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INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW

Comments and observations received by Governments

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COMMENTS AND OBSERVATIONS RECEIVED BY GOVERNMENTS

SWEDEN (ON BEHALF OF THE NORDIC COUNTRIES)

General comments

1. As to the general scope of the articles, it has long been the view of the Nordic countries that an international legal instrument should cover two things, namely, issues regarding the prevention of transboundary harm, and the duty to pay compensation for harm caused. These two main themes have also been of concern for the Working Group.

2. The Nordic countries have earlier emphasized in the Sixth Committee that prevention should cover not only hazardous activities, but also the adverse effects of the normal conduct of harmful activities and of accidents. Although in our comments we refrain from discussing in detail the conceptual distinction between liability and State responsibility, a few remarks seem warranted. Article 8 of the draft provides that the present articles do not apply to transboundary harm arising from a wrongful act. However, the draft is replete with State obligations, breaches of which would seem to entail State responsibility. In fact, if article 1 (b) were deleted, it seems hard to imagine any harm as defined in the text emanating from a State which fulfilled its duties according to the draft articles. Even if article 1 (b) were retained, mixed situations might arise. For example, one could imagine a case where unexpected harm occurred which entailed liability in itself. The harmful effects might increase significantly as a consequence of lack of timely notification to the affected State. The increased harm would then be the direct consequence of a breach of a duty, and would seem to incur State responsibility.

3. It is the view of the Nordic countries that the word "acts" in the title of the draft articles should be replaced by "activities", which is what the articles cover according to article 1.

Comments on specific articles

4. Article 1 (a) refers to activities which involve a risk of causing significant transboundary harm, without enumerating those activities. Some members of the Commission have proposed that a list should be drawn up. We believe that such a list may leave certain activities outside the scope of the instrument, as it is impossible to foresee which activities may involve a risk in the future. Therefore, the solution chosen by the Working Group is the better one.

5. Article 1 (b), placed within square brackets, means that the text also covers activities which have not posed a risk, but which nevertheless have caused harm, i.e., harm which could not have been foreseen and which is therefore not covered by the term "risk". If paragraph (b) were deleted, unexpected harm would not be covered and the instrument would be limited to hazardous activities only. However, even though it may seem unfair to impose liability upon States which have taken due care and which could not have

predicted the harm, it seems still more unjust to allow the loss to fall entirely upon States which had no involvement whatsoever in the activity which caused the harm. To impose liability for unexpected losses would also provide a further incentive for States and operators to take preventive and precautionary measures. For these reasons we would favour removal of the square brackets. The draft articles should also cover activities which do not involve a risk of causing significant transboundary harm, but which none the less in fact do cause such harm.

6. The Commission has specifically requested comments as to the scope of the obligations regarding harm under article 1 (b). In general, the same principles should apply as for harm arising out of activities under paragraph (a) of the article.

7. Article 2 contains the definitions. Paragraph (a) states that it is the product of the risks and the harm which is relevant. Therefore, the instrument is not limited to ultra-hazardous activities.

8. Article 2 (b) explains that the articles do not cover harm which does not occur in the territory of or in other areas under the jurisdiction or control of a State, i.e., it does not cover the high seas and Antarctica. This corresponds closely with the position of the Nordic countries.

9. Regarding article 2 (c) and (d), there may be overlaps between the three criteria of territory, jurisdiction and control. Conflicts of jurisdiction pose difficulties, and it would most probably be beyond the scope of an instrument of the present type to solve them. As for the definition of "affected State" in article 2 (d), the effect of the inclusion of the criterion of "control over" the place where harm occurred is that a State which illegally controls a territory may be eligible for compensation. This effect seems questionable.

10. Article 4, together with article 6, provides a basis for the obligations of chapter II. The provision could be strengthened by substituting "possible" for "appropriate".

11. Article 5 contains the important principle on liability. The liability is stated in very general terms: compensation or other relief. There is no definition of the term "harm" and therefore it is unclear which objects are protected - only persons and property or also the environment? In the commentary, the Working Group states that all three are covered, but that should, in the view of our delegations, be clearly stated in the text. It is also unclear what compensation should cover - costs for remedial measures only or for irreparable harm as well? Any costs or only reasonable costs? It has been the view of the Nordic countries that a minimum compensation should be given for costs incurred.

12. Furthermore, the draft articles do not state clearly who has the primary obligation to pay, the operator or the State on whose territory or under whose jurisdiction or control it operates. The absence of a civil liability regime in the draft seems to imply that it is the State that has the obligation, but that it is only residual in so far as the State in question has provided for adequate legal remedies. It is the view of our delegations that it follows from

established practice, which is reflected in a number of international agreements in various fields, that compensation is primarily incumbent upon the operator, and that the liability of the State, if any, is residual.

