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DRAFT REPORT OF THE INTERNATIONAL LAW COMMISSION
ON THE WORK OF ITS FIFTIETH SESSION

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Chapter VI

INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW (PREVENTION OF TRANSBOUNDARY DAMAGE FROM HAZARDOUS ACTIVITIES)

Addendum

C. Draft articles provisionally adopted by the Commission on first reading

1. Text of the draft articles

[to be inserted]

2. Text of the draft articles with commentaries thereto

Prevention of transboundary damage from hazardous activities

General commentary

(1) The draft articles deal with the concept of prevention in the context of authorization and regulation of hazardous activities which pose a significant risk of transboundary harm. Prevention in this sense, as a procedure or as a duty, deals with the phase prior to the situation where significant harm or damage has actually occurred, requiring States concerned to invoke remedial or compensatory measures, which often involve issues concerning liability.

(2) The concept of prevention has assumed great significance and topicality. The emphasis upon the duty to prevent as opposed to the obligation to repair, remedy or compensate has several important aspects. Prevention should be a preferred policy because compensation in case of harm often cannot restore the situation prevailing prior to the event or accident. Discharge of the duty of prevention or due diligence is all the more required as knowledge regarding the operation of hazardous activities, materials used and the process of managing them and the risks involved is steadily growing. From a legal point of view, the enhanced ability to trace the chain of causation, i.e. the physical link between the cause (activity) and the effect (harm), and even the several intermediate links in such a chain of causation, makes it also imperative for operators of hazardous activities to take all steps necessary to prevent harm. In any event, prevention as a policy is better than cure.

(3) Prevention of transboundary harm arising from hazardous activities is an objective well emphasized by principle 2 of the Rio Declaration[1] and confirmed by the International Court of Justice in its advisory opinion on the Legality of the Threat or Use of Nuclear Weapons in 1996[1bis] as now forming part of the corpus of international law.

(4) The issue of prevention, therefore, has rightly been stressed by the Experts Group on Environmental Law of the World Commission on Environment and Development. Article 10 recommended by the Group in respect of transboundary natural resources and environmental interferences thus reads: "States shall, without prejudice to the principles laid down in articles 11 and 12, prevent or abate any transboundary environmental interference or a significant risk thereof

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[1] Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992, document A/CONF.151/26/Rev.1 (vol.I), p.3.

[1bis] Advisory opinion of 8 July 1996, I.C.J. Reports 1996, p. 15, para. 29.

which causes substantial harm - i.e. harm which is not minor or insignificant."[2] It must be further noted that the well-established principle of prevention was highlighted in the arbitral award in the Trail Smelter case and was reiterated not only in principle 21 of the Stockholm Declaration but also in General Assembly resolution 2995 (XXVII) of 15 December 1972 on cooperation between States in the field of the environment. This principle is also reflected in principle 3 of the 1978 draft UNEP 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 which provided that States must "avoid to the maximum extent possible and ... reduce to the minimum extent possible the adverse environmental effects beyond its jurisdiction of the utilization of a shared natural resource so as to protect the environment, in particular when such utilization might: (a) cause damage to the environment which could have repercussions on the utilization of the resource by another sharing State; (b) threaten the conservation of a shared renewable resource; (c) endanger the health of the population of another State".[3]

(5) Prevention of transboundary harm to the environment, persons and property has been accepted as an important principle in many multilateral treaties concerning protection of the environment, nuclear accidents, space objects, international watercourses, management of hazardous wastes and prevention of marine pollution. It has also been accepted in several conventions concluded by the Economic Commission for Europe such as the 1979 Convention on Long-range Transboundary Air Pollution; the 1991 Convention on Environmental Impact Assessment in a Transboundary Context; the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes; and the 1992 Convention on the Transboundary Effects of Industrial Accidents.

Article 1

Activities to which the present draft articles apply

The present draft articles apply to activities not prohibited by international law which involve a risk of causing significant transboundary harm through their physical consequences.

