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Chairperson: Ms. Picco . . . . . (Monaco)

Contents

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The meeting was called to order at 10 a.m.

Agenda item 81: Consideration of prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm (A/65/184 and Add.1)

1. **Ms. Ryan** (New Zealand), speaking on behalf of the CANZ group of countries (Australia, Canada and New Zealand), said that the potential for transboundary impacts of hazardous activities was ever present and moreover likely to grow in today's world of limited resources and pressure to develop further resources in increasingly challenging circumstances. Indeed, the current gravity of the risk merely reinforced the need for a coherent and widely supported set of general standards of conduct and practice for the prevention of transboundary harm from hazardous activities and the allocation of loss in the event of its occurrence.

2. The adoption of the draft articles on prevention of transboundary harm from hazardous activities and the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, annexed to General Assembly resolutions 62/68 and 61/36, respectively, had attested to their status as authoritative guidance for the conduct of all States in those situations. Their stature and influence in international law could therefore only continue to mount as they were invoked not only in that context, including during the negotiation of relevant bilateral agreements or sector-specific multilateral agreements at the regional or global levels, but also by domestic and international courts and tribunals.

3. The draft articles and draft principles were more potentially valuable in their current form than as a binding convention that either lacked broad and unified support or failed to secure widespread ratification or accession owing to inertia or attention to other priorities. As they stood, they in fact offered a major contribution to the achievement of a consistent, coherent and fair international regime on the topic.

4. **Mr. Rodiles Bretón** (Mexico) said that his delegation had submitted written comments, which were reflected in document A/65/184, on the draft articles on prevention of transboundary harm. Two main issues should be addressed concerning the definitive form and nature of the General Assembly's work on the topic. First, the Assembly should continue to consider the possibility of elaborating a binding convention on the basis of the draft articles prepared by the International Law Commission. In that connection, he noted with interest the idea suggested by Portugal in its written comments that an important first step would be to achieve a whole set of draft articles or principles on both prevention and allocation of loss.

5. The second main issue was that, if the General Assembly decided to undertake negotiations on a convention, both the articles on prevention and the principles on the allocation of loss should be codified in a single legal instrument, in order to avoid a differentiation between the final form of the work on the two aspects.

6. The General Assembly had taken significant steps to confirm the status of the two drafts as authoritative guidance on the conduct of all States in relation to prevention of transboundary harm and allocation of loss. Moreover, as New Zealand had pointed out in its written comments (A/65/184), the draft principles and articles had already been drawn on by courts and tribunals at both the domestic and the international levels.

7. **Mr. Gouider** (Libyan Arab Jamahiriya) said that transboundary harm arising out of lawful activities in areas under State sovereignty or jurisdiction was a matter of vital importance for countries of the Mediterranean basin such as his own, located as they were in an area so vulnerable to damage compounded by the greenhouse effect and the constant exploitation of natural resources. His country's efforts to counter that situation had included not only its accession to relevant international and regional conventions but also its calls for a fair and comprehensive international regime requiring the prevention of harm by all and ascribing clear responsibility in the event of failure to do so. Over the years, State obligations with respect to such activities as transboundary transport had evolved on the basis of the international instruments affirming that requirement, State practice and relevant case law. Serious transboundary harm nevertheless continued to lack any comprehensive international regulation; assignment of responsibility for environmental damage was still only recent, and the focus remained on compensation of the costs entailed in restoring the status quo ante. As to cases where such restoration was impossible, silence was largely the norm.

8. Through its work on the draft articles and draft principles, the International Law Commission had laid

important groundwork for the establishment of a consistent, coherent and fair international regime; indeed, such august bodies as the International Court of Justice had drawn on those articles in making various rulings. Against that background and also taking into account the provisions of, among others, the Convention on International Liability for Damage Caused by Space Objects, it would be an easy matter to address the subject of transboundary harm by way of a binding international convention. As reflected in the Secretary-General's report on the topic (A/65/184), however, the issue was still regrettably mired in controversies centred primarily on the question of international responsibility. Paradoxically, firmly rooted as it was in customary law, that question was universally accepted as fundamentally relating to unlawful acts, whereas responsibility for transboundary harm concerned exceptional acts that were in themselves lawful. His delegation therefore reiterated its call for more tangible efforts to draft a convention on the responsibility of States for internationally unlawful acts, a major topic that would inevitably crop up during any attempt at progress on other topics still being explored.

9. **Ms. Silkina** (Russian Federation) said that the International Law Commission had contributed to the progressive development of law with many innovative draft articles on the prevention of transboundary harm from hazardous activities; those articles were logically supplemented by the draft principles on the allocation of loss arising in the case of such harm, which addressed the prompt and adequate compensation of the victims, response measures and the development of specific international regimes for handling particular categories of hazardous activities, among other important issues.

10. While noting the value of the draft articles and principles, notwithstanding pre-existing regulatory practices for resolving liability issues in that area and the lack of agreement among a majority of States with regard to the fate of those documents, her delegation considered it premature to discuss the drafting of a binding international convention. It was more fitting to adopt the draft articles and principles in the form of a General Assembly declaration or in another non-binding form. Future measures on the issue could be considered at one of the upcoming sessions in the light of decisions taken with respect to the draft articles on the responsibility of States for internationally wrongful acts and on diplomatic protection.