13. Article 6 is about cooperation between States. The article contains no explicit duty of notification in case of the occurrence of harm, even though it may be implied in the duty to cooperate in good faith. A clarification on this point would be appropriate.

14. Article 7 is about implementation. It is formulated in a very general way. There is no clear duty to make legal remedies accessible to private subjects in domestic courts. A provision should be added to the effect that States shall ensure that effective recourse is available in national courts.

15. Article 8 states that the draft articles do not prevent the application of other legal rules which entail State responsibility. The proposed instrument will be residual. This article highlights the difficulty which was pointed out in paragraph 2 above, that a clear distinction must be made between liability and State responsibility.

16. Under article 9, States are obliged to see to it that activities under article 1 (a) are not carried out without authorization; and according to article 10, authorization shall not be given without "an assessment". The commentary mentions that the duty to make environmental impact assessments, which is a more specific procedure, has been included in a number of conventions, but does not go so far as to state that the standards of the assessment shall have general application. However, the environmental impact assessment is prescribed in principle 17 of the Rio Declaration. It is now an accepted concept in international environmental law, and the United Nations Environment Programme (UNEP) has adopted guidelines on environmental impact assessments. Therefore, it would be appropriate to substitute the more specific term "environmental impact assessment" for the vaguer term "assessment".

17. According to the commentary, article 9 prescribes that States shall actively ascertain whether hazardous activities are taking place within the territory, jurisdiction or control of a State. This is an important obligation which should be clearly spelled out in the text.

18. Article 13 obligates States to notify other States if an assessment indicates a risk. It would be preferable to clarify that this information should be provided before the granting of domestic authorization according to articles 9 and 10.

19. Under article 15, there is a duty to inform the public about risks. The reservations are wide, however: "whenever possible and by such means as are appropriate". This phrase should be deleted. As the commentary suggests, the information to be provided ought to be of the same scope as that which shall be given to potentially affected States. Therefore, the wording of article 13 - "available technical and other relevant information on which the assessment is based" - should be employed also in article 15.

20. Article 16 protects information which is vital for national security and industrial secrets. The scope of this exemption seems to be too wide. Such protection is certainly important, but there should be an element of proportionality involved, particularly as concerns industrial secrets, and even more so if the origin of the harm lies in the business whose secrets are concerned. In the commentary the Working Group has argued for such a balance. It would be appropriate to let the text more clearly reflect this view.

21. Article 17 contains the duty of consultation, which to a large extent is a codification of certain basic principles of good-neighbourliness following from general international law as well as treaty law. Paragraph 3 makes it clear that a completed consultation does not free the State of origin from liability, and that if the affected State refuses to accept an activity, the State of origin still has to take the interests of the affected State into account. In this context a more comprehensive duty to settle ensuing disputes through third-party dispute settlement may be considered.

22. In the general commentary to chapter III, the Working Group states that the chapter provides two procedures - in the domestic courts of the State of origin and through negotiations. However, in the text, the former option is not stated in more than implicit terms, which can hardly be read to prescribe a duty to "provide ... substantive and procedural rights to remedies", as the commentary claims.

23. Article 20 bears the title "Non-discrimination". It is the only provision which directly refers to civil liability. It merely provides a prohibition of discrimination, which is a standard provision, and prescribes no duty for the States to ensure a right of redress, and not even a right to access to effective national forums. This should be remedied.

24. Article 21 on the "Nature and extent of compensation or other relief" is of vital importance. The State of origin and the affected State shall negotiate the compensation, taking into account the factors enumerated in article 22 "in accordance with the principle that the victim of harm should not be left to bear the entire loss". This seems to be a reversal of what should be the natural presumption, namely that it is the polluter that shall pay the entire loss, unless there are circumstances which warrant an adjustment.

25. It should also be noted that the dispute settlement obligation is very weak, which our delegations regard as a serious shortcoming. The Commission might consider studying the various mechanisms that are used in instruments of this kind. One possibility is a compulsory reference to the International Court of Justice or to arbitration.

26. In article 22 the three factors mentioned in paragraphs (a) to (c) seem, on the face of it, to undermine the concept of liability for lawful acts. The factors enumerated are normally associated with classical doctrines of State responsibility: (a) whether the State or origin has "complied with its obligations"; (b) if it has "exercised due diligence"; and (c) if it knew or should have known about the activity. If (a) or (b) is present in particular, there would seem to be a breach of an obligation. In such a situation there is a duty of reparation, which goes further than the liability envisaged in the

draft articles. Factors (d) to (j) seem reasonable, taken separately, but jointly they seem to erode the polluter-pays principle.

27. This preliminary analysis of the draft articles is intended as a constructive contribution to the further discussion in the Sixth Committee and the future work on the subject within the International Law Commission. Although the draft text is an excellent point of departure for future work, considerable work remains to be done. For the Nordic countries, it is at present an open question whether we shall aim at a convention or, for the time being, at a less ambitious, non-binding instrument.
