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CHAPTER III

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

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CONTENTS

CHAPTER III

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

A. Introduction

1. The Commission, at its thirtieth session (1978), included the topic "International liability for injurious consequences arising out of acts not prohibited by international law" in its programme of work and appointed Mr. Robert Q. Quentin-Baxter Special Rapporteur. 1/

2. The Commission, from its thirty-second (1980) to its thirty-sixth session (1984), received and considered five reports from the Special Rapporteur. 2/ The reports sought to develop a conceptual basis and schematic outline for the topic and contained proposals for five draft articles. The schematic outline was set out in the Special Rapporteur's third report to the thirty-fourth session of the Commission in 1982. The five draft articles were proposed in the Special Rapporteur's fifth report to the thirty-sixth session of the Commission in 1984. They were considered by the Commission, but no decision was taken to refer them to the Drafting Committee.

3. The Commission, at its thirty-sixth session, in 1984, also had before it the following materials: the replies to a questionnaire addressed in 1983 by the Legal Counsel of the United Nations to 16 selected international organizations to ascertain whether, amongst other matters, obligations which States owe to each other and discharge as members of international organizations may, to that extent, fulfil or replace some of the procedures referred to in the schematic outline 3/ and a study prepared by the secretariat entitled "Survey of State practice relevant to international

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1/ At that session the Commission established a working group to consider, in a preliminary manner, the scope and nature of the topic, and to report to it thereon. For the report of the Working Group see Yearbook ... 1978, vol. II, (Part Two), pp. 150-152.

2/ For the five reports of the Special Rapporteur, see Yearbook ... 1980, vol. II (Part One), p. 247, document A/CN.4/334 and Add.1 and 2; Yearbook ... 1981, vol. II (Part One), p. 103, document A/CN.4/346 and Add.1 and 2; Yearbook ... 1982, vol. II (Part One), p. 51, document A/CN.4/360; Yearbook ... 1983, vol. II (Part One), p. 201, document A/CN.4/373; Yearbook ... 1984, vol. II (Part One), p. 155, document A/CN.4/383 and Add.1.

3/ Yearbook ... 1984, vol. II (Part One), p. 129, document A/CN.4/378.

liability for injurious consequences arising out of acts not prohibited by international law". 4/

4. The Commission, at its thirty-seventh session, in 1985, appointed Mr. Julio Barboza Special Rapporteur for the topic. The Commission received eight reports from the Special Rapporteur from its thirty-seventh session, in 1985 to its forty-fourth session, in 1992. 5/ At its fortieth session, in 1988, the Commission referred to the Drafting Committee draft articles 1 to 10 proposed by the Special Rapporteur for Chapter I (General Provisions) and Chapter II (Principles). 6/ At its forty-first session, in 1989, the Commission also referred to the Drafting Committee the revised version of those articles which had already been referred to the Drafting Committee at the previous session. 7/

5. At its forty-fourth session in 1992, the Commission established a Working Group to consider some of the general issues relating to the scope, the approach to be taken and the possible direction of the future work on the topic. 8/ On the basis of the recommendation of the Working Group, the Commission at its 2282nd meeting on 8 July 1992, took the following decisions:

"(a) Scope of the topic

(i) The Commission noted that, in the last several years of its work on this topic, it has identified the broad area and the outer limits of the

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4/ Yearbook ... 1985, vol. II (Part One) Addendum, document A/CN.4/384.

5/ For the seven reports of the Special Rapporteur, see Yearbook ... 1985, vol. II (Part One), p. 97, document A/CN.4/394; Yearbook ... 1986, vol. II (Part One), p. 145, document A/CN.4/402; Yearbook ... 1987, vol. II (Part One), p. 47, document A/CN.4/405; Yearbook ... 1988, vol. II (Part One), p. 251, document A/CN.4/413; Yearbook ... 1989, vol. II (Part One), p. 131, document A/CN.4/423; document A/CN.4/428 and Corr.1 and 4 (all languages), Corr.2 (English only), and Corr.3 (Spanish only) and Add.1; document A/CN.4/437 and Corr.1 and document A/CN.4/443 and Corr.1 and Corr.2 (Spanish only).

6/ For the text see Yearbook ... 1988, vol. II (Part Two), p. 9.

7/ See Yearbook ... 1989, vol. II (Part Two), para. 311. Further changes on some of those articles were again proposed by the Special Rapporteur in his Sixth Report, see (Official Records of the General Assembly, Forty-fifth Session, Supplement No. 10) (A/45/10), para. 471.

8/ Official Records of the General Assembly, Forty-seventh Session, Supplement No. 10, p. 127-129.

topic but has not yet made a final decision on its precise scope. In the view of the Commission, such a decision at this time might be premature. The Commission, however, agreed that, in order to facilitate progress on the subject, it would be prudent to approach its consideration within that broad area in stages and to establish priorities for issues to be covered.

(ii) Within the understanding set forth in paragraph (i) above, the Commission decided that the topic should be understood as comprising both issues of prevention and of remedial measures. However, prevention should be considered first; only after having completed its work on that first part of the topic would the Commission proceed to the question of remedial measures. Remedial measures in this context may include those designed for mitigation of harm, restoration of what was harmed and compensation for harm caused.

(iii) Attention should be focused at this stage on drafting articles in respect of activities having a risk of causing transboundary harm and the Commission should not deal, at this stage, with other activities which in fact cause harm. In view of the recommendation contained in paragraph (ii) above, the articles should deal first with preventive measures in respect of activities creating a risk of causing transboundary harm and then with articles on the remedial measures when such activities have caused transboundary harm. Once the Commission has completed consideration of the proposed articles on these two aspects of activities having a risk of causing transboundary harm, it will then decide on the next stage of the work."

"(b) The approach to be taken with regard to the nature of the article or of the instrument to be drafted

(iv) In the view of the Commission it would be premature to decide at this stage on the nature of either the articles to be drafted or the eventual form of the instrument that will emerge from its work on this topic. It would be prudent to defer such a decision, in accordance with the usual practice of the Commission, until the completion of the work on the topic. The Commission will examine and adopt the articles proposed for this topic, in accordance with its usual practice, on the basis of the merits of the articles, their clarity and utility for the contemporary and future needs of the international community and their possible contribution to the promotion of the progressive development of international law and its codification in this area."

"(c) Title of the topic

(v) In view of the ambiguity in the title of the topic as to whether it includes 'activities' or 'acts', the Commission decided to continue with its working hypothesis that the topic deal with 'activities' and to defer any formal change of the title, since in the light of the future work on the topic additional changes in the title may be necessary. The Commission will therefore wait until it is prepared to make a final recommendation on the changes in the title."

