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

Rapporteur: Mr. Peter Kabatsi

TEXT OF DRAFT ARTICLES 1, 2 (PARAGRAPHS A, B AND C), 11 TO 14 BIS [20 BIS], 15 TO 16 BIS AND 17 TO 20 WITH COMMENTARIES THERETO PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS FORTY-SIXTH SESSION ...

Addendum

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[CHAPTER II

PREVENTION]*

Article 11

Prior authorization

States shall ensure that activities referred to in article 1 are not carried out in their territory or otherwise under their jurisdiction or control without their prior authorization. Such authorization shall also be required in case a major change is planned which may transform an activity into one referred to in article 1.

Commentary

(1) This article imposes an obligation on States to ensure that activities having a risk of causing significant transboundary harm are not undertaken in their territory or otherwise under their jurisdiction or control without their prior authorization. The word "authorization" means granting permission by governmental authorities to conduct an activity covered by these articles. States are free to choose the form of such authorization.

(2) The Commission also recalls the decision of the International Court of Justice in the Corfu Channel case, where the Court held that a State has an obligation "not to allow knowingly its territory to be used for acts contrary to the rights of other States." 39/ In the view of the Commission, the requirement of prior authorization creates the presumption that activities covered by these articles are taking place in the territory or otherwise under the jurisdiction or control of a State with the knowledge of that State.

(3) The words "in their territory or otherwise under their jurisdiction or control", are taken from article 1 for consistency. The words "activities referred to in article 1" is a shorthand for "activities involving a risk of causing significant transboundary harm".

(4) The second sentence of article 11 contemplates situations where a major change is proposed in the conduct of an activity that is otherwise innocuous, where the change would transform that activity into one which involves a risk of causing significant transboundary harm. The implementation of such a change would also require State authorization. It is obvious that prior

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* The designation of the chapter is provisional.

39/ I.C.J. Reports, 1949, p. 22.

authorization is also required for a major change planned in an activity already within the scope of article 1, and that change may increase the risk or alter the nature or the scope of the risk.

Article 12

Risk assessment

Before taking a decision to authorize an activity referred to in article 1, a State shall ensure that an assessment is undertaken of the risk of such activity. Such an assessment shall include an evaluation of the possible impact of that activity on persons or property as well as in the environment of other States.

Commentary

(1) Under article 12, a State, before granting authorization to operators to undertake activities referred to in article 1, should ensure that an assessment is undertaken of the risk of the activity causing significant transboundary harm. This assessment enables the State to determine the extent and the nature of the risk involved in an activity and consequently the type of preventive measures it should take. The Commission feels that as these articles are designed to have global application, they cannot be too detailed. They should contain only what is necessary for clarity.

(2) Consideration of the interests of others through assessment of the consequences of an activity, as provided for in this article, has been explicitly recognized as an obligation and referred to by the Trail Smelter Tribunal and by some States in their international relations. In its award in the Trail Smelter case, the Tribunal briefly described and highly commended the comprehensive and long-term experiments and collections of data analysed in order to develop a permanent regime fulfilling the duty of care required of the Canadian smelter. The tests had been carried out over a period of three years under the supervision of what the Tribunal called "well-established and known scientists" in chemistry, plant physiology, meteorology and the like, for the purpose of collecting data on the pollution caused by the smelter and on the damage to United States interests. In the opinion of the Tribunal, the study was "probably the most thorough [one] ever made of any area subject to atmospheric pollution by industrial smoke". 40/ Some of the factors

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40/ UNRIAA, vol. III, p. 1973.

considered had been used for the first time in evaluating smoke control. The methods successfully used in testing eventually became embodied in the regime adopted by the Tribunal. 41/

(3) The requirement of article 12 is compatible with Principle 17 of the Rio Declaration on Environment and Development provides also for impact assessment of activities that are likely to have a significant adverse impact on the environment:

> Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority. 42/

Requirement of assessment of adverse effects of activities have been incorporated in various forms in many international conventions. 43/ The

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41/ Ibid., pp. 1973-1974.

42/ A/CONF.151/Rev.1 (vol.I), p. 3.