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[2] Environmental Protection and Sustainable Development - Legal Principles and Recommendations, adopted by the Experts Group on Environmental Law of the World Commission on Environment and Development (Graham and Trotman/Martinus Nijhoff, 1986), p. 75. It was also noted that the duty not to cause substantial harm could be deduced from the non-treaty-based practice of States, and from the statements made by States individually and/or collectively. See J. G. Lammers, Pollution of International Watercourses (Martinus Nijhoff, The Hague, 1984), pp. 346-347, 374-376.

[3] International Legal Materials, vol. 17 (1978), p. 1098. For a mention of other sources where the principle of prevention is reflected, see Environmental Protection and Sustainable Development - Legal Principles and Recommendations, op. cit., pp. 75-80.

(1) Article 1 limits the scope of the articles to activities not prohibited by international law and which involve a risk of causing significant transboundary harm through their physical consequences. Subparagraph (c) of article 2 further limits the scope of articles to those activities carried out in the territory or otherwise under the jurisdiction or control of a State. Since the articles are of a general and residual character, no attempt has been made at this stage to spell out the activities to which they apply. The Commission had different reasons for supporting this conclusion. According to some members, any list of activities would be likely to be under-inclusive, as well as having to be changed from time to time in the light of changing technology. Moreover - leaving to one side certain ultrahazardous activities which are mostly the subject of special regulation, e.g. in the nuclear field or in the context of activities in outer space - the risk that flows from an activity is primarily a function of the particular application, the specific context and the manner of operation. A generic list could not capture these elements. Other members of the Commission are more receptive to the idea of a list of activities. But they take the view that it would be premature at this stage to draw up a list, until the form, scope and content of the articles are more firmly settled. In addition, in their view, the drawing up of such a list is more appropriately done by the relevant technical experts in the context of a diplomatic conference considering the adoption of the articles as a convention.

(2) The definition of scope of activities referred to in article 1 now contains four criteria.

(3) The first criterion refers back to the title of the topic, namely that the articles apply to "activities not prohibited by international law", whether such a prohibition arises in relation to the conduct of the activity or by reason of its prohibited effects.

(4) The second criterion, found in the definition of the State of origin in article 2, subparagraph (d), is that the activities to which preventive measures are applicable are "carried out in the territory or otherwise under the jurisdiction or control of a State". Three concepts are used in this criterion: "territory", "jurisdiction" and "control". Even though the expression "jurisdiction or control of a State" is a more commonly used formula in some instruments,[4] the Commission finds it useful to mention also the concept of "territory" in order to emphasize the importance of the territorial link, when such a link exists, between activities under these articles and a State.

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[4] See, for example, Principle 21 of the Stockholm Declaration, Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972 (United Nations publication, Sales No. E.73.II.A.14 and Corr.), chap. I; the United Nations Convention on the Law of the Sea of 10 December 1982, Official Records of the Third United Nations Conference on the Law of the Sea, vol. XVII (United Nations publication, Sales No. E.84.V.3), document A/CONF.62/122, article 194, paragraph 2; Principle 2 of the Rio Declaration, supra note 1; and article 3 of the United Nations Convention on Biological Diversity of 5 June 1992, document DPI/1307.

(5) The use of the term "territory" in article 1 stems from concerns about a possible uncertainty in contemporary international law as to the extent to which a State may exercise extraterritorial jurisdiction in respect of certain activities. It is the view of the Commission that, for the purposes of these articles, territorial jurisdiction is the dominant criterion. Consequently, when an activity occurs within the territory of a State, that State must comply with the preventive measures obligations. "Territory" is, therefore, taken as conclusive evidence of jurisdiction. Consequently, in cases of competing jurisdictions over an activity covered by these articles, the territorially-based jurisdiction prevails. The Commission, however, is mindful of situations where a State, under international law, has to yield jurisdiction within its territory to another State. The prime example of such a situation is innocent passage of a foreign ship through the territorial sea. In such situations, if the activity leading to significant transboundary harm emanates from the foreign ship, the flag State and not the territorial State must comply with the provisions of the present articles.