"(d) Recommendation on the report of the Special Rapporteur for the next year

(vi) The Commission took note with thanks and appreciation of the previous reports of the Special Rapporteur in which the issues of prevention were examined in respect of both activities having a risk of causing and those causing transboundary harm. It requested that the Special Rapporteur, in his next report to the Commission, should examine further the issues of prevention only in respect of activities having a risk of causing transboundary harm and propose a revised set of draft articles to that effect. 9/"

B. Consideration of the topic at the present session

6. At the present session, the Commission considered the Special Rapporteur's ninth report (A/CN.4/450), at its 2300th and 2302nd to 2306th meetings held between 25 May to 11 June 1993. At the conclusion of the discussion, the Commission decided to refer article 10 (Non-discrimination), which the Commission had examined at its forty-second session, and articles 11 to 20 bis proposed by the Special Rapporteur in his ninth report to the Drafting Committee to enable it to continue its work on the issue of prevention, as the Commission had decided at its preceding session. The Commission indicated that the Drafting Committee could, with the help of the Special Rapporteur, take on a broader task and determine whether the new articles which had been submitted came within a logical framework and were complete or, if they were not, whether they should be supplemented by further provisions. On that basis, the Drafting Committee could then start drafting articles. Once it had arrived at a satisfactory set of articles on the prevention of risk, it might see how the new articles were linked to the general provisions contained in articles 1 to 5 and the principles embodied in articles 6 to 9 and in article 10. The Drafting Committee devoted nine meetings to the articles. Its report (A/CN.4/L.487) was introduced by the Chairman of the Committee at the 2318th meeting of the Commission. It contained the text of the articles adopted by the Committee on first reading namely articles 1 (scope of the present articles), 2 (used terms), 11 (prior authorization), 12 (risk assessment) and 14 (measures to minimize the risk). However, in line with its policy of not adopting articles not accompanied by commentaries, the Commission agreed to defer action on the proposed draft articles to its next session. At that time, it will have before it the

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9/ Ibid.

material required to enable it to take a decision on the proposed draft articles. At the present stage, the Commission merely took note of the report of the Drafting Committee.

7. At the request of the Commission made last year (see para. 5 above), the ninth report of the Special Rapporteur was devoted entirely to the issues relating to the prevention of transboundary harm of activities with a risk of such harm. In that report, the Special Rapporteur described what he considers to be the nature and the content of the concept of prevention and proposed 11 articles (arts. 11 to 20 bis). 10/ In his oral introduction to the report, he referred to the articles which were already before the Drafting Committee 11/ on the General Provisions and on the Principles which dealt with broader issues relating to the topic and indicated that those articles were also relevant, subject to some minor drafting modifications, to the issue of prevention of transboundary harm in respect of activities with a risk of such harm. He also referred to an article 10 which he had proposed in his sixth report under the title of "non-discrimination" 12/ and explained the relevance of that article to the issue of prevention now under consideration.

1. Issues of a general character

8. Some members expressed doubts about the Commission's decision made last year to deal with this topic in stages. Accordingly, in their view, at the current stage, the Commission had to deal only with activities having a risk

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10/ For the text of the articles see notes 13, 14, 16-18, 20, 21 and 23-26 below.

11/ For those articles see Yearbook ... 1989, vol. II (Part Two), pp. 84-85.

12/ Document A/CN.4/428, p. 44. Article read as follows:

"Article 10

Non-discrimination

"States parties shall treat the effects of an activity that arises in the territory or under the jurisdiction or control of another State in the same way as effects arising in their own territory. In particular, they shall apply the provisions of these articles and of their national laws without discrimination on grounds of the nationality, domicile or residence of persons injured by the activities referred to in article 1."

of causing transboundary harm which unnecessarily narrowed the scope of inquiry and also created conceptual difficulties.

9. It was noted that a view was emerging in the Commission that, once the articles on preventive measures had been fully developed, it might suffice for the Commission to conclude that it might be unnecessary to proceed to the second phase of the work, namely, the formulation of rules on compensation for damage. The Commission should keep in mind the more general perspective and, specifically, that second phase of its work.

10. It was felt that the Commission should not encounter any major difficulty during the second phase, since it appeared to agree on some of the basic propositions, for instance, that the victims of transboundary harm should, whatever the modalities of compensation, be adequately and expeditiously compensated and that the actors in a transboundary harm scenario would generally be the "State of origin", the governmental or non-governmental operator of the activity, the affected State, those who benefited from the activity, and the victims of the transboundary harm. The Commission therefore would only have to make proposals to ensure equitable relationships at the primary rule level between the various players in cases where transboundary harm had in fact been caused.

11. It was stated that before making its final proposals on the rules or principles on compensation for harm, the Commission would have to consider a variety of possibilities. For example, the criteria to be applied in determining whether or not due diligence had been exercised in a particular case should include consideration of whether the operator had been adequately insured against all possible harm. In certain circumstances, there should be a presumption in favour of the affected State. In addition, the Special Rapporteur had made a very interesting proposal in draft article 9 whereby there would be an obligation on the State of origin to provide compensation for the harm caused, but the actual amount of the compensation would be decided in negotiations, held in good faith, between the parties. Some thought should also be given to the role of industry-wide mechanisms for the funding of compensation, which had enjoyed remarkable success in the field of marine oil pollution.

12. According to another view, prevention was not the whole of the topic, but it was the topic’s most firmly established part. States which conducted or authorized activities likely to cause harm in the territory of other States or

in international areas were bound by an obligation of prevention, which consisted in doing everything in their power to prevent such harm from occurring or, if it did occur, to minimize the harmful effects. Such was the positive law, as already reflected in a relatively large body of case law, starting with the arbitral award in the Trail Smelter case. On the other hand, it did not seem possible to say that States had an obligation of reparation in the event of harm or that the time was ripe to develop the law in that direction.

13. The relationship between this topic and State responsibility became the subject of comments by some members. It was stated that one of the problems with proceeding rapidly with this topic was the uncertainty about its autonomy. Imposing obligations of prevention on States implied that violation of those rules incurred State responsibility. In that connection, it was considered useful to recall the two different meanings of the word "responsabilité". In the sense of "responsibility", it referred to the mechanism that could lead to reparation, but, in the sense of "liability", it meant being liable for a person, a thing or a situation. In the case of activities conducted in the territory of a State, a distinction had therefore to be drawn between, on the one hand, unlawful activities for which States were responsible within the first meaning of the term and which came under the draft articles on State responsibility and, on the other hand, activities which were not prohibited and therefore not unlawful a priori, for which States were also "liable" within the second meaning of the term, the first consequence of such liability being the obligation to prevent transboundary harm. According to one view, the statement in paragraph 2 of the ninth report to the effect that prevention did not form part of liability was thus very much open to discussion. Quite the contrary, prevention was at the very heart of liability and it was because the State was liable for activities conducted in its territory that it had the legal obligation to prevent the transboundary harm that might result from them. That principle was so important that it might be worthwhile stating it formally at the beginning of the articles on prevention.

14. The remark was made that unlike the topic of State responsibility, where the State was accountable for its failures as a State, and unlike the topic of the Law of the non-navigational uses of international watercourses, where the State owned, regulated and maintained the natural resource, international

liability was concerned with acts over which the State might not, or could not, have control. That was because of the human rights and freedoms enjoyed by individuals, because of the need to separate the State from other entities engaged in production, commerce and services, and because of the need to meet the demands of entrepreneurs in terms of the technology and financial resources needed to promote development. There was, inevitably, some hesitation in accepting the view that States should be liable for activities that caused transboundary harm, since it was felt that, in the interests of allowing market forces free play, excessive regulation was to be avoided. The basic principle that no State should allow its territory to be used so as to cause transboundary harm was so well accepted as to need no repetition, provided the causal connection between the activity and the transboundary harm was well-established. Accordingly, the position of the State involved was governed by State responsibility, while the position of the operator or the owner was well regulated by the law of tort and the law of agency. Any principle the Commission might indicate as a basis for laying down the consequences of liability at the international level could not, therefore, be altogether dissociated from those branches of the law.