43/ See, for example, Arts. 205 and 206 of the United Nations Convention on the Law of the Sea, A/CONF.62/122; Art. 4 of the Convention on the Regulation of Antarctic Mineral Resources Activities of 2 June 1988, International Legal Materials, vol. 28, p. 868; Art. 8 of the Protocol on Environmental Protection to the Antarctic Treaty, of 4 October, 1991, ibid, vol. 30, p. 1461; Art. 14 (1) (a) and (b) of the Convention on Biological Diversity of 1992, doc. DPI/1307; Art. 14 of the ASEAN Agreement on the Conservation of Nature and Natural Resources, of 9 July 1985 in Selected Multilateral Treaties in the Field of Environment, vol. 2, p. 343; Noumea Convention for the Protection of the Natural Resources and Environment of the South-Pacific Region, of 24 November 1986, International Legal Materials, vol. 26, p. 38; Art. XI of Kuwait Regional Convention for the Cooperation on the Protection of the Marine Environment from Pollution, of 24 April 1978, ibid., vol. 17, p. 511; and Jeddeh Regional Convention for the Conservation of the Regional Environment of the Red Sea and Gulf of Aden, of 14 February 1982, Selected Multilateral Treaties in the Field of Environment, vol. 2, p. 144. In some treaties, the requirement of impact assessment is implied. For example, the two multilateral treaties regarding communication systems require their signatories to use their communications installations in ways that will not interfere with the facilities of other States parties. Art. 10, para. 2, of the 1927 International Radiotelegraph Convention requires the parties to the Convention to operate stations in such a manner as not to interfere with the radioelectric communications of other contracting States or of persons authorized by those Governments. League of Nations, Treaty Series, vol. LXXXIV, p.97. Again, the 1936 International Convention concerning the Use of Broadcasting in the Cause of Peace prohibits the broadcasting to another State of material designed to incite the population to act in a manner incompatible with the internal order of security of that State. Ibid., vol. CLXXXVI, p. 301.

most notable is the Convention on Environmental Impact Assessment in a Transboundary Context of 25 February 1991 which is devoted entirely to the procedure to conduct and the substance of impact assessment. 44/

(4) The question of who should conduct the assessment is left to the States. Such assessment is normally conducted by operators observing certain guidelines set by the States. The evaluation of such assessments is normally done by government departments or agencies. These matters would have to be resolved by the States themselves through their domestic laws. However, it is presumed that a State will designate an authority whether or not governmental, to evaluate the assessment on behalf of the Government and will accept responsibility for the conclusions reached by that authority.

(5) The article does not specify what the content of the risk assessment should be. Obviously the assessment of risk of an activity can only be meaningfully prepared if it relates the risk to the possible harm to which the risk could lead. Most existing international conventions and legal instruments do not specify the content of assessment. There are exceptions, such as the Convention on Environmental Impact Assessment in a Transboundary Context, which provides in detail the content of such assessment. 45/

44/ For the text of the Convention see, Internationales Umweltrecht - Multilaterale Vertrage, BzUB7/I./92, reprinted in International Legal Materials, vol. 30, p. 800.

45/ A prime example, is article 4 of the Convention on Environmental Impact Assessment in a Transboundary Context of 1991. That article provides that the environmental impact assessment of a State party should contain as a minimum, the information described in Appendix II to the Convention. Appendix II lists nine items as follows:

Content of the Environmental Impact Assessment Documentation

Information to be included in the environmental impact assessment documentation shall, as a minimum, contain, in accordance with Article 4:

(a) A description of the proposed activity and its purpose;

(b) A description, where appropriate, of reasonable alternatives (for example, location or technological) to the proposed activity and also the no-action alternative;

(c) A description of the environment likely to be significantly affected by the proposed activity and its alternatives;

General Assembly resolution 37/217 of 24 March 1983 on International Cooperation in the Field of the Environment also provides, in conclusion No. 8, in detail for the content of assessment for offshore mining and drilling. 46/

(6) The prevailing view in the Commission is to leave the specifics of what ought to be the content of assessment to the domestic laws of the State conducting such assessment. However, the Commission feels that such an assessment shall contain, at least, an evaluation of the possible harmful impact of the activity concerned on persons or property as well as on the environment of other States. This requirement, which is contained in the second sentence of article 12, is intended to clarify further the reference, in the first sentence, to the assessment of "the risk of the activity causing significant transboundary harm". The Commission believes that the additional clarification is necessary for the simple reason that the State of origin will have to transmit the risk assessment to the States which might be suffering harm by that activity. In order for those States to evaluate the risk to which they might be exposed, they need to know what possible harmful effects that activity might have on them as well as the probabilities of the harm occurring. That information is crucial, as the article makes clear.