(6) The concept of "territory" for the purposes of these articles is narrow and therefore the concepts of "jurisdiction" and "control" are also used. The expression "jurisdiction" of a State is intended to cover, in addition to the activities being undertaken within the territory of a State, activities over which, under international law, a State is authorized to exercise its competence and authority. The Commission is aware that questions involving the determination of jurisdiction are complex and sometimes constitute the core of a dispute. This article certainly does not presume to resolve all the questions of conflicts of jurisdiction.

(7) Sometimes, because of the location of the activity, there is no territorial link between a State and the activity such as, for example, activities taking place in outer space or on the high seas. The most common example is the jurisdiction of the flag State over a ship. The 1958 Geneva Conventions on the Law of the Sea and the 1982 United Nations Convention on the Law of the Sea have covered many jurisdictional capacities of the flag State.

(8) Activities may also be undertaken in places where more than one State is authorized, under international law, to exercise particular jurisdictions that are not incompatible. The most common areas where there are functional mixed jurisdictions are the navigation and passage through the territorial sea, contiguous zone and exclusive economic zones. In such circumstance, the State which is authorized to exercise jurisdiction over the activity covered by this topic must, of course, comply with the provisions of these articles.

(9) In cases of concurrent jurisdiction by more than one State over the activities covered by these articles, States shall individually and, when appropriate, jointly comply with the provisions of these articles.

(10) The function of the concept of "control" in international law is to attach certain legal consequences to a State whose jurisdiction over certain activities or events is not recognized by international law; it covers situations in which a State is exercising de facto jurisdiction, even though it lacks jurisdiction de jure, such as in cases of intervention, occupation and unlawful annexation which have not been recognized in international law. Reference may be made, in

this respect, to the advisory opinion by the International Court of Justice in Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) case.[5] In that case, the Court, after holding South Africa responsible for having created and maintained a situation which the Court declared illegal and finding South Africa under an obligation to withdraw its administration from Namibia, nevertheless attached certain legal consequences to the de facto control of South Africa over Namibia. The Court held:

> "The fact that South Africa no longer has any title to administer the Territory does not release it from its obligations and responsibilities under international law towards other States in respect of the exercise of its powers in relation to this Territory. Physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States."[6]

(11) The concept of control may also be used in cases of intervention to attribute certain obligations to a State which exercises control as opposed to jurisdiction. Intervention here refers to a short-time effective control by a State over events or activities which are under the jurisdiction of another State. It is the view of the Commission that in such cases, if the jurisdictional State demonstrates that it had been effectively ousted from the exercise of its jurisdiction over the activities covered by these articles, the controlling State would be held responsible to comply with the obligations imposed by these articles.

(12) The third criterion is that activities covered in these articles must involve a "risk of causing significant transboundary harm". The term is defined in article 2 (see the commentary to article 2). The words "transboundary harm" are intended to exclude activities which cause harm only in the territory of the State within which the activity is undertaken without any harm to any other State. For discussion of the term "significant", see the commentary to article 2.

(13) As to the element of "risk", this is by definition concerned with future possibilities, and thus implies some element of assessment or appreciation of risk. The mere fact that harm eventually results from an activity does not mean that the activity involved a risk, if no properly informed observer was or could have been aware of that risk at the time the activity was carried out. On the other hand, an activity may involve a risk of causing significant transboundary harm even though those responsible for carrying out the activity underestimated the risk or were even unaware of it. The notion of risk is thus to be taken objectively, as denoting an appreciation of possible harm resulting from an activity which a properly informed observer had or ought to have had.

(14) In this context, it should be stressed that these articles as a whole have a continuing operation and effect, i.e., unless otherwise stated, they apply to

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[5] I.C.J. Reports 1971, p. 14.

[6] Ibid., para. 118.

activities as carried out from time to time. Thus it is possible that an activity which in its inception did not involve any risk (in the sense explained in paragraph (13), might come to do so as a result of some event or development. For example, a perfectly safe reservoir may become dangerous as a result of an earthquake, in which case the continued operation of the reservoir would be an activity involving risk. Or developments in scientific knowledge might reveal an inherent weakness in a structure or materials which carry a risk of failure or collapse, in which case again the present articles might come to apply to the activity concerned in accordance with their terms.

