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Comments and observations received from Governments

Topic:

International liability for injurious consequences arising out of acts not prohibited by international law

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

[Agenda item 3]

DOCUMENT A/CN.4/481 and Add.1

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* Denmark, Finland, Iceland, Norway and Sweden.

Introduction

1. On 16 December 1996, the General Assembly adopted resolution 51/160, entitled "Report of the International Law Commission on the work of its forty-eighth session". In paragraph 6 of that resolution, the Assembly encouraged Governments that might wish to do so to provide, in writing, their comments and observations on the report of the Working Group on international liability for injurious consequences arising out of acts not prohibited by international law, annexed to the report of the Commission,[1] in order that the Commission might, in the light of the report of the Working Group and such comments and observations as might be made by Governments and those that have been made in the Sixth Committee, consider at its forty-ninth session how to proceed with its work on the topic and make early recommendations thereon.

2. In a note dated 31 December 1996, the Secretary-General invited Governments to submit their comments pursuant to paragraph 6 of General Assembly resolution 51/160.

3. As at 14 April 1997, a reply had been received from the Government of the United States of America, which is reproduced in section A of the present report. The reply from the Government of Sweden (on behalf of the Nordic countries) is reproduced in section B below.

[1] *Yearbook ... 1996*, vol. II (Part Two), annex I, pp. 100–132.

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A. United States of America

1. Introduction

4. In paragraph 6 of its resolution 51/160, entitled "Report of the International Law Commission on the work of its forty-eighth session", the General Assembly encouraged Governments who might wish to do so to provide their comments and observations, in writing, on the report of the Working Group on international liability for injurious consequences arising out of acts not prohibited by international law, in order to guide the Commission in its consideration of the topic at its forty-ninth session on how to proceed with its work.

5. The Government of the United States of America is pleased to provide the following comments and observations.

2. Overview

6. The Commission has been considering this topic since 1978. The conceptual framework for the topic has varied greatly over the course of the work. The initial approach focused on devising a scheme imposing liability for actual injury or harm, emphasizing procedural obligations of States; for example, cooperation with regard to preventative measures, notification and negotiations for reparation in the event of harm.

7. During this period, consideration of the topic appeared to be based on the theory that States should only be liable for activities not prohibited by international law that caused or threatened to cause significant physical transboundary damage. Moreover, many Commission members took the position that the activities covered should only include those widely recognized as being ultrahazardous.

8. Later approaches addressed the much broader concept of having liability flow from activities that entail a risk of significant transboundary harm.

9. The reactions of States to this topic, as reflected in the debates in the Sixth Committee, have varied widely in recent years. In 1996, the Commission formed a working group on international liability for injurious consequences arising out of acts not prohibited by international law, to review the topic in all its aspects. The Working Group presented a report containing 22 draft articles, along with a commentary thereto.[2] The Commission was not, however, able to examine the draft articles at its forty-eighth session in 1996.

10. The draft articles, presented as if to form the basis of a treaty, describe a very broad and ambitious regime. The 22 draft articles are divided into three chapters covering, respectively, "General provisions", "Prevention" and "Compensation or other relief".

11. Chapter I of the draft articles (arts. 1–8) sets forth the basic parameters of the proposed regime and some of the fundamental obligations of States. The regime applies to all activities not prohibited by international law which involve a risk of significant transboundary harm (art. 1 (*a*)). A bracketed proposal would extend the scope even further to include activities that entail no such risk but which nevertheless cause such harm (art. 1 (*b*)).

12. Draft articles 3 and 4 obligate States to prevent or minimize such risk and, where harm occurs, to minimize its effects. Draft article 5 declares that "liability arises from significant transboundary harm caused by an activity referred to in article 1 and shall give rise to compensation or other relief".

13. Chapter II of the draft articles (arts. 9–19) sets forth certain obligations of States relating to the prevention of harm. In particular, a State must ensure that covered activities do not occur on their territories without prior authorization by that State, which cannot be given before the State undertakes an assessment of the risk of significant transboundary harm posed by the proposed activity (arts. 9 and 10). Where the assessment indicates such a risk, the State must notify other States likely to be affected. Those States may require the "State of origin" to enter into consultations "with a view to achieving acceptable solutions" based on a set of factors involved in "an equitable balance of interests" (arts. 17–19).

14. Chapter III of the draft articles (arts. 20–22) outlines two distinct approaches for pursuing compensation or other relief in the event of significant transboundary harm. The first approach requires States of origin not to discriminate against persons who have suffered such harm and who seek relief within that State's judicial or administrative systems (art. 20). Draft article 20 does not, however, expressly appear to require States to allow such recourse in the first instance. The second approach requires the State of origin to enter into negotiations with other affected States, at their request, "on the nature and extent of compensation or other relief" (art. 21), based on another set of factors for negotiation (art. 22).