(d) A description of the potential environmental impact of the proposed activity and its alternatives and an estimation of its significance;

(e) A description of mitigation measures to keep adverse environmental impact to a minimum;

(f) An explicit indication of predictive methods and underlying assumptions as well as the relevant environmental data used;

(g) An identification of gaps in knowledge and uncertainties encountered in compiling the required information;

(h) Where appropriate, an outline for monitoring and management programmes and any plans for post-project analysis; and

(i) A non-technical summary including a visual presentation as appropriate (maps, graphs, etc.).

For the Convention, see International Legal Materials, vol. 30, p. 800, 1991.

46/ General Assembly Official Records: Thirty-seventh Session, Supp. No. 51 (A/37/51).

(7) The assessment shall include the effects of the activity not only on persons and property, but also on the environment of other States. The Commission is convinced of the necessity and the importance of the protection of the environment, independently of any harm to individual human beings or property.

(8) It is the view of the Commission that the requirement of authorization obliges a State to be aware that an activity with a possible risk of significant transboundary harm is taking place in its territory or otherwise under its jurisdiction or control and that the State should take the measures indicated in these articles. This article requires the State to take a more responsible and active role in regulating activities taking place in their territory or under their jurisdiction or control with possible significant transboundary harm. The Commission takes note, in this respect, of the decision by the Trail Smelter Tribunal holding that Canada was responsible in international law for the conduct of the Trail Smelter, and that its Government had "the duty ... to see to it that this conduct should be in conformity with the obligation of the Dominion under international law as herein determined". 47/ The Tribunal held that in particular, "the Trail Smelter shall be required to refrain from causing any damage through fumes in the State of Washington". 48/ In the view of the Commission, article 11 is compatible with this requirement.

(9) This article does not oblige the States to require risk assessment for any activity being undertaken within their territory or otherwise under their jurisdiction or control. Activities involving a risk of causing significant transboundary harm have some general characteristics which are identifiable and could provide some indication to States as to which activities might fall within the terms of these articles. For example, the type of the source of energy used in manufacturing an activity, the substances manipulated in production, the location of the activity and its proximity to the border area, etc. could all give an indication of whether the activity might fall within the scope of these articles. There are certain substances that are listed in some conventions as dangerous or hazardous and their manipulation in any

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47/ United Nations, Reports of International Arbitral Awards, vol. 3, pp. 1965-66.

48/ Ibid, p. 1966.

activity in itself may be an indication that those activities might have significant transboundary harm. 49/ There are also certain conventions that list the activities that are presumed to be harmful and that might signal that those activities might fall within the scope of these activities. 50/ The Commission is aware that additional criteria are necessary to determine with more precision the type of activities within the scope of these articles. It, therefore, intends to consider the issue at a later stage and recommend either a provision defining the activities falling within the scope of these articles or a provision listing such activities or certain quality of such activities.

Article 13

Pre-existing activities

If a State, having assumed the obligations contained in these articles, ascertains that an activity involving a risk of causing significant transboundary harm is already being carried out in its territory or otherwise under its jurisdiction or control without the authorization as required by article 11, it shall direct those

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49/ For example, the 1974 Convention for the Prevention of Marine Pollution from Land-based Sources provides in Art. 4 an obligation for parties to eliminate or restrict the pollution of the environment by certain substances and the list of those substances are annexed to the Convention, UNEP, Selected Multilateral Treaties in the Field of the Environment, Ref. Series 3, 1983, p. 430. Similarly, the 1974 Convention on the Protection of the Marine Environment of the Baltic Sea Area provides a list of hazardous substances in annex I and of noxious substances and materials in annex II, deposits of which are either prohibited or strictly limited, in ibid, p. 405. See also the Protocol to the 1976 Convention for the Protection of the Mediterranean Sea against Pollution, in ibid., p. 448; and the 1976 Convention for the Protection of the Rhine against Chemical Pollution, in United Nations, Treaty Series, vol. 1124, p. 375.

50/ See for example annex I to the 1991 Convention on Environmental Impact Assessment in a Transboundary Context, where a number of activities such as the crude oil refineries, thermal power stations, installations to produce enriched nuclear fuels, etc. are identified as possibly dangerous to the environment and requiring environmental impact assessment under the Convention, International Legal Materials, vol. 30, p. 800; and annex II of the 1993 Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, where activities such as the installations of sites for the partial or complete disposal of solid, liquid wastes by incineration on land or at sea, installations or sites for thermal degradation of solid, gaseous or liquid wastes under reduced oxygen supply, etc. have been identified as dangerous activities. This Convention also has a list of dangerous substances in annex I. The Convention E.T.S. 150.

responsible for carrying out the activity that they must obtain the necessary authorization. Pending authorization, the State may permit the continuation of the activity in question at its own risk.