15. It would perhaps be easier, it was stated, to prescribe the appropriate rules on prevention, both for the State and for other entities, if the State was dealt with separately from the operator or owner. The State's role, as noted by the Special Rapporteur, was essentially to prescribe standards and to enact and monitor the implementation of laws and regulations. The role of the operator was different and more demanding. His obligations could be, among others, to submit an environmental impact study of the activity concerned, to give an indication of the level of risk entailed, to propose measures to deal with such risk and to contain any consequences. If an activity was likely to cause transboundary harm, a requirement could also be laid down that the activity should be carried out in such a way that it would cause no foreseeable harm to another State or the operator could be required to obtain the necessary authority to carry out the activity after engaging in consultation with those responsible in the State or States concerned.

16. A few members commented on the difficulty of drafting articles with a scope so broad as to be applicable to any kind of activity with transboundary harmful effects. They felt that it would be necessary to identify the classes of activity which would fall under the future instrument. The new article 11

proposed by the Special Rapporteur simply referred, in that connection, to former article 1, which, even in conjunction with article 2 (Use of terms), hardly filled that lacuna. Article 1 spoke of activities involving risk, while article 2 explained that what was meant was the risk of appreciable transboundary harm. But all kinds of activities could cause transboundary harm and the Special Rapporteur should have identified the different categories of such activities instead of proposing rules which could apply only to specific groups of activity, for instance, the building of nuclear power plants. If there was one general lesson to be learned from environmental law, it was certainly that preventive efforts must always be adapted to the specificities of the danger to be combated.

17. In that connection, it was explained that in order to prevent the danger from materializing, the international community needed hard rules that went beyond the 1972 Stockholm Declaration and the 1992 Rio Declaration. In addition, the areas in which there was still a regulatory deficit should be identified. Admittedly, the Special Rapporteur referred to the Convention on Environmental Impact Assessment in a Transboundary Context and to the Convention on the Transboundary Effects of Industrial Accidents, but he had not discussed the impact of those two instruments on his topic - an impact that was perhaps considerable. Perhaps, too, he should have explained how he conceived the relationship between the rules he proposed and the often fairly detailed provisions of the 1982 United Nations Convention on the Law of the Sea.

(a) Concept of risk

18. The Special Rapporteur explained that activities involving risk were chiefly those which may cause transboundary harm due to accidents. Therefore, the cause of transboundary harm was essentially limited to circumstances where the control over these activities, for various reasons, was somehow lost. The articles he had proposed in his ninth report were designed to deal specifically with this type of activities. The Special Rapporteur took note of concerns expressed in the previous sessions of the Commission to the effect that it was difficult in some cases to assess whether a particular activity had a risk of transboundary harm. In his view, in a large number of cases, it was possible to consider whether an activity which had particular features that involved risk was likely to cause transboundary harm, through examination of substance handled, the technology used in it and particular circumstances

in which the activity was conducted. In his view, the obligation of due diligence in taking preventive measures, such as providing information, notification, consultation, etc. seemed to apply to all different types of activities with a risk of causing transboundary harm.

19. A few members found the concept of risk much too broad and, consequently, the scope ratione materiae of the articles unclear. In their view, the Commission should attempt to identify classes of activities to which the articles on prevention would apply. In their view, the articles on prevention were essentially directed at establishing an environmental impact assessment system, which was certainly not suitable for all activities involving risk; it would be relevant only with regard to planned works whose dimensions went beyond a certain threshold that must itself, be carefully defined. It was significant, they thought, that all existing instruments attempted to describe in precise detail the activities to which they applied. The general concept of activities involving risk might well be suitable when liability for harm was being considered. Yet a procedure for assessment of environmental impact must be confined, on account of its very nature, to certain easily identifiable activities which, when carried out in isolation, involved a specific risk of transboundary harm.

(b) Issues relating to the question of prevention

20. In the ninth report, the Special Rapporteur defined preventive measures as those which attempted to: (a) ensure that activities under the jurisdiction or control of a State were carried out in such a way as to minimize the probability of an accident which would have transboundary effects, and (b) reduce the harmful effects resulting from the accident. Therefore, the objective of preventive measures was twofold. The Special Rapporteur underscored the words "to attempt" in order to emphasize that the purpose of the obligation is not to prevent the occurrence of any harm - something which he found by definition problematic, since the activities involved were those which had a risk of causing harm - but to compel the States to take certain actions in order to minimize the risk of accidents and their transboundary harmful consequences. Thus the function contemplated for a State in its preventive measures was limited to setting forth prudent and comprehensive rules including enactment of laws and administrative regulations and enforcing them in respect of undertakings, under its jurisdiction or control, of activities with a risk of causing transboundary harm.

21. Under this arrangement, the Special Rapporteur explained, a State was not, in principle, liable for private activities in respect of which the State had carried out properly and reasonably its supervisory functions. Those supervisory functions were spelled out in the articles that he had proposed and included, for example, granting prior authorization for the conduct of the activity only upon receiving a satisfactory assessment report of the activity, making sure that certain measures were provided for in order to reduce accidents, etc. The Special Rapporteur explained that the statement, that a State was not, in principle, liable for private activities, was intended to keep the possibilities open for certain cases where the State might have residual liability. Those cases included, for example, where the operator or his insurance lacked financial ability to pay the total amount of compensation. Such a model was already followed in some conventions. He did not wish to elaborate on whether or not such a residual State liability was appropriate for the topic at this time, since the matter would have to be examined when dealing with the question of liability which the Commission will be examining at a later stage.

22. As regards the nature of the provisions setting forth measures of prevention, the Special Rapporteur explained that those provisions, in his view, constituted "due diligence", and would be deemed to be unfulfilled only where no reasonable effort was made to fulfil them. Therefore, those provisions were not of the nature of what might be called the obligation of result, in the sense of articles 21 and 23 of Part One of State Responsibility, requiring the prevention of a given event.

23. The Special Rapporteur noted the inequality between developing and developed States in their ability to comply with the obligation of prevention and their potential liability in case of transboundary harm. He expressed his agreement with the point which had been repeatedly made to the effect that developing countries lacked the financial and technical resources to monitor the activities of multinational corporations which were often responsible for conducting activities with a risk of transboundary harm. To remedy the situation, the Special Rapporteur suggested to include a provision in the part of the articles dealing with principles which would require, in general terms, that the special situation of the developing States should be taken into account in formulating any regime to prevent transboundary harm.

24. He also referred to the suggestion he had made in his previous reports to the effect that a role should be contemplated for international organizations in these articles in terms of providing assistance to developing countries in assessing the transboundary effects of activities with a risk of transboundary harm or assisting those States in evaluating assessments done by other States contemplating undertaking such activities that might affect developing States. He expressed his concern as to how international organizations, which were not parties to these articles may be required to provide assistance in accordance with these articles. He could think of some organizations that were capable of playing a useful role in assisting developing States. They included, for example, the United Nations Environment Programme, the Economic Commission for Europe, the Food and Agricultural Organization, the World Health Organization, the United Nations Development Programme etc.

25. Comments on the question of the obligation of prevention dealt with the content of prevention, the structure of the articles on prevention and the special situation of the developing countries and the obligation of prevention.

26. As regards the content of the obligation of prevention, some members felt strongly that the concept of prevention should be limited to the obligation to prevent the occurrence of transboundary harm or what might be called prevention ex ante. These members, in principle, did not disagree with the idea of an obligation to containing or reduce the extent and scope of the harm once such harm occurred, but they believed that such measures were really in the nature of reparation for, or correction of, harmful effects, and could therefore more suitably be covered at the next stage in the Commission’s work.

27. The comment was made that, from the ninth as well as the previous reports, it seemed that the Special Rapporteur endorsed the view that the legitimacy of all measures defined in the framework of this topic, including preventive measures, was based on the fact that every State was prohibited from using its territory for purposes contrary to the rights of other States. That hypothesis might, however, be a source of misunderstanding, since any activity capable of causing harm to another State could be regarded as an unlawful activity and it could then be asked whether what was involved was not simply State responsibility for wrongful acts.

