in article 9 of section 6,<sup>95</sup> the schematic outline adopts the first aspect of the unified approach by identifying criteria other than wealth that are directed at specific concerns and thus allows for distinctions to be made regarding activities within one state or between different developing states. The ability to adjust to varying circumstances embodied in the schematic outline is thus desirable, but two points should be kept in mind. First, some of the criteria presently enumerated in the schematic outline may have unfortunate side effects, as is discussed above.<sup>96</sup> Second, the schematic outline's ability to be sensitive to differing circumstances is achieved via a balancing test that is at present so amorphous as to be unpredictable and manipulable by decisionmakers.<sup>97</sup> The criteria to be applied must become more certain, and they must attract broad international support. In the long-term, at least, solutions to problems of international liability for nonprohibited acts will require the cooperation and active participation of all states, developing and developed. The rules proposed should reflect that reality.<sup>98</sup>

Quite apart from the standard of care to be applied, is the scope of the international-liability rules.<sup>99</sup> It has been suggested, presumably as a means of aiding developing states, that the state of which a multinational corporation is a national should be liable when it "exports" dangerous industries to developing states and harm results.<sup>100</sup> The schematic outline does not encompass such activities; Quentin-Baxter argued that states remain "primarily accountable" for things that happen within their own territory, that they may choose whether to allow the import of dangerous industries and that they can condition such import on the "exporting" state's retaining liability.<sup>101</sup> That position has been countered by arguments pointing to the developing state's asserted disabilities described above. The approach in the schematic outline is preferable for several reasons. First, the state where the activity occurred is in the best geographical position to regulate that activity. Second, attempts to regulate extraterritorially would

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95. Schematic Outline, *supra* note 6, § 5, art. 3; *id.* at § 6, art. 9. *See supra* text accompanying notes 72 and 84.

96. *See supra* text accompanying notes 83–85.

97. *See* Magraw, *supra* note 5, at 327.

98. *See generally* Ashford & Ayers, *Policy Issues for Consideration in Transferring Technology to Developing Countries*, 12 *ECOLOGY L.Q.* 871 (1985).

99. *See supra* text accompanying notes 29–35, 74.

100. *See, e.g.*, Quentin-Baxter's Third Report, *supra* note 22, at 9–11. The possibility discussed in the accompanying text would occasionally work to developing states' disadvantage because business entities based in developing states increasingly are investing in other states.

101. *Id.*

tend to be viewed, in the absence of an agreement permitting such regulation, as interfering with the sovereignty of the state in which the activity occurred. Third, holding the “exporting” state liable might tend to reduce the “importing” state’s vigilance and thus lessen the likelihood that the latter state will fulfill its moral obligation to protect its own nationals. Finally, holding the “exporting” state liable might easily have undesirable effects on the international flow of capital and technology.<sup>102</sup>

A final question to be addressed herein concerns the concept of “shared expectations”—also occasionally referred to as “shared values”<sup>103</sup>—which is of central importance to whether, and, if so, to what type and amount of, reparations are due if transboundary harm occurs and no conventional regime governs.<sup>104</sup> The schematic outline defines “shared expectations” as follows:<sup>105</sup>

4. In the two preceding articles, “shared expectations” include shared expectations which:

(a) have been expressed in correspondence or other exchanges between the States concerned or, in so far as there are no such expressions,

(b) can be implied from common legislative or other standards or patterns of conduct normally observed by the States concerned, or in any regional or other grouping to which they both belong, or in the international community.

The concept of “shared expectations” is of interest to the present article because of the possibility that such expectations may not exist between a developed state and a developing state in the same sense, or to the same degree, that such expectations exist between two developed states (or, possibly, two developing states). For example, at least in Quentin-Baxter’s view, the *Trail Smelter* arbitration<sup>106</sup> was successful in part because of “shared values”<sup>107</sup> or “shared expectations”<sup>108</sup> between Canada and the United States. It is not at all clear that Mexico and the United States could rely on the existence of similarly strong shared expectations or values with respect to the Grey Triangle.<sup>109</sup> Also, it is not obvious that shared expecta-

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102. For a more complete discussion of this question, see Magraw, *supra* note 5, at 325–26.