Commentary

(1) Article 13 is intended to apply in respect of activities within the scope of article 1, which were being conducted by a State before that State assumed the obligations contained in these articles. The words "having assumed the obligations contained in these articles" are without prejudice to the final form of these articles.

(2) In accordance with this article, when the State "ascertains" that such an activity has been conducted in its territory or otherwise under its jurisdiction or control, before these articles come into force for it, it should "direct" those responsible for carrying out the activity to obtain the necessary authorization. The expression "necessary authorization" here means permits required under the domestic law of the State, in order to implement its obligations under these articles.

(3) The Commission is aware that it might be unreasonable to require States party to these articles to apply immediately these articles in respect of existing activities. An immediate requirement of compliance could put a State in breach of the article, the moment it becomes party to them. In addition, a State party, at the moment of entry into force of these articles, might not know of the existence of all such activities within its territory or under its jurisdiction or control. For that reason, the article provides that when a State "ascertains" the existence of such an activity, it should comply with the obligations. The word "ascertain" in this article should not, however, be interpreted so as to justify States, when becoming parties to these articles, to take no action to identify such activities or merely to wait until such information is brought to their knowledge by other States or private entities. The word "ascertain" should be understood in the context of the obligation of due diligence, requiring reasonable and good faith efforts by the States to identify such activities. Therefore, the word "ascertain" should be understood in the context of the explanations given in this paragraph.

(4) A certain period of time might be needed for the operator of the activity to comply with the authorization requirements. The Commission is of the view that the choice between whether the activity should be stopped pending authorization or should continue while the operator goes through the process of obtaining authorization should be left to the State of origin. If the

State chooses to allow the activity to continue, it does so at its own risk. It is the view of the Commission that absent any language in the article indicating possible repercussions, the State of origin will have no incentive to comply and to do so expeditiously with the requirements of these articles. At the same time, in view of the fact that the Commission has not yet decided on the form and the substance of a liability regime for this topic, the issue cannot be prejudged at this time. Therefore, the expression "at its own risk" is intended (a) to leave the possibility open for any consequences as the future draft articles on this topic might impose on the State of origin in such circumstances; and (b) to leave the possibility open for the application of any other rule of international law on responsibility in such circumstances.

(5) Some members of the Commission favoured the deletion of the words "at its own risk". In their view, those words implied that the State of origin may be liable for any damage caused by such activities before authorization was granted. That implication, they believed, prejudged the issue of liability which the Commission had not even discussed. The reservation of these members extended also to the use of these words in article 18, paragraph 3. Other members of the Commission, however, favoured the retention of those words. In their view, those words did not imply that the State of origin was liable for any harm caused; it only kept the option of such a possible liability open. They also felt that the deletion of those words would change the fair balance the article maintains between the interests of the State of origin and the States likely to be affected.

(6) In case the authorization is denied by the State of origin, it is assumed that the State of origin will stop the activity. If the State of origin fails to do so, it will be assumed that the activity is being conducted with the knowledge and the consent of the State of origin and therefore the second sentence of article 13 becomes applicable.

Article 14*

Measures to prevent or minimize the risk

States shall take legislative, administrative or other actions to ensure that all appropriate measures are adopted to prevent or minimize the risk of transboundary harm of activities referred to in article 1.

Commentary

(1) The standard of the obligation of States to take preventive measures is due diligence. Article 14 is the core of the due diligence obligation requiring States to take certain unilateral measures to prevent or minimize a risk of significant transboundary harm. The obligation imposed by this article is not an obligation of result within the meaning of article 21 of Part One of State responsibility. It is the conduct of a State that will determine whether the State has complied with its obligation under this article.

(2) Due diligence has been widely used in international conventions 51/ as well as in the resolutions and reports of international conferences and organizations as the standard basis for the protection of the environment from harm. 52/ The obligation of due diligence was recently discussed in a

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* The expression "prevent or minimize the risk" of transboundary harm in this and other articles will be reconsidered in the light of the decision by the Commission as to whether the concept of prevention includes, in addition to measures aimed at preventing or minimizing the risk of occurrence of an accident, measures taken after the occurrence of an accident to prevent or minimize the harm caused.