28. The remark was also made that the Commission had to formulate residual rules applicable to liability for the consequences of the activity within the

State which arose independently of its will. The very legal basis of these obligations was the sovereign equality of States. Therefore the Commission must, in its role of codifying international law, produce a legal framework into which activities involving risk could be fitted and which would give States and the courts the necessary points of reference. Governments must know that, when they acted within their borders, they were also assuming international obligations and responsibilities. The draft articles should therefore be as general as possible so as not to distort the obligation of prevention through legalistic or excessive procedures, which would not reflect the true situation. States did not expect a detailed and binding procedure, but rather the enunciation of general obligations on which they could draw in deciding on their relations in that regard.

29. As regards the structure of the articles on prevention, a number of comments were made.

30. It was noted that in the ninth report, the Special Rapporteur dealt only with the technical articles without providing an overall picture of the obligation of prevention. Several provisions in his previous reports now before the Drafting Committee were also relevant to issues of prevention. Together with some elements from those provisions, a homogeneous whole on prevention could have formed the first part of the draft articles, possibly to be followed by further parts on reparation and on the settlement of disputes. Some principles could have been enunciated, starting with the obligation of prevention linked to liability as a result of the risks involved in the activities envisaged. That would mean combining article 3, paragraphs 1, 6 and 8 including the provisions of article 2 (a) and (b), already referred to the Drafting Committee, in that part of the draft. It might also be necessary to include an article in the general part on risks to areas not under the national jurisdiction of States (global commons).

31. According to the same view, having set the principles as indicated in preceding paragraph, the modalities for implementation could be indicated. Such modalities could be classified under six separate headings: first, notification, information and the limits thereto; secondly, assessment, taking account of the views of other potentially affected States - and, possibly, international organizations - and of the balance of interests; thirdly, authorization, which would be made contingent on insurance effectively covering risks; fourthly, the maintenance of the obligation of vigilance after

the start of activities and the question of activities already in progress at the time of the adoption of the future convention; fifthly, the possible grouping of all provisions relating to the cessation and limitation of harm, which could be described as prevention ex post; and, sixthly, the explicit statement of another basic general principle, namely, that, if the State in whose territory the activity involving risk took place did not fulfil its obligations of prevention, its liability for failure to do so would be incurred.

32. Still on the structure of the articles, doubts were expressed by a few members as to whether the requirement of notification and information on activities envisaged by a State without taking account of the views of another State, as well as consultations, could be considered measures for the prevention of possible harm. The obligation to provide information could be unnecessary in some cases and indispensable in others. The launching of satellites, for example, was an activity involving risk that could cause transboundary harm, but the communication of technical information on that activity was indispensable only if the satellite had a nuclear power source on board, which would increase the risk of harm. This was the reason, according to this view, for the difficulty in drafting an instrument which could be applicable to all activities.

33. As regards the provisions on information and consultation and other interactions between the States concerned, a question was raised as to whether, in a case in which a foreseen risk did materialize, the State which suffered harm or its nationals would be deemed to have had knowledge of, and to have acquiesced in, the possibility of the occurrence of transboundary harm. Presumably that was not the intention, but the point could be resolved through drafting.

34. As regards the situation of the developing countries, the following comments were made. It was noted that the developing countries, on account of their lack of adequate resources and technology, might find the obligations imposed by the articles unduly onerous. Why should a developing country be obliged to ensure that a transboundary impact assessment was undertaken in respect of an activity taking place in its territory, to carry out consultations with potentially affected States and to design and implement preventive measures for activities that were inherently lawful and beneficial to its economy because they generated employment? The fact that the

activities were often undertaken by transnational corporations over which the developing host country did not have sufficient effective control would not make it any easier for some of those countries to accept the obligations imposed by the articles. In another forum of the United Nations, it was recalled, developed States had staunchly resisted the adoption of a code of conduct for transnational corporations which would, inter alia, oblige such entities to conduct their activities in accordance with environmentally sound practices.

35. As regards the Special Rapporteur's suggestion that some general form of wording should be included in the chapter on principles to take account of the situation of the developing States, one view expressed was that it did not go far enough. The need of developing countries for preferential treatment should also be reflected in the articles on prevention, which should take account, in particular, of the principles laid down in the Rio Declaration on Environment and Development. Also, with regard to preventive measures, the standards which applied to developed countries might be unsuitable for developing countries, since the cost, in social and economic terms, might be so great as to impede their development. The articles on prevention should include general provisions on ways of facilitating the transfer of technology, including new technology, in particular from the developed to the developing countries.

36. The remark was also made that as conceived in the proposed draft articles, the principle of prevention did not take account of the situation of those countries with regard to access to industrial technology; the resulting undifferentiated implementation of primary rules might give rise to a new type of condition being posed for the transfer of technology that might well make the developing countries increasingly hesitant about acceding to the system advocated within the framework of the United Nations. The Commission must bear those facts in mind by including special provisions for the developing countries while not compromising the universality of the proposed system. It was noted that the Special Rapporteur was not indifferent to those concerns, as he had shown in his report. He had proposed to include a provision in the chapter on principles. It was to be hoped that the formulation of such a provision would not be unduly general and abstract.

37. It was also stated that the Commission should keep in mind the lack of sufficient technology and human resources in the developing countries. Yet,

at the same time, the need for vigilance must be impressed on developing countries, since the harmful effects of accidents in their territories would usually affect other developing countries that were themselves lacking in technological and financial resources. The old adage "An ounce of prevention is worth a pound of cure" was especially apt in that context, particularly as prevention costs less. So, while prevention must be emphasized, developing countries must be helped in acquiring the necessary technological competence and resources to carry out risk assessment.

2. Specific articles

38. While some members commented only in general terms on the ninth report, some other members commented also on specific articles proposed by the Special Rapporteur. Summaries of those comments are produced in paragraphs 39-88 below.

(a) Article 11. Prior authorization 13/

39. Article 11 would provide that activities with a risk of transboundary harm require the authorization of the State within whose territory or jurisdiction they are conducted; and that authorization should be obtained prior to commencement of major modification of the activity. In the view of the Special Rapporteur, the requirement of prior authorization was the first step a State took in order to exercise its supervisory functions and responsibility. The Special Rapporteur stated that he had taken note of reservations made by some members of the Commission in the previous sessions on this requirement. Those reservations were based on the argument that (a) such a requirement interfered with the domestic affairs of States; and (b) this was a matter that States complied with routinely because of their own interests, given that in case of an accident they themselves would be first to suffer damage. The Special Rapporteur did not find this reasoning persuasive enough to delete article 11. In his view, the activities covered

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13/ Article 11 reads as follows:

Article 11

Prior authorization

The activities referred to in article 1 shall require the prior authorization of the State under whose jurisdiction or control they are carried out. Such authorization shall also be required when a major change in the activity is proposed.

under this topic had the potential of affecting the rights of a State other than the State where they were being carried out. Such a requirement had, therefore, only the effect of balancing the rights and the obligations of the States involved and could not be interpreted as interfering in the domestic affairs of the State of the origin. In addition, he found little comfort for the affected State in knowing that the State of the origin had also suffered damage as a result of the accident. He also believed that there might be cases where the State of origin might conduct activities with a risk of potential harm in ways that would minimize harm to itself and expose its neighbour to more of such potential harm, for example by conducting these activities near border areas.