11. **Ms. Farhani** (Malaysia) expressed support in principle for the international efforts to strengthen the regulatory regime on prevention of transboundary harm from hazardous activities. Her delegation nonetheless shared the cautionary view of others that the draft articles and draft principles should remain in their current form pending further study of developments in State practice. The former were already used as an important reference for international legal practice and the latter had been incorporated into the environmental liability laws of some States, indicating that progressive acceptance of clear and practical rules would be more easily achieved if their current non-binding form was retained. A comprehensive analytical study of State responses, issues and concerns should be conducted, however, before giving consideration to any further action on that score.

12. Concerns already expressed by her delegation remained. First, in draft articles 1 to 3, the scope of the relevance threshold of "significant" required further clarification and more precise definition. An understanding of the threshold being adopted in State practice would assist in that endeavour. The breadth of the wording in draft article 2 (Use of terms) also required further examination. As to draft article 9, the innovative approach was welcome, but it was unclear how far States would comply with the proposed mandatory requirement for consultation on preventive measures, much less the exhortation contained in paragraph 3. It would therefore be interesting to know how other States expected that requirement to be implemented.

13. In accordance with the principle of permanent sovereignty of States over natural resources within their territory or otherwise under their jurisdiction or control, States had the freedom to exploit those resources as they saw fit. Such freedom was not unlimited, however; due consideration must be given to any transboundary harm that it might cause, in particular to delicate and irreplaceable ecosystems and the livelihoods they supported.

14. **Mr. Serpa Soares** (Portugal) said that the General Assembly's adoption of the draft articles and draft principles had been a positive step towards minimizing transboundary harm from hazardous activities and making provision for prompt and adequate compensation for any ensuing loss. The topic should be analysed in the light of its history and with a view to the codification and progressive development

of international law in a harmonious and coherent manner. In that context, it was important to keep in mind that the prevention of transboundary harm and the international liability in the case of loss from such harm fell under one main topic, namely international liability for injurious consequences arising out of acts not prohibited by international law. Prevention and loss should therefore be addressed on equal legal terms, with equal enforceability.

15. His delegation looked forward to the development of a single convention on that main topic with a view to adequately establishing State responsibility for transboundary harm from hazardous activities and an effective system of compensation for loss arising out of the lawful activities of States. In the interim, a comprehensive and coherent set of draft articles or even draft principles addressing prevention and allocation of loss would already be an achievement. To that end, a working group should be established to study new developments of relevance to the draft and to harmonize the two aspects of the current topic into a single instrument for future adoption by the General Assembly.

16. **Mr. Phan** Duy Hao (Viet Nam) said that the draft articles on prevention of transboundary harm from hazardous activities represented a significant step forward in the development of international law on the topic, as did the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities. With reference to the latter, his country endorsed the purposes set forth in principle 3 and welcomed the inclusion of the precautionary principle and the "polluter-pays" principle, as well as the approach adopted in principle 4, paragraph 1, concerning the need for State measures to ensure prompt and adequate compensation for victims. It also supported the development, where necessary, of regional and bilateral arrangements in the interest of establishing effective and feasible mechanisms to address the consequences of hazardous activities.

17. With respect to the draft articles, his delegation welcomed the clear emphasis placed therein on the obligation of States to strengthen cooperation, seek assistance from international organizations, facilitate information exchange and undertake consultations with a view to the prevention of significant transboundary harm from hazardous activities. In that vein, it supported the establishment of a mechanism for assisting developing countries to prevent and deal with the consequences of such activities.

18. It also agreed with the Commission's suggestion that the draft articles should be codified as a treaty. As befitted its importance in inter-State relations, the issue of transboundary harm from hazardous activities should be addressed within a strong legal framework. Time was needed to complete the binding instruments essential to the effective implementation of measures to prevent and cope with such harm, a long-term process demanding further examination and clarification of the matters surrounding the topic. The remaining differences on some of those matters were no reason to prevent delegations from working together to identify possible solutions; on the contrary, it was those differences that emphasized the imperative for joint efforts in the interest of preserving and protecting the environment in the event of transboundary damage.

19. **Mr. Johnson** (United States of America) said that the draft articles and draft principles marked a positive step towards encouraging States to address such issues as notification in specific national and international contexts and to provide prompt and adequate compensation for victims of transboundary harm. The draft principles incorporated progressive notions with respect to the responsibility of operators, the desirability of backup financial security measures and the importance of prompt response measures, in addition to including broad concepts of compensable harm. They also laid emphasis on the need for national, bilateral, regional and sectoral arrangements for implementation of the draft principles. To that end, his delegation called for national action and State-to-State agreements in specific contexts.

20. The draft articles and draft principles would be more likely to gain widespread acceptance and fulfil their intended purpose if retained in their current form. Clearly innovative and aspirational in character, they were each designed to serve as resources for encouraging national and international action in specific contexts, rather than to form the basis of a global treaty.