51/ See for example, Art. 194, para. 1 of the United Nations Convention on the Law of the Sea, A/CONF.62/122; Arts. I, II and VII(2) of the Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter in International Legal Materials vol. 11, p. 1294; Art. 2 of the Vienna Convention for the Protection of the Ozone Layer; Ibid; vol. 26, p. 1529. Art. 7, para. 5 of the Convention on the Regulation of Antarctic Mineral Resources Activities International Legal Materials, vol. 28, p. 868; Art. 2 para. 1 of the Convention on Environmental Impact Assessment in a Transboundary Context, doc. E/ECE/1250; and Art. 2, para. 1 of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes International Legal Materials vol. 31, p. 1313.

52/ See Principle 21 of the World Charter for Nature, General Assembly resolution 37/7 adopted on 28 October 1982; Principles VI and VIII of Draft Principles relating to weather modification prepared by the WHO and by UNEP, in Digest of United States Practice in International Law, 1978, p. 1205.

dispute between Germany and Switzerland relating to the pollution of the Rhine by Sandoz; the Swiss Government acknowledged responsibility for lack of due diligence in preventing the accident through adequate regulation of its pharmaceutical industries. 53/

(3) In the Alabama case, the Tribunal examined two different definitions submitted by the parties, the United States and the United Kingdom, of due diligence. The United States defined due diligence as:

> "[A] diligence proportioned to the magnitude of the subject and to the dignity and strength of the power which is to exercise it; a diligence which shall, by the use of active vigilance, and of all the other means in the power of the neutral, through all stages of the transaction, prevent its soil from being violated; a diligence that shall in like manner deter designing men from committing acts of war upon the soil of the neutral against its will, ..." 54/

The other party to the dispute, United Kingdom, defined due diligence as "such care as governments ordinarily employ in their domestic concerns." 55/ The Tribunal seemed to have been persuaded by the broader definition of the standard of due diligence presented by the United States and expressed concern about the "national standard" of due diligence presented by the United Kingdom. The Tribunal stated that "The British Case seemed also to narrow the international duties of a government to the exercise of the restraining powers conferred upon it by municipal law, and to overlook the obligation of the neutral to amend its laws when they were insufficient." 56/

(4) The extent and the standard of the obligation of due diligence was also elaborated on by Lord Atkin in the case of Donoghue v. Stevenson as follows:

53/ See New York Times, 11 November 1986, p. A 1; 12 November 1986, p. A 8; 13 November 1986, p. A 3. See also Alexander Kiss, "Tchernobale" ou la pollution accidentelle due Rhin par les produits chimiques, in Annuaire Français de Droit International, vol. 33, 1987, pp. 719-727.

54/ The Geneva Arbitration (The Alabama case) in J. B. Moore, History and Digest of the International Arbitrations to which the United States has been a Party, vol. I, 1898, pp. 572-73.

55/ Ibid., p. 612.

56/ Ibid.

> The rule that you are to love your neighbour becomes, in law, you must not injure your neighbour; and the lawyer's question, "who is my neighbour?" receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts and omissions which are called into question. 57/

(5) In the context of article 14, due diligence is manifested in reasonable efforts by a State to inform itself of factual and legal components that relate foreseeably to a contemplated procedure and to take appropriate measures in timely fashion, to address them. Thus, in accordance with article 14, States are under an obligation to take unilateral measures to prevent or minimize the risk of transboundary harm of the activities within the scope of article 1. Such measures include, first, formulating policies designed to prevent or minimize transboundary harm and, second, implementing those policies. Such policies are expressed in legislation and administrative instructions and implemented through various enforcement mechanisms. The word "ensure" in the phrase "to ensure that all necessary measures are adopted" is intended to require a particularly high standard in State behaviour viz., to be rigorous in designing and implementing policies directed at minimizing transboundary harm.

(6) The Commission believes that the standard of due diligence against which the conduct of a State should be examined is that which is generally considered to be appropriate and proportional to the degree of risk of transboundary harm in the particular instance. For example, activities which may be considered ultra-hazardous require a much higher standard of care in designing policies and a much higher degree of vigour on the part of the State to enforce them. Issues such as the size of the operation; its location; special climate conditions; materials used in the activity; and whether the conclusions drawn from the application of these factors in a specific case are reasonable are among the factors to be considered in determining the due diligence requirement in each instance. The Commission also believes that what would be considered a reasonable standard of care or due diligence may change with time; what might be considered an appropriate and reasonable procedure, standard or rule at one point in time, might not be considered as

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57/ [1932] A.C., p. 580 (H.L.(Sc)).

such at some point in the future. Therefore, due diligence requires a State to keep abreast of technological changes and scientific developments and to determine not only that equipment for a particular activity is working properly, but also that it meets the most current specifications and standards.