40. Many members supported article 11 even though it seemed at first glance to state the obvious. In their view, it put the State and the operator on notice. To some members article 11 as well as 12, 13 and 14 seemed too detailed and might ultimately mean that the legal regime of prevention would amount to interference in the domestic affairs of States.

41. The remark was made that article 11 gave rise to two problems. The first related to the definition of the concept of risk. Only in the light of that definition could it be said whether States could reasonably be expected to accept prior authorization as a general obligation. The second problem related to the periodic renewal of the authorization or the possibility, or even the obligation, to withdraw it in certain cases, which was nowhere expressly provided for.

42. It was also noted that the requirement of prior authorization should be examined within the larger trend in international relations on economic and trade issues. The trend in international agreements was to require States to adopt legislation on specific issues in order to ensure that specific obligations were carried out. To protect themselves, and in view of the realities of modern-day life, States tried to impose liability on the operator, who was usually in the best position to exercise supervision. That led to an impasse, however. If a State imposed too many regulations on operators, it could be accused of impeding private investment. Yet if it refrained completely from regulating economic activities, it could be held liable for accidents occurring in its territory. Therefore, two standards would have to be set: one for States that were able to exercise the controls stipulated in an agreement, and another for those that lacked the necessary

scientific and technical infrastructure. Increasingly, international agreements demanded that prior notice be given and consultations be held before certain activities were carried out. The provisions imposing obligations on States should be drafted carefully, taking into account the need for a proper balance between a certain degree of freedom necessary for private operators and the State obligations to prevent transboundary harm.

(b) Article 12. Transboundary impact assessment 14/

43. Article 12 would provide that a State require that an assessment of the possible transboundary impact of an activity be undertaken before an activity is authorized. The Special Rapporteur explained that such a requirement was not novel and was already incorporated in some of the most recent legal instruments on the environment. 15/ In his view, assessment did not require that there must be certainty that a particular activity would cause significant transboundary harm, but only certainty that a significant risk of such a harm existed.

44. The Special Rapporteur explained that he believed that assessment, the subject matter of this article and, the requirements of exchange of information and consultation covered by articles 15, 16 and 18 are closely linked. All are geared to an objective which is very important for the purposes of an effective prevention regime, namely encouraging the participation of the State presumed to be affected so that it can help to ensure that the activity is carried out more safely in the State of origin and at the same time be in a position to take more precautions in its own

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14/ Article 12 reads as follows:

Article 12

Transboundary impact assessment

In order to obtain the authorization referred to in article 11, the territorial State shall order an assessment to be undertaken of the possible transboundary impact of the activity and of the type of risk that impact will produce.

15/ Reference to that effect was made to principle 17 of the Rio Declaration on Environment and Development of 1992 (A/CONF.151/26/Rev.1 (vol.1),p. 3)), article 4(2) of the Convention on the Transboundary Effects of Industrial Accidents of 1992 (International Legal Materials, vol. 31, p. 1330) and article 2 (2 and 3) of the Convention on Environmental Impact Assessment in a Transboundary Context of 1991 (E/ECE/1250).

territory to prevent or minimize the transboundary impact. Cooperation, in the view of the Special Rapporteur, is an essential part of these obligations.

45. The comment was made that the requirement of environmental impact assessment played an important role in these articles. Article 12 should therefore be spelled out, perhaps in some detail, so that the essential components of a good environmental impact assessment were clearly defined. Precedents for such definitions existed, both in conventions and in decisions of the UNEP Council. Unless the essential requirements were thus identified, there was a risk that a State might appear to have fulfilled its obligations by carrying out a study of some kind, whereas, in reality, it had totally failed to have the potential risk properly assessed.

46. It was stated that the consequences of an adequate assessment could differ. First, if the assessment revealed that no risk existed and the State therefore did not notify any neighbouring State and authorized the activity, what liability would ensue if, notwithstanding the assessment, harm to a neighbouring State did occur? Would the State which had carried out the assessment be immune from any suit in respect of the harm caused, or could the injured State still bring a suit, claiming either that the assessment had been faulty or that the first State's conclusions on the basis of the assessment had been wrong? Second, if the assessment did reveal a risk of significant harm, the State of origin was required only to notify the affected State or States of the situation, but not to transmit the actual assessment. Why was that so? The reason could hardly be a matter of national security and industrial secrets, something that was dealt with separately in article 17. The participation of the public, a matter mentioned in paragraph 37 of the report, would appear to rule out such considerations. To ensure that the State gave sufficient and adequate information to the affected States, it might be necessary to introduce a provision to the effect that failure by the State of origin to communicate information to a neighbouring State, which proved in due course to be essential to any assessment of the risk, would in itself constitute grounds establishing the liability of the first State.

47. Some members felt that the assessment should be the responsibility of the operator, while some others felt that the prevention of major risks was the responsibility of the State. According to a few members, it was for the State to decide how it should proceed with preventive obligations; article 12 was, therefore, unnecessary.

48. It was also noted that the relationship between articles 12 and 15 was unclear, because article 15 gave the impression that, even if the assessment required under article 12 showed a possibility of substantial transboundary harm, the State could nevertheless give its authorization within the meaning of article 11. But why, in that case, should it be required to notify the other States of the results of the assessment? Further clarification was therefore necessary.

(c) Article 13. Pre-existing activities 16/

49. Article 13 would provide that should it happen that an activity with a risk of transboundary harm is being conducted without authorization required under article 11, the State within whose territory or jurisdiction the activity is being conducted must require that an authorization under article 11 be obtained.

50. It was noted that article 13, extended the scope of international liability to pre-existing activities, which may have continued for several years without ever causing harm; that presupposed that they had not involved any significant risk at the outset. To make such activities subject to the requirements envisaged might therefore create difficulties in the relationship between the State and the operators, since the new demands of the State with respect to prevention could be regarded as a departure from the initial undertakings or as a modification, implied or otherwise, of the investment contract.

51. According to one view, when a State discovered that an activity that might cause transboundary harm was being carried out under its jurisdiction without authorization, the most appropriate response would be not only to warn those responsible, but also to enjoin them to comply with the established

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16/ Article 13 reads as follows:

Article 13

Pre-existing activities

If a State ascertains that an activity involving risk is being carried out without authorization under its jurisdiction or control, it must warn those responsible for carrying out the activity that they must obtain the necessary authorization by complying with the requirements laid down in these articles. Pending such compliance, the activity in question may continue on the understanding that the State shall be liable for any harm caused, in accordance with the corresponding articles.

requirements. In its present wording, the article merely provided for the issuance of a warning: a stronger tactic should be adopted.

52. To a few members, the article seemed unclear. It might be better to state that the continued exercise of such activity was without prejudice to the question of State responsibility. It was also noted that once the State had undertaken new obligations to allow certain activities to be conducted on its territory, with due regard to its duties towards other States and to environmental considerations, it should normally prohibit any activity that did not meet those standards. In any event, it was generally the operator, not the State, that would be required to pay for any damage caused.

(d) Article 14. Performance of activities 17/

53. Article 14, referred to by the Special Rapporteur, as the core of the articles on prevention, would require, in the first instance, that a State ensure, through legislative and other measures, that an operator involved in undertaking the types of activities covered by this topic, has used the best available technology, to minimize the risk of significant transboundary harm; and in the event of an accident, harm is contained and minimized. States under this article are also required to encourage operators to take compulsory insurance or provide other financial guarantees enabling them to pay for compensation.

54. While, in principle, the core of article 14 was found acceptable by many members, its scope and drafting led to a number of comments.

