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Preliminary comments of Belgium with regard to Article 11 on Financial Security

I. Introductory remarks with respect to the need of financial assurances in international environmental liability instruments[1]. The need for financial assurances. Policy considerations.

1. There is general agreement that personal injury or property damages caused by pollution are not of a nature that they should be borne by the victim himself. A common concern is also that clean up and restoration measures should not be borne by the community as a whole but by those who made them necessary[2].
In order to achieve the foregoing objectives, the tort system itself is not sufficient. Financial assurances must be provided for the event of insolvency of the liable party as well as the situation where no liability can be established as the source of pollution

* This document has not been formally edited.
[1] This note is largely based on Hubert Bocken, "Alternative compensation systems for environmental liabilities", general report for the AIDFA XII th World Congress, New York, 21-25 October 2002.
[2] This presently is a universal policy objective with respect to "new" pollution. In many countries (other than the U.S.), there is also willingness to co-finance with public resources the clean up of historic pollution.

remains unidentified or the defendant can invoke the statute of limitation or another valid defence.

2. General objectives of environmental policy have to be taken into account in setting up financial assurances: incentives for the operator to limit pollution must be maintained. The final allocation of the losses through recourse mechanisms and the origin of contributions financing the system will be relevant in this respect.

3. Actually, many national and international instruments[3] require financial assurances, generally for fairly specific types of activities: nuclear installations, production and transportation of hydrocarbons, marine transportation, waste disposal and soil clean up. A limited number of schemes are generally applicable, to all types of operations. The major examples of the latter category are the US Cercla and the Swedish and Finnish Environmental Damage Insurance.
Many of the provisions requiring financial assurances have raised concern about the possibility of actually meeting the requirements as well as complaints about the lack of consultation with the financial or insurance sector. It appears that in fact, financial products and alternative compensation mechanisms do emerge, to satisfy the financial responsibility requirements.

Limited availability of environmental liability insurance

4. The insurance market seems to be divided between a fairly limited number of individual insurers and insurance markets developing specialized coverage for environmental liabilities and a larger number of insurers refraining from entering the environmental liability market.
In any event, many limitations are imposed on the environmental liability insurance, when it is available.
Presently indeed, environmental liability insurance may be available in many markets as a risk management tool for the protection of the careful operator of environmentally dangerous operations, but not as an instrument providing the general public protection against negligent operations or disregards of environmental law.

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[3] Some legal documents require guarantees specifically to cover costs related to the monitoring, maintenance or closure of installations or security and remedial measures. Examples are found in the European Council regulation regarding transboundary shipments of waste, the EU directive on landfills and the implementing legislation. The art. 516-1 of the French *Code de l'environnement* requires financial security from the operator of listed installations which present important risks for pollution or accidents, quarries and installations for the disposal of waste, explicitly stating that they do not cover compensation of damages caused to third parties by the installation.
Generally, the financial guarantees must cover the costs resulting from the non-observation of direct obligations as well as the compensation of damages resulting from occurrence-like events. Financial guarantees are called for by international treaties on liability for damages arising from specific activities such as the transportation or extraction of hydrocarbons, the transportation of hazardous goods, the disposal or transportation of waste, transportation in general, the use production of nuclear energy. The Lugano treaty imposes guarantees for a large class of environmentally dangerous activities. Even when not called for by international law, domestic legislation has been adopted in several jurisdictions, requiring financial guarantees for specific types of operations, such as the treatment and disposal of waste, the production or transportation of hydrocarbons, the transportation of hazardous goods and underground storage tanks. Less numerous are rules imposing financial assurances for industrial installations in general or making it possible to require such guarantees.

Imposing on a large scale compulsory liability insurance thus probably is not a viable option for protecting the general interest in the area of pollution damages.

From the viewpoint of the general interest, coverage of liability is not necessary; coverage of insolvency is.

5. When examining the problem of financial assurances from the viewpoint of public interest, it has to be stressed that the objective is to ensure compensation in the event of insolvency of the liable party and when the liable party is not identified or can invoke a valid defence or the statute of limitations.
The objective is not to protect operators against possible liability. The decision whether or not financial mechanisms have to be used which protects operators of environmentally dangerous operations protection against liability can be left to the operators themselves (and their insurers).
The difference between the limited assurance against insolvency, which is necessary for the protection of the public interest, and coverage of environmental liability is substantial. Under the former system of financial assurance, the operator himself will indeed in the first place bear with his own assets the burden of his liability and is not given any action against the insurer or guarantor. Only when his assets have been depleted (or when no liability can be established for the reasons indicated) need the financial assurances come into play. To the same extent, the solution will be much less expensive than full coverage of liability.

Possible technical solutions

6. A number of technical solutions have already been put into effect in different countries in order to provide cover in the event of insolvency of the debtor (or the latter remaining unidentified), but without covering the liability of the operator himself. In present environmental law, one can find environmental depositary funds, guarantee funds, insolvency insurances for the benefit of third parties and co-operative risk sharing arrangements.