(7) The Commission takes note of Principle 11 of the Rio Declaration on Environment and Development which states:

> States shall enact effective environmental legislation. Environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply. Standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries. 58/

Similar language is found in Principle 23 of the Stockholm Declaration. That Principle, however, specifies that such domestic standards are "[w]ithout prejudice to such criteria as may be agreed upon by the international community". 59/ It is the view of the Commission, that the economic level of States is one of the factors which is taken into account in determining whether an appropriate standard of due diligence has been exercised by a State. But a State's economic level cannot be used to discharge a State from its obligation under this article.

(8) The words "administrative and other actions" cover various forms of enforcement actions. Such actions may be taken by regulatory agencies monitoring the activities and courts and by administrative tribunals imposing sanctions on operators not complying with the rules and the standards or any other pertinent enforcement procedure a State has established.

(9) The obligation of the State is first to attempt to design policies and to take legislative or other actions with the aim of preventing significant transboundary harm. If that is not possible, then the obligation is to attempt to minimize such harm. In the view of the Commission, the word "minimize" should be understood in this context to mean reducing the possibility of harm to the lowest point possible.

58/ Doc. A/CONF.151/26/Rev.1 (vol. I), p. 3.

59/ Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972, Doc. A/CONF.48/Rev.1.

(10) The expression "prevention" in this article, pending a further decision by the Commission, is intended to cover only those measures taken before the occurrence of an accident in order to prevent or minimize the risk of the occurrence of the accident.

Article 14 bis [20 bis]

Non-transference of risk

In taking measures to prevent or minimize a risk of causing significant transboundary harm, States shall ensure that the risk is not simply transferred, directly or indirectly, from one area to another or transformed from one type of risk into another.

Commentary

(1) This article states a general principle of non-transference of risk. It calls on States when taking measures to prevent or minimize a risk of causing significant transboundary harm, to ensure that the risk is not "simply" transferred, directly or indirectly, from one area to another or transformed from one type of risk to another. This article is inspired by the new trend in environmental law, beginning with its endorsement by the Stockholm Conference on the Human Environment, to design comprehensive policy for protecting the environment. Principle 13 of the General Principles for Assessment and Control of Marine Pollution suggested by the Intergovernmental Working Group on Marine Pollution and endorsed by the United Nations Conference on the Human Environment provides:

> Action to prevent and control marine pollution (particularly direct prohibitions and specific release limits) must guard against the effect of simply transferring damage or hazard from one part of the environment to another. 60/

(2) This Principle was incorporated in article 195 of the United Nations Convention on the Law of the Sea which states:

> In taking measures to prevent, reduce and control pollution of the marine environment, States shall act so as not to transfer, directly or indirectly, damage or hazards from one area to another or transform one type of pollution into another. 61/

60/ Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972, Annex III, doc. A/CONF.48/Rev.1, p. 73.

61/ A/Doc.A/CONF.62/122.

Article II, paragraph 2, of the Code of Conduct on Accidental Pollution of Transboundary Inland Waters also provides for a similar principle:

> In taking measures to control and regulate hazardous activities and substances, to prevent and control accidental pollution, to mitigate damage arising from accidental pollution, countries should do everything so as not to transfer, directly or indirectly, damage or risks between different environmental media or transform one type of pollution into another. 62/

(3) The Rio Declaration on Environment and Development discourages States, in Principle 14, from relocating and transferring to other States activities and substances harmful to the environment and human health. This Principle even though primarily aimed at a different problem, is rather more limited than Principle 13 of the Principles for Assessment and Control of Marine Pollution, the Law of the Sea and the Code of Conduct mentioned earlier. Principle 14 reads:

> States should effectively cooperate to discourage or prevent the relocation and transfer to other States of any activities and substances that cause severe environmental degradation or are found to be harmful to human health. 63/

(4) The expression "simply transferred" is taken from Principle 13 of the Principles for Assessment and Control of Marine Pollution endorsed by the Stockholm Conference in 1972. That expression is concerned with precluding actions that purport to prevent or minimize but, in fact, merely externalize the risk by shifting it to a different sequence or activity without any meaningful reduction of said risk. The Commission is aware that, in the context of this topic, the choice of an activity, the place in which it should be conducted and the use of measures to prevent or reduce risk of its transboundary harm are, in general, matters that have to be determined through the process of finding an equitable balance of interests of the parties concerned; obviously the requirement of this article should be understood in that context. It is, however, the view of the Commission that in the process of finding an equitable balance of interests, the parties should take into account the general principle provided for in the article.

