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Consideration of prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm

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Report of the Secretary-General

Summary

The present report, prepared pursuant to General Assembly resolution 74/189, contains comments and observations of Governments on the consideration of prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm.

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I. Introduction

1. The present report has been prepared pursuant to paragraph 3 of General Assembly resolution 74/189, in which the Assembly invited Governments to submit further comments on any future action, in particular on the form of the articles on prevention of transboundary harm from hazardous activities[1] and the principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities,[2] bearing in mind the recommendations made by the International Law Commission in that regard, including in relation to the elaboration of a convention on the basis of the articles,[3] as well as on any practice in relation to the application of the articles and principles.

2. The Secretary-General, in a circular note dated 8 January 2020, drew the attention of Governments to resolution 74/189, and a reminder was sent out on 13 January 2022. Submissions were received from Argentina, El Salvador, Madagascar, Qatar, Türkiye and the United Kingdom of Great Britain and Northern Ireland. The present report should be read together with the previous reports of the Secretary-General on this item (A/65/184, A/65/184/Add.1, A/68/170, A/71/136, A/71/136/Add.1, A/74/131 and A/74/131/Add.1).

II. Comments and observations received from Governments

Argentina

3. Argentina recalled that it relied on the articles to support its position in the rejoinder for the case relating to *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* before the International Court of Justice. In particular, Argentina stated that it relied on the articles to support its position on the principle relative to the realization of an environmental impact assessment and the economic and social consequences that would result from the pollution of the River Uruguay. Argentina noted that such arguments were considered by the Court when issuing its judgment on 20 April 2010.

El Salvador[4]

4. El Salvador recognized that the principles and articles contained in resolutions 61/36 and 62/68, respectively, were consistent with the need to protect the environment, on the one hand, by emphasizing the preventive component of the commitment of States to curb environmental impacts in their territories and to avoid causing damage to persons, property or the environment in the territory or in other places under the jurisdiction or control of a State other than the State of origin and, on the other hand, by reaffirming obligations that covered a subsequent stage once the damage had occurred, such as the obligation to guarantee prompt and adequate compensation for victims.

5. With regard to the draft articles, El Salvador noted that the prevention of transboundary harm had been a key obligation in the progressive development and codification of international environmental law, being enshrined in principle 21 of the Declaration of the United Nations Conference on the Human Environment

[1] General Assembly resolution 62/68, annex.
[2] General Assembly resolution 61/36, annex.
[3] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* and corrigendum (A/56/10 and A/56/10/Corr.1), para. 94.
[4] For previous comments, see A/68/170, paras. 10–14; A/71/136, paras. 5–7; and A/74/131, paras. 4–12.

(Stockholm, 1972) and principle 2 of the Rio Declaration on Environment and Development (1992). El Salvador stated that those Declarations established the sovereign right of States to exploit their own resources pursuant to their own environmental and development policies. However, in El Salvador's view, those Declarations also imposed a responsibility to ensure that activities within States' jurisdiction or control did not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

6. El Salvador noted that the above-mentioned principles, as well as others on the subject that were equally relevant, were rightly recognized in the articles on prevention of transboundary harm. It was noted that this was of great interest to El Salvador since it was in line with the goal of protecting and safeguarding the environment, its ecosystems, resources, goods and population, and also with the duty of restitution in the event of harm.

7. Moreover, it was stated that the codification of the articles on prevention of transboundary harm was supported by the fact that the provisions thereof were reflected in the relevant national regulations and procedures of Member States, such as article 42 of the Environment Act of the Republic of El Salvador (Legislative Decree No. 233, as amended), under which the duty to prevent and control pollution was set out in the following terms: "All natural or legal persons, the State and its decentralized entities are required to avoid actions that damage the environment and to prevent, control, monitor and report to the competent authorities any pollution that may harm health, the quality of life of the population and ecosystems, especially activities that pollute the atmosphere, water, soil and the coastal marine environment".

8. El Salvador deemed that, in view of the above, the possible future implementation of the draft articles was sufficiently well supported by the legislative, regulatory and administrative practice of States to ensure that it could be achieved.

9. El Salvador made specific observations in relation to the text of the draft articles, noting that in preambular paragraph 3, language could be added to emphasize that the freedom of States to carry on or permit activities in their territory or otherwise under their jurisdiction and control was not unlimited, especially if such activities posed serious risks to the States concerned.

10. It was also noted that the term "significant" transboundary harm, contained in the draft articles, did not provide certainty as to its content and scope, and might exclude from regulation harm caused by chemical, biological or radiological hazards, which might arise as a form of transboundary harm. El Salvador noted the need to prevent, avoid and reduce this type of harm before it occurred, and therefore considered it appropriate to suggest that the aspect of prevention was developed in the draft principles (principle 3) as one of the guiding purposes thereof.

11. With regard to measures to prevent or minimize risk, while noting that the draft articles already provided that States should take all necessary legislative, administrative or other action to implement the provisions of the said articles or that the States concerned might agree upon others by mutual consent, El Salvador considered it important that a guide to possible measures that may be taken by States to minimize the risk of harm also be developed as part of the draft articles.

12. As for the draft principles, El Salvador stated that the material content included a series of international obligations that might influence the legislative, regulatory and administrative practice of States and that, if incorporated into a convention, might give rise to binding legal effects that were potentially applicable to the international community, given the type of guarantees that they safeguarded.

13. In conclusion, El Salvador expressed the view that the draft articles and draft principles had the elements necessary to establish an international environmental instrument with a broad approach to the scope of the responsibility that might arise from the action or omission of a State regarding the protection of its environment, ecosystems and transboundary natural resources. El Salvador therefore considered that the above-mentioned texts could serve as a basis for the negotiation of a legally binding instrument that would cover both aspects, namely, a comprehensive response to environmental emergencies and prompt and adequate compensation in the event of harm, and efforts to prevent and reduce transboundary pollution.