55. The remark was made that another important factor from the point of view of the State in whose territory the activities were carried out was that the highest obligation that the articles should impose on it was one of "due diligence", which the report of the Special Rapporteur defined as obligations

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17/ Article 14 reads as follows:

Article 14

Performance of activities

The State shall ensure, through legislative, administrative or other measures, that the operators of the activities take all necessary measures, including the use of the best available technology, to minimize the risk of significant transboundary harm and reduce its probable scale or, in the event of an accident, to contain and minimize such harm. It shall also encourage the use of compulsory insurance or other financial guarantees enabling provision to be made for compensation.

deemed to be unfulfilled "only where no reasonable effort is made to fulfil them". The essence of the State's obligation was thus to carry out its supervisory function by putting in place appropriate legislative, administrative and enforcement measures in respect of the activities being undertaken in its territory. It was, however, open to question whether the wording of article 14 sufficiently conveyed "due diligence" as distinct from an absolute obligation. If a State adopted the necessary legislative and administrative measures, which, if applied by the private operator, would minimize the risk of significant transboundary harm and reduce its probable scale or, in the event of accident, contain and minimize such harm, and, if the operator failed to comply with those measures, would the expression "ensure" that operators "take all necessary measures" mean that the State was in breach of the obligation imposed by the article? Surely the State should not be responsible in such cases and the wording of article 14 should be revised accordingly.

56. As regards the meaning of prevention, it was stated that the article should deal only with prevention before any damage occurs. The problem of prevention ex post related to liability in the strict sense, with the cessation of the activity, compensation for harm caused, etc.; that was another question, which came under the second part of the topic, namely, corrective measures. Therefore the narrow concept of prevention should be adopted in this article and should be amended to read: "The State shall, through legislative, administrative or other measures, allow on its territory only the activities of operators who take all necessary measures, including the use of the best available technology, to minimize the risk of transboundary harm. It shall make the conduct of such activities subject to the use of insurance commensurate with the risk incurred".

57. The view was also expressed that article 14 conditioned the right of a State to conduct activities with extraterritorial effects within its territory with caution and vigilance before authorizing the activities and while the activities were being undertaken. This article therefore seemed to involve progressive development of the law, with regard to which the requirement of insurance was helpful.

58. According to another view the obligation imposed under the article was for the State to prescribe a duty or duties for the operator to undertake; it was not an obligation to ensure that the operator, in fact, carried out those

duties. Should the operator fail to do so, the obvious sanction would be for the State not to authorize the activity.

59. As regards the insurance requirement, it was stated that it would be useful, as indicated in article 14, that States require the use of insurance. A comment was made to the effect that insurance was essentially a private sector matter and could not form the subject of an international obligation with respect to a risk which might or might not be commercially insurable.

(e) Article 15. Notification and information 18/

60. Article 15 would provide that should an assessment of an activity reveal the possibility of significant transboundary harm, the State of origin would be required to so inform the State or States likely to be affected should an accident occur, and provide them with the results of the assessment. Where there is more than one potentially affected State, assistance of competent international organizations may be sought. States are also required, whenever possible and appropriate, to provide those sections of the public likely to be affected with such information as would enable them to participate in decision-making process relating to the activity. The ninth report mentions

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18/ Article 15 reads as follows:

Article 15

Notification and information

If the assessment referred to in the preceding article indicates the possibility of significant transboundary harm:

(a) The State of origin shall notify the States presumed to be affected regarding this situation and shall transmit to them the available technical information in support of its assessment;

(b) Such notification shall be effected either by the State of origin itself or through an international organization with competence in that area if the transboundary effects of an activity may extend to more than one State which the State of origin might have difficulty identifying;

(c) Should it later come to the knowledge of the State of origin that there are other States presumed to be affected, it shall notify them without delay;

(d) States shall, whenever possible and as appropriate, give the public liable to be affected information relating to the risk and harm that might result from an activity subject to authorization and shall enable such public to participate in the decision-making processes relating to those activities.

three recent legal instruments on the environment which contained similar provisions. 19/ The Special Rapporteur noted that there seemed to be a principle common to many of the instruments dealing with transboundary effects of activities. That principle encouraged participation by individuals and private entities that would presumably be affected in making decisions about the conduct of activities with a risk of significant harm; both in the State of the origin and, under the principle of non-discrimination, in the potentially affected State. Taking into account the considerable diversity in development and political and social awareness among States, this particular aspect of the obligation, in the view of the Special Rapporteur, should be conditioned by the words "whenever possible and an appropriate".

61. The Special Rapporteur noted that, in an earlier version of this article, he had proposed that the State of origin should provide information and notification to the potentially affected State "as soon as possible". He removed that temporal requirement from the new version of the article since some members of the Commission were not sure that it would always be possible in relation to certain activities. He himself, however, believes that such a temporal requirement is useful and could be worked out in the article.

62. Most members who commented on the article supported the principle of notification and information, but expressed concerns about the scope of the article and the practical application of the obligation contained in it.

63. It was agreed that when assessing transboundary effects and before the authorization was given, it would be logical for the State in whose territory the activity is going to take place to inform and consult the States concerned. The information communicated to other States should relate not only to assessment, but also to the decision which the State was going to make. The article should therefore be redrafted to specify the purpose of the notification and information.

64. As for preliminary notification and consultation, the comment was made that it would not be wise or realistic to try to impose a precise obligation on States in connection with information to be made public at the domestic level. The supply of information to other States should be governed by the

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19/ Article 3 of the Convention on Environmental Impact Assessment in a Transboundary Context; articles 3 and 10 of the Convention on the Transboundary Effects of Industrial Accidents, and principle 19 of the Rio Declaration on Environment and Development. For reference see note 15 supra.

two fundamental principles of good faith and good neighbourliness, which were more a matter of conduct than of the means employed. Besides, the State of authorization did not always need to become directly involved in satisfying the other States likely to be affected: the burden of providing the necessary information and engaging in consultation could therefore be left, at least in the initial stages, to the operator.

65. Some members felt that the article required additional clarification. For example, it should be clear in the article that the State of origin might sometimes be unable to determine in advance which States might be at risk. Also what mechanism would have to be used to discharge the obligation to involve the public in the decision-making process? A few members expressed reservation on the requirement of informing the public. In their view, it was up to each State to decide who should be informed and how.

66. Several members did not agree with the basic obligation imposed by article 15. In their opinion, the State of origin did not have to notify the other States of the conclusions of its assessment: instead, it should inform them of the content of its legislation and the measures it had taken to ensure that the activities were consistent with that legislation. In the same context, it was questioned whether notification and information had to be made officially. In any case, in the view of the members, the State of origin could not reasonably be expected to refrain from undertaking a lawful activity, especially when that activity was deemed indispensable to the country’s development and when there was no other solution.

67. Various views were expressed regarding the assistance of international organizations to developing countries in the context of this article.

68. According to one view, special treatment should be accorded to developing countries so far as the assessment of transboundary effects and measures of notification and information were concerned and an assistance programme should be established to provide them with funds and technology. Such a programme and such treatment should be the subject of special provisions, similar to articles 202 and 203 of the United Nations Convention on the Law of the Sea. It should also be compulsory for the operators to take out insurance, so as not to impose a financial burden on States in a case of transboundary harm.

69. According to another view, article 15 dealt, appropriately, with the role that international organizations could play, but restricted that role to notification and information. However, notification was something for the

States concerned, except in certain cases. International organizations, with their financial and technological resources, could provide assistance in many other areas, such as preventive measures and risk assessment. Their involvement should therefore be envisaged, and the conditions for such involvement should be outlined in a separate article or articles. One of the major concerns would be to prevent States from obstructing action by international organizations if it was justified, and to ensure that they agreed on the way in which such action was to be carried out.