3. General comments

15. Although the draft articles are presented as if to form the basis of a binding instrument, the United States continues to believe that the work should be devoted to crafting non-binding guidelines or general principles. Agreements already in existence or under negotiation suggest a need for liability regimes closely tailored to the particular circumstances of the activity in question and the parties involved. The United States does not believe that it is feasible, or even necessarily desirable, to elaborate a single binding regime to cover all cases.

[2] Ibid.

16. The general commentary to the draft articles provided by the Working Group on international liability for injurious consequences arising out of acts not prohibited by international law begins with the assumption that:

> [t]he frequency with which activities permitted by international law, but having transboundary injurious consequences, are undertaken, together with scientific advances and greater appreciation of the extent of their injuries and ecological implications dictate the need for some international regulation in this area.[3]

17. The United States believes that, while this is undoubtedly true, the "international regulation in this area" ought to proceed, as it has been proceeding, in careful negotiations concerned with particular topics (for example, oil pollution, hazardous wastes and transboundary environmental impact assessments) or particular regions. Given the rapidly developing circumstances of these negotiations, the Commission will be hard-pressed to elaborate anything on this topic beyond general principles of a non-binding nature.

18. In addition, the United States reiterates its concern that the work of the Commission on this topic has steadily expanded in scope. The draft articles would obligate States to set up a permitting and environmental impact assessment process for virtually all activities, public or private, that could cause significant transboundary harm, and implies State liability for all such harm. This approach is unacceptable to the Government. In order to produce a useful document likely to command consensus, the Commission should narrow the focus in a number of respects, as discussed below.

4. Comments on chapter I (arts. 1–8)

19. As provided in article 1 (*a*), the scope of the present draft articles would apply to "[a]ctivities not prohibited by international law which involve a risk of causing significant transboundary harm". The Working Group on international liability for injurious consequences arising out of acts not prohibited by international law has specifically asked for views as to whether the scope should be extended to cover other activities not prohibited by international law which do not entail a risk of causing significant transboundary harm but nonetheless cause such harm. The Working Group also asked for views on whether draft article 1 should be supplemented by a list of activities or substances to which the articles apply or whether it should be confined, as it is now, to a general definition of activities.

20. In the view of the United States, draft article 1 (*a*) is *already* too broad and certainly should not be expanded as suggested. In the view of the United States, article 1 (*a*) should actually be narrowed to encompass only ultrahazardous or particularly hazardous activities. To impose liability (as draft article 5 does) for *all* legal activities which involve *any* risk of causing significant transboundary harm brings the scope of the topic to a virtually unmanageable level, one far beyond that currently recognized by customary international law or any existing convention.

21. To extend the regime even further, to encompass additional activities that do not entail any risk but nevertheless cause harm, is beyond contemplation.

22. If agreement is reached to limit the topic to ultrahazardous or particularly hazardous activities, as the United States proposes, it might be useful to develop a list of such activities, although any list developed should not purport to be exhaustive. New activities may occur in the future that deserve to be covered.

23. The United States would also like to raise a related concern. Draft article 1 (*a*) does not define or limit the term "activity". As such, all activities not prohibited by international law which involve a risk of causing significant transboundary harm would be covered. In theory, this could include the imposition of economic sanctions, even United Nations-mandated sanctions, or even other legitimate economic policies that States may implement. If this is not the intent, and the United States believes that it is not, then the Commission should make it clearer that the scope of the draft articles is limited to physical harm only.

24. Draft article 5 asserts that "liability arises from significant transboundary harm caused by an activity referred to in article 1 and shall give rise to compensation or other relief". The Working Group on international liability for injurious consequences arising out of acts not prohibited by international law has noted that chapter III, dealing with the modalities for seeking compensation or other relief, has been drafted in a flexible manner and does not impose "categorical obligations". The Working Group has specifically sought comments on this approach.

25. The concerns of the United States with respect to the liability provisions of the draft articles relates more to draft article 5 itself than to the provisions of chapter III. As drafted, article 5 is both ambiguous and troubling. To say that "liability arises from significant transboundary harm" is to leave open the question of precisely *who* (or what) is liable. Are States liable in every such case? Are private entities ever liable? Are States and private entities ever jointly and severally liable?

26. Given that the draft articles are presented as if to form the basis of a treaty, it might be assumed that they seek to impose obligations only on States, not on private entities. The commentary to draft article 5 does not shed useful light on this key question, instead stating that "the principle of liability is without prejudice to the question of ... the entity that is liable and must make reparation".

27. The United States does not believe that, under customary international law, States are generally liable for significant transboundary harm caused by private entities acting on their territory or subject to their jurisdiction or control. From a policy point of view, a good argument exists that the best way to minimize such harm is to place liability on the person or entity that causes such harm, rather than on the State. Indeed, as the commentary itself observes, some specific regimes already in existence, such as the Convention on Civil Liabil-

[3] Ibid., p. 103.

ity for Damage Resulting from Activities Dangerous to the Environment (Lugano, 21 June 1993),[4] take this approach; others do not. The point is that the draft articles do nothing to advance the understanding of this central point and may in fact serve merely to confuse matters.