1. Depositary funds and guarantee funds

7. Protection against insolvency of the party liable for environmental damages can be provided by depositary funds and guarantee funds. When depositary funds are used, the resources providing the financial assurances are made available by the individual potentially liable party. Guarantee funds are generally financed through levies on the activities of operators who have a relevant link to the type of damage covered.

8. In the Netherlands, a draft act on mining activities[4] provides for a Mining Guarantee Fund financed by a levy on the production of minerals, which, in the event the operator is insolvent or has ceased to exist, will cover damages that cannot otherwise be compensated.
In Belgium, the former Coal Mine Guarantee Fund[5] was set up in part as a depositary fund in which payments made by the operators of a mine were held in individual

[4] Eerste Kamer, 2001-2002, 26 219, art. 134.
[5] Law of July 12, 1939.

accounts and in part as a collective guarantee fund which intervened in the event the individual accounts were depleted.
Especially in the area of soil clean up, funds, which provide financial guarantee against insolvency, are numerous. The most prominent example is the Hazardous Substances Superfund set up in the US by CERCLA in order to finance the necessary measures whenever there are no responsible private parties willing and able to do so. It is financed by taxes on the petrochemical industry and, from 1986, by a general environmental tax on a broad range of companies. The fund is mainly used to finance government clean ups. Under certain circumstances it also compensates damages to natural resources as well as response costs incurred by private parties. Generally, EPA succeeds in finding one or more liable parties under the broad liability provisions of CERCLA. Actions to recover government response costs are at the core of the program.
We find similar systems in other countries, be it that less emphasis is placed on the recovery from responsible parties. In France, orphan sites are the concern of the *Fonds de modernisation de la gestion des déchets*, created, in 1995, to finance, among other things, clean ups of industrial sites where no solvent operator can be found. The fund is financed by a tax on waste products. A similar mechanism exists in Germany in Hessen.

2. Direct insurance protecting third parties against the consequences of insolvency of the policyholder.

9. Interesting security mechanisms are the Swedish and Finnish Environmental Damages Insurances (EDI)[6]. In both countries, compulsory insurance provides compensation in the event the liable party is insolvent, when a tort claim is precluded by prescription or when the source of damage remains unknown.
Essential is that the EDI only provides compensation to third parties remaining uncompensated in the event of insolvency of the insured. It is not liability insurance. It can be analyzed as a direct (casualty) insurance taken out by the operator for the benefit of unnamed third parties. EDI does not protect the insured himself against liability. The insured cannot present claims against the insurer.
Both schemes are compulsory insurances imposed on the holders of environmental permits.
The schemes in both countries basically cover damages to private persons. The Swedish scheme since a1999 also covers urgent clean up costs made by public authorities in the event of insolvency of the liable party.
The amounts of the compensation provided under both schemes are fairly low, as are the premiums. The Finnish scheme provides for a maximum amount of compensation of FIM 30 million per injured event and an absolute maximum of FIM 50 million per insurance period.
In Sweden, a consortium of the five domestic insurance companies operated EDI until 1999. Since then, AIG is the insurer under a three-year agreement with the Swedish government; the broker Marsh collects the premiums. Since January 1st, 1999, when AIG became the carrier, 13 claims have been filed. Out of this number, 12 concerned clean up costs. Two claims have obtained coverage. The average claims cost is estimated at SEK 1.000.000. The main reasons for declined claims are that the possibility to seek

[6] See AIDA XIth World Congress New York 22-25 ocotber 2002. Alternative compensation mechanisms for damages. The Nordic Countries. Denmark, Finland, Norway, Sweden. Common report and national reports, Dansk Selskab for Forsikringsret, 2001, 115 and 191.

indemnification from the liable party has not been exhausted and the fact that the clean up is not urgent needed.
In Finland, an "Environmental Insurance Center" has been set up for the purpose of handling insurers' common affairs. All companies that write EDI are members of the Center. As indicated above, all insurance companies are obliged to write EDI if asked to do so. The Center also acts as a back-up fund when the obligation to take out insurance has not been observed. Until now, there seem to be no claims that have been compensated under the scheme.
Under the Swedish and Finnish EDI, the burden of the liability still is borne by the operator who remains free to protect himself by liability insurance or other mechanisms. The preventive effect of tort law thus remains whole. The total financial burden that they impose is comparably limited; the benefits provided, however, are equally limited.
The schemes illustrate also how the insurance market can participate in the elaboration of alternative security mechanisms. During the negotiations relating to the establishment of the scheme between the government and the association of the Swedish Industry, in the late eighties, the initial plan was actually to set up a fund. However, it appeared that the insurance industry was able to provide a higher coverage than a newly established fund set up by industry. The system, however, still largely resembles a fund. Indeed, the premiums are not based on an individualized risk assessment, but are determined in accordance with the level of environmental permit.