70. Again, as regards international organizations, concerns were expressed about the possibility of imposing any obligation at all on "an international organization with competence in that area" and even about whether such organizations should be referred to, except where, like the Seabed Authority, IMO or ICAO, they dealt with areas outside the jurisdiction of States.

(f) Article 16. Exchange of information 20/

71. Article 16, to facilitate preventive measures, provides for periodic exchange of information between the States concerned on an activity with a risk of transboundary harm.

72. The article appeared to be generally acceptable.

20/ Article 16 reads as follows:

Article 16

Exchange of information

While the activity is being carried out, the parties concerned shall periodically exchange any information on it that is useful for the effective prevention of transboundary harm.

(g) Article 17. National security and industrial secrets 21/

73. The Special Rapporteur explained the need for an article to ensure the legitimate concerns of a State in protecting its national security as well as industrial secrets which may be of considerable economic value. This interest of the State of origin, in the view of the Special Rapporteur, would have to be brought into balance with the interests of the potentially affected State through the principle of "good faith". The Draft Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States 22/ attempted to maintain a reasonable balance between the interests of the States involved by requiring the State of origin that is refusing to provide information on the basis of national security and industrial secrets, to cooperate with the potentially affected State in good faith and on the basis of the principle of good-neighbourliness to find a satisfactory solution. The Special Rapporteur attempted to introduce the same balance in article 17 by requiring good-faith cooperation from the State of the origin with the potentially affected State.

74. Some members supported an article of this nature which they found to be a necessary element in regulating the supply of information to other States. To prevent States from using it as a means of evading the legal regime of prevention, it was suggested that the concepts of "national security" and "industrial secrets" should be narrowly defined and that the second part of the article should be strengthened so as to ensure a proper balance between the needs of security and the provision of information pertaining to transboundary hazards. It was also suggested that the words "and in a spirit of good-neighbourliness" be added after the words "in good faith".

21/ Article 17 reads as follows:

Article 17

National security and industrial secrets

Data and information vital to the national security of the State of origin or to the protection of industrial secrets may be withheld, but the State of origin shall cooperate in good faith with the other States concerned in providing any information that it is able to provide, depending on the circumstances.

22/ UNEP/GC.6/17.

75. It was also noted that the exception contained in this article was not without value, but, apart from the fact that it heightened inequality between States, it might defeat the purpose of the obligation to cooperate in good faith. In particular, it might suppress any inclination to exercise the right of initiative that draft article 19 recognized for the State likely to be affected by giving the State of origin a discretionary power not only for the information to be transmitted, but even for the decision whether or not to transmit it.

(h) Article 18. Prior consultation 23/

76. Article 18 would provide for consultations between the States concerned, on preventive measures. It was the view of the Special Rapporteur that consultations were necessary to complete the process of participation by the affected State and to take into account its views and concerns about an activity with a potential for significant harm to it.

77. Some members found article 18 unbalanced. It seemed to them that the Special Rapporteur had implicitly been working on the basis of a presumption of wrongfulness. Requiring "mutually acceptable solutions" was thus going much too far. This would amount to granting them a right of veto; that would not be acceptable. Stress should therefore be placed on cooperation based on good faith and the spirit of good-neighbourliness. The comment was made that the State of origin naturally had to listen to what the other States had to say, but it alone had to take the final decision, possibly taking account of the "factors involved in a balance of interests" referred to in article 20 of the main draft. Having consulted, informed in good faith, assessed and imposed the necessary preventive measures, including insurance, the State should be

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23/ Article 18 reads as follows:

Article 18

Prior consultation

The States concerned shall enter into consultations, at the request of any of them and without delay, with a view to finding mutually acceptable solutions regarding the preventive measures proposed by the State of origin, cooperation among the States concerned in order to prevent harm, and any other issue of concern in connection with the activity in question, on the understanding that in all cases liability for any transboundary harm it might cause will be subject to the provisions of the corresponding articles of this instrument.

able to authorize the activity without the potentially affected States being able to prevent it from doing so, contrary to what draft article 18 implicitly provided. The point was not to find mutually acceptable solutions, but to authorize the conduct of a lawful activity with a "lesser risk".

78. It was also noted that while it was clearly desirable that States should be obliged to consult, it was impossible to require them to reach agreement. A mechanism for settlement of disputes would have to be considered for cases in which no agreement was reached.

79. The remark was also made that one should anticipate a problem in the application of this article, where one State considered that an activity was not likely to cause such harm, while the other insisted on limiting the freedom of the citizens of the first State from engaging in activities beneficial to them. Even if the complainant State was not allowed a right of veto, the obligation to consult would itself entail a duty to satisfy another State and to accept conditions which were perhaps so onerous that the activity itself would have to be abandoned. In such instances, one obvious solution would be to adopt some means for the peaceful settlement of disputes, such as recourse to neutral expert opinions. But even with resort to dispute settlement procedures, the usefulness of this provision was doubtful.

80. As regards the purpose of article 18, it was noted that the Special Rapporteur raised the question of establishing special regimes, perhaps in the form of a convention governing everything relating to the activity in question. In view of that possibility, it was difficult to understand why, according to article 18, the States concerned should enter into consultations with a view to finding mutually acceptable solutions for any issue of concern in connection with the activity in question, "on the understanding that in all cases liability for any transboundary harm it might cause will be subject to the provisions of the corresponding articles of this instrument". If the articles under consideration were one day to become a framework agreement, it would be quite logical to leave States the possibility of establishing special regimes, including a strict liability regime, to regulate, in detail, the questions dealt with by the framework agreement.

(i) Article 19. Rights of the State presumed to be affected 24/

81. This article is designed to deal with situations where for some reason the potentially affected State was not notified of the conduct of an activity with a risk of potential transboundary harm, as provided for in the above articles. This may have happened because the State of origin did not perceive the hazardous nature of the activity although the other State was aware of it, or because some effects made themselves felt beyond the frontier, or because the affected State had a greater technological capability than the State of origin, allowing it to infer consequences of the activity of which the latter was not aware. In such cases, the potentially affected State may request the State of origin to enter into consultations with it. That request should be accompanied by a technical explanation setting forth the reasons for concern. If the activity is found to be one of those covered by these articles, the State of origin is obligated to pay compensation for the cost of the study.

82. Various comments were made in respect of this article. The comment was made that it would be logical, for States that had not been consulted to be given the right to express their point of view in the spirit of what was provided in draft article 19, but subject to two reservations. First, that it was not a right of the State "presumed to be affected", but of the State "likely to be affected". Secondly, the text proposed by the Special Rapporteur should be redrafted in such a way as to distinguish between risk, which, in the context, it was legitimate to take into consideration, and harm, which was not within the scope of prevention. Therefore, there was no need to go any further, in particular as far as the settlement of disputes was

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24/ Article 19 reads as follows:

Article 19

Rights of the State presumed to be affected

Even when no notification has been given of an activity conducted under the jurisdiction or control of a State, any other State which has reason to believe that the activity is causing it or has created a significant risk of causing it substantial harm, may request consultations under the preceding article. The request shall be accompanied by a technical explanation setting forth the reasons for such belief. If the activity is found to be one of those referred to in article 1, the State of origin shall pay compensation for the cost of the study.

concerned. All obligations of prevention linked to "liability" were, in fact, firm obligations which the State had to fulfil, account being taken of the circumstances, existing technology and the means available to it. If it did not fulfil those obligations, it would be responsible, but only within the framework of the topic of State responsibility for internationally wrongful acts.