5. Comments on chapter II (arts. 9–19)

28. Draft articles 9 and 10 together require States to prohibit the carrying out of any activity involving a risk of significant transboundary harm without prior governmental authorization, which must be preceded by an environmental risk assessment (including assessment of the risk of significant transboundary harm). These articles appear to be premised on the existence of "command and control" economies of the sort that have generally disappeared in favour of market-oriented economies, in which Governments exercise more limited regulatory control.

29. In short, few if any Governments could actually carry out the envisioned risk assessments for all covered activities that may be carried out by private actors on their territory or otherwise subject to their jurisdiction or control. A more feasible approach might be to require States only to conduct risk assessments for such activities carried out by the Governments themselves. Minimizing the risks posed by private activities could be addressed through domestic liability laws and private insurance programmes.

6. Comments on chapter III (arts. 20–22)

30. With respect to chapter III, the United States endorses the principle articulated in draft article 20 that States should not discriminate in providing access to their judicial systems for those seeking relief from significant transboundary harm, although such access in the view of the United States need not be identical to access provided to individuals with claims of harm occurring in the State of origin. While draft article 20 clearly prohibits this kind of discrimination, the United States questions why it does not appear to require a State of origin in the first instance to provide access to those seeking relief from significant transboundary harm.

31. More generally, the United States endorses the flexible approach of chapter III, which contemplates the two avenues that are generally open to those seeking compensation or other relief in such situations (access to courts in the State of origin and State-to-State negotiations). In some circumstances, it may be most appropriate for victims of significant transboundary harm to seek redress through the judicial or administrative systems of the State of origin. In other circumstances, particularly where the transboundary harm is widespread or is actually caused by an agent or instrumentality of a Government, State-to-State negotiations may be the best approach.

[4] Council of Europe, *European Treaty Series*, No. 150.

B. Sweden (on behalf of the Nordic countries)

1. General comments

32. As to the general scope of the draft articles, it has long been the view of the Governments 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 on international liability for injurious consequences arising out of acts not prohibited by international law.

33. The Nordic countries had 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 the comments they refrained from discussing in detail the conceptual distinction between liability and State responsibility, a few remarks seem warranted. Draft article 8 provides that the 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 draft article 1 (*b*) were deleted, it would seem 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, a case could be imagined 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.

34. 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.

2. Comments on specific articles

35. Draft 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. The Nordic countries 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 on international liability for injurious consequences arising out of acts not prohibited by international law is the better one.

36. Draft 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 article 1 (*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 the Nordic countries 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 nonetheless in fact do cause such harm.

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

38. Draft article 2 contains the definitions. Article 2 (*a*) states that it is the product of the risks and the harm which is relevant. Therefore, the instrument is not limited to ultrahazardous activities.

39. Draft 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.

40. Regarding draft 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.

41. Draft article 4, together with draft article 6, provide a basis for the obligations of chapter II. The provision could be strengthened by substituting "possible" for "appropriate", in draft article 4.

42. Draft 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 on international liability for injurious consequences arising out of acts not prohibited by international law states that all three are covered, but that should, in the view of the Nordic countries, 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.

43. 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 insofar as the State in question has provided for adequate legal remedies. It is the view of the Nordic countries 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.

44. Draft 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.

45. Draft 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.

46. Draft 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 33 above, that a clear distinction must be made between liability and State responsibility.

47. Under draft 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 on Environment and Development.[5] It is now an accepted concept in international environmental law, and 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".

48. According to the commentary, draft 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.

49. Draft 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 draft articles 9 and 10.

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[5] *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992* (A/CONF.151/26/Rev.1 (Vol. I, Vol. I/Corr.1, Vol. II, Vol. III and Vol. III/Corr.1)) (United Nations publication, Sales No. E.93.I.8 and corrigenda), vol. I: *Resolutions adopted by the Conference*, resolution 1, annex 1.

50. 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 draft article 13—"available technical and other relevant information on which the assessment is based"—should also be employed in draft article 15.

51. Draft 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 on international liability for injurious consequences arising out of acts not prohibited by international law has argued for such a balance. It would be appropriate to let the text more clearly reflect this view.

52. Draft 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.

53. In the general commentary to chapter III, the Working Group on international liability for injurious consequences arising out of acts not prohibited by international law 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",[6] as the commentary claims.

54. Draft 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.

55. Draft 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 draft 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.

56. It should also be noted that the dispute settlement obligation is very weak, which the Nordic countries 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 ICJ or to arbitration.

57. In draft article 22 the three factors mentioned in its paragraphs (*a*)–(*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 of 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.

58. This preliminary analysis of the draft articles is intended as a constructive contribution to further discussion in the Sixth Committee and the future work on the subject within the 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 to aim at a convention or, for the time being, at a less ambitious, non-binding instrument.

[6] *Yearbook ... 1996*, vol. II (Part Two), annex I, p. 129.