3. Co-operative risk sharing arrangements.

10. Industry associations may, for a number of reasons, want to set up, outside the insurance market, their own arrangements to satisfy legal requirements to provide third parties protection in the event of insolvency of individual operators. Sometimes mutual insurance will offer a solution.
An interesting example of another type of co-operative risk sharing agreement is found in the Netherlands with respect to the cost of soil clean up operations at gas stations.
The Dutch legislation requires operators of gas stations, to provide financial security for liability resulting from soil pollution in an amount of 226 890,11 Euro (previously 500.000 fl) per tank with a maximum of EUR 1 361 340,65 per station. The Dutch insurers offer an underground storage tank policy, which covers clean up costs and damage to third parties. In view of the relatively high cost of the policy, the sector established a private guarantee fund, CoFiZe (Stichting Collectief Financieel Zekerheidsfonds), in order to satisfy the financial security requirements[7]. The fund does assume liability up to the above-mentioned amount in case a claim against a member based on soil pollution cannot be satisfied by reason of his insolvency. No liability is assumed in the event of intent, grave negligence or willful disregard of the operator. In order to become a member, the operator has to satisfy certain requirements showing that his site is pollution free and that he lives up to the environmental standards. About 3500 gas stations (or 95% of the total) are affiliated with CoFiZe.
Claims can be brought by the authorities or by third parties, including the owner of the premise on which the station was established, provided he has no other links with the operator than the lease contract. The plaintiff should establish that he has taken all reasonable measures in order to execute his claim.
The operator himself can bring no claim against the fund. Again, this solution only

[7] Subat, Tussen wensen, eisen en werkelijkheid. Een verslag van 10 jaar bodemsanering, 2001, 142.

provides a basic solution to prevent orphaned sites but leaves it to the operator whether or not to protect his own assets against liability by insurance or other mechanisms.
The difference in cost between liability cover and the limited cover provided by CofiZe is considerable. In 1994, the yearly insurance premium would have been 5000 to 6000 fl. per year. Upon becoming member of CoFiZe, to the contrary, a single payment of 1000 Euro is required, complemented by a yearly payment of about 12 Euro.

Some recommendations.

11. A compulsory system of financial assurances protection third parties in the event of insolvency (and preferably also in the event of the source of pollution remaining unidentified) may be a valid alternative to liability insurance and other schemes covering the liability of the operator. Its merits should be studied with attention. The cost of its operation no doubt is substantially lower than that of systems covering liability. At the same time the full preventive effect of environmental liability is maintained.

12. When setting up a similar system of financial assurance against insolvency, it seems necessary to limit the cost of the overall system by providing a separate treatment for specific sectors creating well-established and considerable risks. We refer more particularly to the nuclear installations, the production and transportation of hydrocarbons, underground storage tanks, the transportation and disposal of waste. In many countries, separate systems are already in place for the latter categories. They should not be replaced.

13. The international legislator should not impose one single technical solution (depositary fund, guarantee fund, environmental damage insurance, co-operative risk sharing arrangement), but should leave the national authorities and the organisations of operators of environmentally dangerous activities, the largest possible flexibility in to choose the solution, which allows the best financial and fiscal cost optimisation, taking into account also the willingness of insurers to participate in the scheme. In general, member states should promote the possibility of co-operative risk sharing mechanisms, among others, by giving the contributions to the latter the same fiscal treatment as insurance premiums.

14. The possibility of setting up a system of financial guarantees also largely depends on the precision of the category of damages for which liability can arise. If need be, the assurances can made more manageable by using a financial cap or limiting them to part of a certain class of damages.

II. Key features of the Belgian position on financial securtiy.

15. Providing that a number of preconditions are met, Belgium is rather advocate of an mandatory system of financial security. In case a serious environmental damage takes place and the authorities and the victims of the industrial accident which has transboundary effects on transboundary watercourses are faced with an undercapitalised operator, a situation which sadly often occurs in reality, the damage becomes a public charge, in the worst case scenario the damage is not even cleaned up. In many cases, the liability rules often overshoot their goal without some kind of pre-financing.

Nevertheless, the industry can not be forced to take an insurance policy or an other financial security if these are not available at the market under favourable conditions.

Aware of the complexity of this problem, we therefore suggest to insert some degree of flexibility in the text of article 11 of the Protocol.

At this moment, systems of funds and insurance are only available in a restricted number of sectors (e.g. for nuclear energy, hazardous waste disposal, maritime transport, certain cleanup costs). According to us it initially comes down to make the financial security compulsory for hazardous activities of which the real risk for the environment and human health has been proved sufficiently. With regard to the exact form of the financial security, it should be noted that apart from liability insurance a variety of options (bonds, financial guarantees, a declaration of self-insurance, but also insolvency coverage and if properly administered a fund) and combinations of different options (cf. a system of layers as under the IMO conventions) remains possible. In our opinion, it seems appropriate to differentiate according to the type of damages, e.g. the cost of measures of reinstatement can not be treated in the same way as loss of life and damage to property.

Furthermore, in order to persuade the sectors involved and to dispose the necessary financial products at reasonable conditions, we attach great importance to encouraging incentives of the government, for example tax measures, to satisfy the financial responsibility requirements.