Agenda Item 162: Report of the International Law Commission on the work of its fifty third session- International Liability for Injurious Consequences Arising out of Acts not prohibited by International Law

Statement by Mr. Narinder Singh, First Secretary on November 5, 2001

Mr. Chairman,

We thank the Chairman of the International Law Commission, Mr. Peter Kabatsi, for his lucid introduction of Chapter V of the ILC Report concerning International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law (Prevention of Transboundary Damage from Hazardous Activities) and congratulate the ILC for having completed the second reading of the Draft Articles on Prevention of Transboundary Damage. Dr. P.S. Rao deserves special appreciation for his contribution as a Special Rapporteur and for submitting reports of high quality and for making every effort to accommodate views and comments of all countries. The ILCs effort to integrate the needs of development with priorities for environmental protection are particularly praiseworthy. In this connection, we would also like to place on record our appreciation of the work done by Professor Quentin Quentin-Baxter and Mr. Julio Barboza as Special Rapporteurs on this topic.

Article 1 states that the present articles apply to activities not prohibited by international law which involve a risk of causing significant transboundary harm through physical consequences. It may be recalled that this delimitation of the topic became necessary to distinguish it from obligations of States for consequences arising from internationally wrongful acts, which is the subject of State responsibility. It was argued that the topic of prevention was essentially concerned with management of risk and is, therefore, unrelated to categorization of activities not prohibited by international law. On the other hand, the view was taken that any deletion of the phrase might necessitate a review of the entire text of the draft Articles. This might even broaden the scope requiring fresh approval by States in the Sixth Committee. It was pointed out that the retention of the phrase was essential to indicate the link between the sub-topics of prevention and liability.

Even though the Special Rapporteur recommended for practical reasons to delete the phrase "activities not prohibited by international law", neither the members of the Commission nor States who examined the matter later in the Sixth Committee in the year 2000 could come to any conclusion as opinions were divided. My delegation expresses its happiness at the retention of the phrase which is essential to indicate that further work remains to be done on the subject of liability following the adoption of the articles on prevention. However, we have an open mind as to the timing and scope of the study to be undertaken.

Article 3 is the central Article dealing with the concept of prevention which is essentially an obligation of due diligence. The standard of due diligence against which the conduct of State of origin should be examined is that which is generally considered to be appropriate and proportional to the degree of risk of trans-boundary harm in any particular instance. It involves a duty on the part of the State to inform itself of factual and legal components that relate foreseeably to a contemplated procedure and to take appropriate measures in timely fashion to address them. In this connection it may be noted that the economic level of a State is

one of the factors to be taken into account in determining whether a State has complied with its obligation of due diligence. However a State's economic level cannot be used to release the State from its obligations under the present articles. In other words, even in the case of developing countries, a necessary degree of vigilance and monitoring of hazardous activities in its territory is expected. The operator of the activity is expected to bear the cost of prevention to the extent he is responsible for the operation.

Articles 6 to 11 provide for the obligation of the State of origin, in the first instance, to require that any hazardous activity be conducted only with its prior authorization, which should be based on an assessment of the risk involved. Where the risk involved is likely to cause significant trans-boundary harm, the State of origin is required to provide notification and information to the States likely to be affected. Articles 9 to 11 provide for engagement between the State of origin and the States likely to be affected. Such an engagement could result in setting out the conditions under which the activities could be authorized. It could also provide for joint management of the risk and the project itself. Article 13 provides an important obligation to inform the public which may be exposed to risk involved with a view to ascertaining their views. This obligation extends not only in respect of the population of the State of origin but also to people of other States likely to be affected. Article 15 provides for non-discrimination and protection or other appropriate redressal to all persons, without regard to nationality, residence or place of injury, in accordance with its judicial or other procedures and the legal system of the State of origin. Such protection extends equally to persons exposed or likely to be exposed to the risks involved.

Article 19 provides for compulsory fact-finding in case of any dispute between the States concerned and in the absence of any other obligatory applicable mechanism of peaceful settlement of disputes or a mechanism established by mutual agreement. It may be noted that this is a compromise proposal and takes a minimalist position rejecting two extreme points of view. One such point of view demands a more comprehensive compulsory system of settlement of disputes. The other point of view rejects a reference to any compulsory procedure including compulsory fact-finding mechanism.

The commentaries to the Draft Articles explain their scope of application and provide useful guidance on relevant case law, authoritative opinion and relevant general principles of international law, including environmental law. The UN Convention on Non-navigational uses of International Watercourses, 1997 was relied upon being the closest instrument adopted by the ILC in terms of the issues involved. This provided for continuity and stability of the legal principles involved.

The Preamble to the Draft Articles attempts to balance the need for development and the obligation to preserve, protect and promote environmental safety and security. This is done by referring to both the principles of permanent sovereignty of States over the natural resources and the Rio Declaration on Environment and Development. It also emphasises the limits to freedom of a State in authorising the carrying out of hazardous activities within its territory and also refers to the requirement of seeking and the right to obtain international cooperation on the part of States concerned.

In our earlier statements, we have applauded the work of the Commission on this topic, and noted that it should be treated more as a progressive development of international law, particularly in respect of the obligations concerning the management of risk and engagement between States of origin and States likely to be affected. The obligation to inform the public (Article 13), the need to provide foreign nationals access to domestic judicial and quasi-judicial forums (Article 15) and on the settlement of disputes (Article 19) are particular examples of progressive development.

India, along with a number of other countries, has also emphasized the need to give due emphasis to issues concerning development, the transfer of technology and resources with a view to capacity building in the developing countries. The importance of differentiating the standards applicable to developing countries from those accepted by the developed countries was also noted as the same standards may not be suitable for all. In this connection, the need for the establishment of international funds was also emphasized. In other words, India welcomes the draft Articles on prevention but underscores the need to place the entire effort of management of risk of hazardous activities which are indispensable for development in the overall context of the right to development with due regard to the environment and the interests of States and peoples likely to be affected.

With respect to the above issues, we appreciate the efforts of the Commission to accommodate our point of view at least in the Preamble which vindicates our position that the entire subject of prevention could only be seen in the broader context of the right to development and the obligation to promote, preserve and protect the environment. The 'precaution' and 'polluter-pays' principles noted as factors to be taken into consideration under Article 10 and while discharging the duty of authorisation of any hazardous activity are principles of prudence to be adopted in the interest of the State and its population. These principles cannot be invoked as strict legal obligations. In this connection, States concerned would be guided by their economic policies and priorities, availability of funds with the operator and the overall benefits sought to be maximized for its population.

The Draft Articles represent a well thought out and elaborate set of provisions which should, we hope, bring clarity into the discussions on one of the legal aspects of sustainable development, and my delegation supports the recommendation of the ILC that these Draft Articles are now ready for adoption as a framework convention. For this purpose, it is suggested that the same procedure be adopted as in the case of the ILC draft Articles on Non-navigational Uses of International Watercourses.