103. See Quentin-Baxter’s Second Report, *supra* note 87, at 13 (discussing the *Trail Smelter* arbitration, *supra* note 86 and accompanying text).

104. See *supra* text accompanying notes 26–27.

105. Schematic Outline, *supra* note 6, § 4, art. 4.

106. See *supra* note 86 and accompanying text.

107. Quentin-Baxter’s Second Report, *supra* note 87, at 13.

108. *Id.* at 20. See *id.* at 18 (discussing use of United States Supreme Court jurisprudence).

109. My research did not identify any discussion in Quentin-Baxter’s reports of shared expectations, or a lack thereof, between developed and developing states. There was one instance where a particular problem possibly confronting developing states was raised immediately before a sentence

tions would exist between many sets of adjoining developing states, e.g., Libya and Egypt, or the states along the west coast of Africa, many of whom have different colonial parents and thus different inherited legal traditions.

The schematic outline is not silent with respect to those possibilities, however. It provides that, in the absence of expressed bilateral shared expectations, recourse can be had to any shared expectations that can be implied from “standards or patterns of conduct” of the states concerned, of any “regional or other grouping” to which they belong, or of the international community.<sup>110</sup> If two states do not have shared expectations specific to their own relationship, therefore, a broader type of shared expectation nevertheless may be available.

The approach just described raises a set of interesting questions arising from the fact that that approach appears to parallel, and may interact with, the system of rules governing general customary international law, regional custom, the possibility of special customary law among states grouped by criteria other than geographic proximity, and the persistent objector.<sup>111</sup> It is a nice set of questions—beyond the scope of this article—precisely how these shared-expectation and customary-law doctrines interrelate, and whether the shared-expectation approach will lead to contradictions with, or modifications to, traditional customary-law concepts.

## CONCLUSION

There has been significant support in the International Law Commission and in the Sixth Committee (the law committee) of the General Assembly for protecting the interests of developing states under the evolving rules regarding international liability for nonprohibited acts. The issue of international liability is becoming increasingly important as global interdependency intensifies and as technological change poses ever greater threats of transboundary harm. The schematic outline, which is playing a germinal role in defining international liability, does not provide express benefits for

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dealing with shared expectations in a different context:

If a developing State cannot afford not to become the repository of some wealthier country's “dirty” industries, it may require international effort—perhaps monitored and organized by an appropriate international organization—to arrive at solutions that do justice to the interests of the source State and of other affected States.

Quentin-Baxter's Fourth Report, *supra* note 8, at 32. That language does not shed any light on the concept of shared expectations, however, and may be irrelevant to it.

110. Schematic Outline, *supra* note 6, § 4, art. 4 (quoted *supra* at text accompanying note 105).

111. Ted Stein discussed the persistent objector in his article *The Persistent Objector in International Law*, 26 HARV. J. INT'L L. 457 (1985).

developing states. It enumerates criteria that may have the effect, however, of reducing, vis-a-vis developed states, the amounts of reparations required of developing states in the event activities within the territory or control of those states cause transboundary harm.

The desirability of including those criteria is not self-evident. They may be justifiable as a general matter, that is, apart from any special benefits they confer on developing states. Close analysis, however, is required to evaluate the potential detrimental effects of those same criteria.

In particular, the criteria should be applied evenly on a case-by-case basis without any special consideration given to the fact that one or more of the states involved may be less wealthy than the other state(s) involved. Additionally, a meaningful aid program should be established, contemporaneously with the effectuation of the international liability rules, to provide technical and financial assistance to developing states in order to facilitate their meeting the uniform standards of care. Finally, developing states should be allowed a transition period, during which greater leeway would be afforded to those states, in order to alleviate hardship that would otherwise occur due to the imposition of the new standards.