83. It was also noted that there was the fear that, under the cover of article 19, the State presumed to be affected, would interfere in the economic and industrial policy of the State of origin and thereby cause that State material harm. It would therefore be preferable, in the case of pre-existing activities, to confine the application of measures of prevention to activities having harmful effects or at least to potentially dangerous activities such as nuclear or chemical plants, a list of which could be incorporated in an annex.

(j) Article 20. Factors involved in a balance of interests 25/

25/ Article 20 reads as follows:

Article 20

Factors involved in a balance of interests

In the case of the consultations referred to above and in order to achieve an equitable balance of interests among the States concerned in relation to the activity in question, these States may take into account the following factors:

(a) Degree of probability of transboundary harm and its possible gravity and extent, and the likely incidence of cumulative effects of the activity in the affected States;

(b) The existence of means of preventing such harm, taking into account the highest technical standards for engaging in the activity;

(c) Possibility of carrying out the activity in other places or with other means, or availability of other alternative activities;

(d) Importance of the activity for the State of origin, taking into account economic, social, safety, health and other similar factors;

(e) Economic viability of the activity in relation to possible means of prevention;

(f) Physical and technological possibilities of the State of origin in relation to its capacity to take preventive measures, to restore pre-existing environmental conditions, to compensate for the harm, caused or to undertake

84. The Special Rapporteur stated that one of the goals of these articles is to provide for a system or a regime in which the parties could balance their interests. In addition to procedures which allow States to negotiate and arrive at such a balance of interest, there are principles of content to such an exercise. Article 20 intended to deal with the latter and listed factors that must be taken into account in any balancing of interests. He noted the comments made by the members of the Commission at previous sessions. Those comments did not indicate disproval of the list of factors, but uncertainty about where they should be placed. Even though, he himself was, in the past, unenthusiastic about having an article listing factors relevant to balancing of interests, he now finds merit in having such an article. He referred to article 6 of the Law of the non-navigational uses of international watercourses in which factors relevant to the principle of equitable and reasonable utilization of watercourses were listed. In his view, an article listing factors relevant to balancing of interests was useful because it more easily operationalized a very general concept.

85. Most of the members who commented on this article found it useful particularly if the articles were to become a framework convention whose provisions were meant not to be binding but to act as guidelines for States.

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alternative activities;

(g) Standards of protection which the affected State applies to the same or comparable activities, and standards applied in regional or international practice;

(h) Benefits which the State of origin or the affected State derive from the activity;

(i) Extent to which the harmful effects stem from a natural resource or affect the use of a shared resource;

(j) Willingness of the affected State to contribute to the costs of prevention or reparation of the harm;

(k) Extent to which the interests of the State of origin and the affected States are compatible with the general interests of the community as a whole;

(l) Extent to which assistance from international organizations is available to the State of origin;

(m) Applicability of relevant principles and norms of international law.

It was noted that the article referred both to equitable principles and scientific data, but it was unclear how it would be applied in practice. These members felt the article would be better placed in an annex, particularly in view of the fact that the list was not exhaustive.

86. Several members did not find much utility in the concept of "balance of interest" and consequently in the list of factors contained in the article. The comment was also made to the effect that only the principle of taking account of the interests of other States and of the international community should be included in the article, with a non-exhaustive list of those factors included in the commentary.

(k) Article 20 bis. Non-transference of risk or harm 26/

87. The Special Rapporteur explained that his ninth report dealt with preventive measures, that a State should take in respect of activities with a risk of transboundary harm. These measures, which were basically of a procedural nature, should be accompanied by an article setting forth the principle of non-transference of risk or harm. He mentioned that similar provisions were found in some other legal instruments dealing with comparable problems such as the Code of Conduct on Accidental Pollution of Transboundary Inland Waters (article II(2)), the United Nations Convention on the Law of Sea (article 195) and the Rio Declaration on Environment and Development. Such an article could be placed in the section on principles and could be drafted more broadly so as to apply to both issues of risk and harm covering the articles on prevention and those on liability which will come later.

88. Few members commented on article 20 bis. Some found it logical and normal to include in the draft articles the principles of non-transference of risk or harm. However, others felt the article only complicated the situation.

26/ Article 20 bis reads as follows:

Article 20 bis

Non-transference of risk or harm

In taking measures to prevent, control or reduce the transboundary effects of dangerous activities, States shall ensure that risks or harm are not transferred between areas or environmental media, and that one risk is not substituted for another.

3. Other issues

(a) The question of dispute settlement procedures

89. The Special Rapporteur explained that in his view the principle of consultations between the State of origin and the potentially affected State rested on the principle of good faith and cooperation. But he believed that this assumption did not preclude possibilities of impasse where States concerned were unable to resolve by themselves genuine concerns through consultations. In addition, he referred to concerns expressed by some members of the Commission to the effect that the consultations should not provide an opportunity for abuse of the process by the potentially affected State. To remedy these problems the Special Rapporteur found it useful and practical to anticipate a provision on peaceful settlement of disputes to deal specifically with problems which might arise during consultations. One possible means of peaceful settlement of disputes, in the view of the Special Rapporteur, was a commission of inquiry similar to that proposed in appendix IV of the Convention on Environmental Impact Assessment in a Transboundary Context and in annex II of the Convention on the Transboundary Effects of Industrial Accidents. These procedures are designed to provide advice to the parties and are at the same time automatic. The Special Rapporteur did not believe that this was an urgent matter, but he felt that it would be useful if during the discussion, the members of the Commission expressed their views on it.

90. Some members supported the idea of envisaging dispute settlement procedures in the context of this topic. The remark was made that it should be clear whether the articles on the settlement of disputes should apply to disputes in general or only to disputes arising out of the consultations contemplated. It was noted that the Special Rapporteur had presented convincing arguments in favour of specific procedures dealing with dispute relating to the original assessment of risk, more particularly in the form of inquiry commissions. In that context, it was also recommended by some members that any dispute settlement procedure should have a technical inquiry commission as an essential component. The models provided for in the Convention on Environmental Impact Assessment in a Transboundary Context or in the Convention on the Transboundary Effects of Industrial Accidents were also considered appropriate. Some other members felt that it would be preferable to decide on this question when the work on articles was completed and the a decision on the nature of the articles was made.

(b) The question of the polluter-pays principle

91. The Special Rapporteur noted that in some recent instruments, such as in the Code of Conduct on Accidental Pollution of Transboundary Inland Waters and in the Convention on the Transboundary Effects of Industrial Accidents, there are provisions containing the polluter-pays principle. This principle, in his view, should be carefully examined by the Commission in relation to these articles since the principle was relevant to both measures of prevention and the regime of civil liability. He stated his intentions to examine the polluter-pays principle in his report for the next session of the Commission.

92. Few comments were made on the polluter-pays principle. In general there was agreement that the principle might be appropriate when dealing with the question of liability and that the issue should be discussed thoroughly then. It was noted that a legal regime of the kind the Commission was working on should be based on the liability of the operator rather than on that of the State. The reason was that liability derived from something other than failure to fulfil an obligation and did not entail full compensation for harm, regardless of the circumstances in which the harm had occurred. Transboundary harm resulting from an activity involving risk carried out in the territory or under the control of a State might, however, give rise in certain circumstances to the liability of the State of origin.

93. It was noted that the polluter-pays principle should also be examined in the context of what a State had done before the occurrence of harm and after the occurrence of harm. The role of the State in this regard is relevant to its possible liability for harm caused.