21. **Ms. Leal Perdomo** (Bolivarian Republic of Venezuela) said that her delegation, basing itself on the principle of the freedom of States to carry on or permit activities in their territory or otherwise under their jurisdiction or control, attached special importance to the Commission's work on prevention of transboundary harm and allocation of loss. Her delegation therefore endorsed the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, which marked a significant step

forward in the implementation of principles 13 and 16 of the Rio Declaration on Environment and Development.

22. Before a decision was taken on whether or not to adopt a binding convention on the prevention of transboundary harm, it would be necessary to examine the application of the draft articles in the light of bilateral and multilateral inter-State relations. As for the draft principles, official information on State practice and on the application of the principles both domestically and internationally, should be compiled with a view to the adoption of appropriate measures concerning the ultimate form they would take.

23. **Mr. Riyan** (India) said that the draft articles were a useful addition to the existing customary law reflected in cases dealing with transboundary harm and damage arising out of hazardous activities. Moreover, the general manner in which they dealt with the issue offered the flexibility for States to fashion specific liability regimes for particular activity sectors under their jurisdiction.

24. As to the draft principles, his delegation agreed with their purpose but had concerns about an expanded definition of "damage" that included loss of life or personal injury, loss of or damage to property, loss or damage by impairment of the environment, costs of reasonable measures of reinstatement of property and costs of reasonable response measures. The principles should be complementary in nature and not prejudice the regime of State responsibility under international law.

25. His delegation also supported the fundamental premise underlying the topic, namely that primary liability lay with the operator in all situations involving harm arising out of hazardous activities. The operator should additionally be mandated to establish and maintain sufficient financial security and insurance coverage to enable payment of compensation for harm caused to innocent victims. Supplementary funding could also be provided with the participation of industry and other stakeholders.

26. Concerning response measures, while the obligations of notification and consultation to mitigate the effects of transboundary harm were recognized in various international instruments governing hazardous activities, the competent authorities of a State had the power under domestic laws to require response measures from the operator for the purpose of mitigating or eliminating those effects. Any residual response measures by the State should be supplementary to the operator's liability in accordance with the State's capacity to undertake such measures.

27. The draft articles and draft principles each served as a useful guide to States in their adoption of legislative, regulatory and administrative measures incorporating relevant principles in their domestic laws and policies. Any attempt to codify the draft articles in the form of a convention, however, would prove counter-productive and add no value to the progressive development of international law already achieved on the topic. Indeed, State practice indicated a preference for sectoral environmental treaties with inbuilt liability regimes.

28. **Mr. Wilson** (United Kingdom) said that his country's position concerning the form of the draft articles remained unchanged; there was no need for a convention on the prevention of transboundary harm or the allocation of loss. Both subjects were already covered by a number of binding sectoral and regional instruments, one example of which was the European Union Directive on environmental liability with regard to the prevention and remedying of environmental damage. Furthermore, parties to the Convention on Environmental Impact Assessment in a Transboundary Context, which included his country, were obliged to assess the impact of certain activities and to notify and consult other States if there was a likelihood of significant adverse transboundary environmental impact. Liability for nuclear incidents was also governed by an extensive regime, namely the Paris Convention on Nuclear Third Party Liability and the so-called Brussels Supplementary Convention.

29. The benefit of adopting a convention that assumed a "one-size-fits-all" approach to all categories of transboundary harm was questionable, whereas subject-specific initiatives tailored to address different activities and potential harms had an obvious advantage. The draft articles and draft principles should therefore remain as non-binding guidance.

30. **Ms. Guo** Xiaomei (China) said that the draft articles and draft principles would each have a positive impact on how States dealt with issues relating to transboundary harm. Concerning the definition of "State of origin", however, the approach of using "the territory or otherwise under the practical jurisdiction or control …" as the sole criterion for identifying the State of origin was out of step with the needs of practice. On that score, important parameters to be

taken into account included the State of nationality of the operator, the host State of the major part of the operator's business and the host State of the entity that commanded or controlled operations. A further suggestion was to include in the draft articles provisions of exception to or exemption from the obligation of prevention, such as in force majeure situations in the event of a natural disaster.

31. As to the final form to be taken by the draft articles and the draft principles, a consistent approach was advisable in view of the close linkage between the two. Given that both contained elements that required testing and further refinement by State practices, efforts should continue to focus on developments in that area. The possibility of formulating international conventions on the basis of the two drafts could be revisited in future when conditions were ripe.

32. **Ms. Köhler** (Austria) said that, as stated in the report of the Secretary-General (A/65/184), her country's view was that existing State practice should be taken into account in considering the ultimate form of the draft articles. Assessment of the draft articles would be improved by taking into account reports on State practice, which, together with the draft articles themselves, could serve as a basis for working group discussions on the possibility of a convention.

33. In the case of the draft principles, their current form precluded a similar approach. It would therefore be preferable to postpone a decision as to their ultimate form in favour of continuing to monitor developments in State practice. The topic should again be placed on the agenda of the Sixth Committee in six years' time with a view to assessing the need for action concerning the final form of the draft principles.

The meeting rose at 11.05 a.m.