Madagascar

14. Madagascar was of the view that to ensure the full respect by States of the principles and articles contained in resolutions 61/36 and 62/68, respectively, it would be recommendable that the said articles and principles would be grouped together in a single international convention so that they would be binding. Madagascar stressed that it would be up to the States concerned to define and specify the content of such a convention in bilateral and/or multilateral agreements, or even in their national legislation. Madagascar suggested that a single article must be devoted to the definition of the terms that would be used therein, listed in alphabetical order.

15. It was noted by Madagascar that the prevention of transboundary damage resulting from hazardous activities, and the distribution of losses resulting from such damage, must also be considered in the light of the principles contained in the Rio Declaration on Environment and Development, and of other considerations that emphasized the close relationship between the environment and development issues. It was also noted that particular attention must be given to the situations and needs of developing countries, countries that are more environmentally vulnerable and countries that were victims of the activities of companies in developed countries. In the view of Madagascar, the international community must do everything possible to help them.

16. With regard to the nature of dangerous activities not prohibited by international law, Madagascar expressed the view that criteria must be established in such a way as to facilitate the determination of the activities that fell within the scope of the articles and principles. Likewise, Madagascar deemed that the degree of damage likely to be caused must also be determined, and suggested that the definition of the term “significant damage” be more precise.

17. Finally, with regard to the text of the draft principles, Madagascar stated that principle 6 on international and domestic remedies was vague as to which international bodies would be competent to rule on compensation. It was also stated that the principle according to which international jurisdiction could only be seized after exhaustion of local remedies must be respected.

Qatar[5]

18. Qatar stated that it supported the early adoption of an international convention on the basis of the draft articles on prevention and the draft principles on the allocation of loss, as it considered that they were essential to promoting and securing environmental safety and sustainability at the national and international level.

[5] For previous comments, see A/68/170, paras. 28–29; and A/74/131, paras. 25–26.

Türkiye[6]

19. With regard to the draft articles, Türkiye conveyed its observation that, overall, the draft articles appeared to resemble the provisions of the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention) and the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, to which Türkiye was not a party.

20. Specific observations were made in relation to the text of the draft articles. In respect of article 1, Türkiye noted that the scope of the articles was too broad and ambiguous. Türkiye was of the view that multilateral international cooperation mechanisms which had more limited and particular scope based on concrete criteria (such as the type of activity, nature of the harm or geographical area of applicability) should be preferred. Türkiye noted that it was already party to such agreements, that were of a more limited and focused nature, such as the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, dated 22 March 1989, the Protocol on the Prevention of Pollution of the Mediterranean Sea by Transboundary Movements of Hazardous Wastes and their Disposal, dated 1 October 1996, and the Convention on Long-range Transboundary Air Pollution, dated 13 November 1979.

21. As for article 2, specifically subparagraph (a) of paragraph 1, Türkiye was of the view that the terms “risk” and “harm”, “probability”, as well as the term “significant”, represented subjective criteria and would give rise to differences in interpretation. It was noted that other States had also expressed similar views regarding those terms. Türkiye highlighted that even though the commentaries to the draft articles contained some clarification in this regard, it was also acknowledged therein that the evaluation as to the scope of “the risk of causing significant transboundary harm” would need to be made in view of each specific case. Türkiye was of the view that, considering the foregoing, the subparagraph should be drafted more clearly and in a more detailed way so as to facilitate a proper legal determination rather than a conceptual one.

22. Türkiye also noted that article 6 envisaged an authorization requirement for any activity within the scope of the concerned articles carried out in the territory of a State, or otherwise under its jurisdiction or control, including all pre-existing activities. Türkiye expressed the view that the retrospective application of such an authorization requirement to activities that had already been completed or that had been initiated before the concerned requirement was legally established, could jeopardize legal predictability and stability and violate the principles of non-retroactivity and acquired rights.

23. Türkiye also made specific observations in relation to the text of the principles, highlighting that since such principles applied to hazardous activities that were not prohibited by international law, it considered that the term “all necessary measures” in paragraph 1 of principle 4 should be replaced with the term “all available/feasible measures”.

24. With regard to paragraph 2 of principle 4, Türkiye considered that the attribution of strict liability to operators or third persons/entities could be made subject to an additional criterion requiring that “the concerned operation/business be of a nature that can cause significant harm even where appropriate care and diligence, as may be reasonably expected, is exercised”. It was noted that it is not uncommon for such a higher threshold to accompany strict liability provisions in national legislation,

[6] For previous comments, see A/74/131/Add.1, para. 3.

including the Turkish Code of Obligations. Türkiye also expressed the view that it might be appropriate if the liability without fault, to be imposed on operators or other persons/entities due to transboundary harm from hazardous activities, were made subject to a statute of limitations.

United Kingdom of Great Britain and Northern Ireland

25. The United Kingdom recalled that, in resolutions 61/36 and 62/68, the General Assembly had noted that the questions of prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm were of major importance in the relations of States. The United Kingdom stated that it believed that this continued to be the case.

26. With regard to the articles, the United Kingdom recalled that the International Law Commission recommended the elaboration of a convention on the basis thereof. In considering this recommendation, the United Kingdom noted that it was party to a number of sectoral and regional instruments governing issues of harm resulting from hazardous activities. The United Kingdom also noted that it considered that there was an advantage in relying on these subject-specific instruments. It was highlighted that the United Kingdom did not see a strong case for a convention on the basis of the draft articles. However, it noted that its position would be kept under review given the importance of the topic.