62/ E/ECE/1225; ECE/ENVWA/16.

63/ Doc. A/CONF.151/26/Rev.1 (vol. I), p. 3.

(5) The word "transfer" means physical movement from one place to another. The word "transformed" is taken from article 195 of the Law of Sea Convention and refers to the quality or the nature of risk. The words "directly or indirectly" are also taken from article 195 of the Law of the Sea Convention and are intended to set a much higher degree of care for the States in complying with their obligations under this article.

Article 15

Notification and information

1. If the assessment referred to in article 12 indicates a risk of causing significant transboundary harm, the State of origin shall notify without delay the States likely to be affected and shall transmit to them the available technical and other relevant information on which the assessment is based and an indication of a reasonable time within a response is required.

2. Where it subsequently comes to the knowledge of the State of origin that there are other States likely to be affected, it shall notify them without delay.

Commentary

(1) Article 15 deals with a situation in which the assessment undertaken by a State, in accordance with article 12, indicates that the activity planned does indeed pose a risk of causing significant transboundary harm. This article, together with articles 16, 16 bis, 18 and 19 provides for a set of procedures essential to balancing the interests of all the States concerned by giving them a reasonable opportunity to find a way to undertake the activity with satisfactory and reasonable measures designed to prevent or minimize transboundary harm.

(2) Article 15 calls on a State to notify other States that are likely to be affected by the activity that is planned. The activities here include both those that are planned by the State itself and by private entities. The requirement of notification is an indispensable part of any system designed to prevent or minimize transboundary harm.

(3) The obligation to notify other States of the risk of significant harm to which they are exposed is reflected in the Corfu Channel case, where the International Court of Justice characterized the duty to warn as based on "elementary considerations of humanity". 64/ This principle is well

64/ Corfu Channel Case, I.C.J. Reports, p. 22, 1949.

developed in the context of the use of international watercourses and in that context is embodied in a number of international agreements, decisions of international courts, and tribunals, declarations and resolutions adopted by intergovernmental organizations, conferences and meetings, and studies by intergovernmental and international non-governmental organizations. 65/

(4) In addition to the utilization of international watercourses, the principle of notification has also been developed in respect of other activities with transboundary effects. For example, article 3 of the Convention on Environmental Impact Assessment in a Transboundary Context 66/ and articles 3 and 10 of the Convention on the Transboundary Effects of Industrial Accidents. 67/ Principle 19 of the Rio Declaration on Environment and Development speaks of timely notification:

> States shall provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect and shall consult with those States at an early stage and in good faith. 68/

(5) The procedure for notification has been established by a number of OECD resolutions. For example, in respect of certain chemical substances, OECD resolution C(71)73 of 18 May 1971 stipulates that each member State is to receive notification prior to the proposed measures in each other member State regarding substances which have adverse impact on man or the environment where such measures could have significant effects on the economics and trade of the other States. 69/ OECD resolution C(74)224 on 14 November 1974 on the "Principles concerning transfrontier pollution" in its Principle on "Principle

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65/ For treaties dealing with prior notification and exchange of information in respect of watercourses, see commentary to article 12 "Notification concerning planned measures with possible adverse effects" of the draft articles on The Law of the Non-Navigational Uses of International Watercourses, Chapter ... , page ... above.

66/ Article 3 of the Convention provides for an elaborate system of notification. For the Convention see, E/ECE/1250, reproduction International Legal Materials, vol. 30, p. 800. ...

67/ Ibid., vol. 31, p. 1333.

68/ Doc. A/CONF.151/26/Rev.1 (vol. I), p. 3.

69/ OECD, OECD and the Environment, 1986, p. 89, para. 4 of the Annex.

of information and consultation" requires notification and consultation prior to undertaking an activity which may create a risk of significant transboundary pollution. 70/

(6) The principle of notification is well established in case of environmental emergencies. Principle 18 of the Rio Declaration on Environment and Development, 71/ article 198 of the United Nations Convention on the Law of Sea; 72/ article .. of the Convention on Early Notification of a Nuclear Accident; 73/ article 14 (1) (d) and (3) of the Convention on Biological Diversity; 74/ and article 5 (1) (c) of the International Convention on Oil Pollution Preparedness, Response and Cooperation 75/ all require notification.

(7) Where assessment reveals the risk of causing significant transboundary harm, in accordance with paragraph 1, the State which plans to undertake such activity has the obligation to notify the States which may be affected. The notification shall be accompanied by available technical information on which the assessment is based. The reference to "available" technical and other relevant information is intended to indicate that the obligation of the State of origin is limited to transmitting the technical and other information which was developed in relation to the activity. This information is generally revealed during the assessment of the activity in accordance with article 12. Paragraph 1 assumes that technical information resulting from the assessment includes not only what might be called raw data, namely fact sheets, statistics, etc., but also the analysis of the information which was used by the State of origin itself to make the determination regarding the risk of transboundary harm.

(8) States are free to decide how they wish to inform the States that are likely to be affected. As a general rule, it is assumed that States will

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70/ Ibid., p. 142.

71/ Ibid.

72/ Doc. A/CONF.62/122.

73/ International Legal Materials, vol. 25, p. 1369.

74/ Doc. DPI/1307.

75/ International Legal Materials, vol. 30, p. 735.

directly contact the other States through diplomatic channels. In the absence of diplomatic relations, States may give notification to the other States through a third State.

(9) Paragraph 2 addresses the situation where the State of origin, despite all its efforts and diligence, is unable to identify all the States that may be affected prior to authorizing the activity, but during the process of authorization or after the activity is undertaken gains that knowledge. In accordance with this paragraph, the State of origin, in such cases, is under the obligation to make such notification without delay. The reference without delay is intended to require that the State of origin should make notification as soon as the information comes to its knowledge and it has had an opportunity, within a reasonable time, to determine that certain other States are likely to be affected by the activity.

Article 16

Exchange of information

> While the activity is being carried out, the States concerned shall exchange in a timely manner all information relevant to preventing or minimizing the risk of causing significant transboundary harm.

Commentary

(1) Article 16 deals with steps to be taken after an activity has been undertaken. The purpose of all these steps is the same as previous articles viz., to prevent or minimize the risk of causing significant transboundary harm.

(2) Article 16 requires the State of origin and the likely affected States to exchange information regarding the activity, after it has been undertaken. In the view of the Commission, preventing and minimizing the risk of transboundary harm based on the concept of due diligence are not a once-and-for-all effort; they require continuing efforts. This means that due diligence is not terminated after granting authorization for the activity and undertaking the activity; it continues in respect of monitoring the implementation of the activity as long as the activity continues.

(3) The information that is required to be exchanged, under article 16, is whatever would be useful, in the particular instance, for the purpose of prevention of risk of significant harm. Normally such information comes to the knowledge of the State of origin. However, when the State that is likely

to be affected has any information which might be useful for prevention purposes, it should make it available to the State of origin.

(4) The requirement of exchange of information is fairly common in conventions designed to prevent or reduce environmental and transboundary harm. These conventions provide for various ways of gathering and exchanging information, either between the parties or through providing the information to an international organization which makes it available to other States. 76/ In the context of these articles, where the activities are most likely to involve a few States, the exchange of information is effected between the States directly concerned. Where the information might affect a large number of States, relevant information may be exchanged through other avenues, such as for example, competent international organizations.

(5) Article 16 requires that such information should be exchanged in a timely manner. This means that when the State becomes aware of such information, it should inform the other States quickly so that there will be enough time for the States concerned to consult on appropriate preventive measures or the States likely to be affected will have sufficient time to take proper actions.

(6) There is no requirement in the article as to the frequency of exchange of information. The requirement of article 16 comes into operation only when States have any information which is relevant to preventing or minimizing transboundary harm.

76/ For example, article 10 of the Convention on the Protection of Marine Pollution from Land-based Sources; International Legal Materials, vol. 13, p. 352; article 4 of the Vienna Convention for the Protection of the Ozone Layer, ibid., vol. 26, p. 1529 and article 200 of the United Nations Convention on the Law of Sea, A/CONF.62/122 speak of individual or joint research by the States Parties on prevention or reduction of pollution and of transmitting to each other directly or through a competent international organization the information so obtained. The Convention on Long-range Transboundary Air Pollution provides for research and exchange of information regarding the impact of activities undertaken by the State parties to the Convention, in International Legal Materials, vol. 18, p. 1442. Examples are found in other conventions such as article VI, para. 1 (iii) of the Code of Conduct on Accidental Pollution of Transboundary Inland Waters, Doc. E/ECE/1225-ECE/ENVWA/16; article 17 of the Convention on Biological Diversity, Doc. DPI/1307; and article 13 of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, International Legal Materials, vol. 31, p. 1313.