(15) The fourth criterion is that the significant transboundary harm must have been caused by the "physical consequences" of such activities. It was agreed by the Commission that in order to bring this topic within a manageable scope, it should exclude transboundary harm which may be caused by State policies in monetary, socio-economic or similar fields. The Commission feels that the most effective way of limiting the scope of these articles is by requiring that these activities should have transboundary physical consequences which, in turn, result in significant harm.

(16) The physical link must connect the activity with its transboundary effects. This implies a connection of a very specific type - a consequence which does or may arise out of the very nature of the activity or situation in question, in response to a natural law. That implies that the activities covered in these articles must themselves have a physical quality, and the consequences must flow from that quality, not from an intervening policy decision. Thus, the stockpiling of weapons does not entail the consequence that the weapons stockpiled will be put to a belligerent use. Yet this stockpiling may be characterized as an activity which, because of the explosive or incendiary properties of the materials stored, entails an inherent risk of disastrous misadventure.

Article 2

Use of terms

For the purposes of the present articles:

(a) "risk of causing significant transboundary harm" encompasses a low probability of causing disastrous harm and a high probability of causing other significant harm;

(b) "harm" includes harm caused to persons, property or the environment;

(c) "transboundary harm" means harm caused in the territory of or in other places under the jurisdiction or control of a State other than the State of origin, whether or not the States concerned share a common border;

(d) "State of origin" means the State in the territory or otherwise under the jurisdiction or control of which the activities referred to in draft article 1 are carried out;

(e) "State likely to be affected" means the State in the territory of which the significant transboundary harm is likely to occur or which has jurisdiction or control over any other place where such harm is likely to occur.

Commentary

(1) Subparagraph (a) defines the concept of "risk of causing significant transboundary harm" as encompassing a low probability of causing disastrous harm and a high probability of causing other significant harm. The Commission feels that instead of defining separately the concept of "risk" and then "harm", it is more appropriate to define the expression of "risk of causing significant transboundary harm" because of the interrelationship between "risk" and "harm" and the relationship between them and the adjective "significant".

(2) For the purposes of these articles, "risk of causing significant transboundary harm" refers to the combined effect of the probability of occurrence of an accident and the magnitude of its injurious impact. It is, therefore, the combined effect of "risk" and "harm" which sets the threshold. In this respect the Commission drew inspiration from the Code of Conduct on Accidental Pollution of Transboundary Inland Waters,[7] adopted by the Economic Commission for Europe in 1990. Under article I, paragraph (f), of the Code of Conduct, "'risk' means the combined effect of the probability of occurrence of an undesirable event and its magnitude". It is the view of the Commission that a definition based on the combined effect of "risk" and "harm" is more appropriate for these articles, and that the combined effect should reach a level that is deemed significant. The prevailing view in the Commission is that the obligations of prevention imposed on States should be not only reasonable but also sufficiently limited so as not to impose such obligations in respect of virtually any activity, for the activities under discussion are not prohibited by international law. The purpose is to strike a balance between the interests of the States concerned.

(3) The definition in the preceding paragraph allows for a spectrum of relationships between "risk" and "harm", all of which would reach the level of "significant". The definition identifies two poles within which the activities under these articles fall. One pole is where there is a low probability of causing disastrous harm. This is normally the characteristic of ultrahazardous activities. The other pole is where there is a high probability of causing other significant harm. This includes activities which have a high probability of causing harm which, while not disastrous, is still significant. But it would exclude activities where there is a very low probability of causing significant transboundary harm. The word "encompasses" in the second line is intended to highlight the intention that the definition is providing a spectrum within which the activities under these articles will fall.

(4) As regards the meaning of the word "significant", the Commission is aware that it is not without ambiguity and that a determination has to be made in each specific case. It involves more factual considerations than legal

[7] Document E/ECE/1225-ECE/ENVWA/16.

determination. It is to be understood that "significant" is something more than "detectable" but need not be at the level of "serious" or "substantial". The harm must lead to a real detrimental effect on matters such as, for example, human health, industry, property, environment or agriculture in other States. Such detrimental effects must be susceptible of being measured by factual and objective standards.

(5) The ecological unity of the Planet does not correspond to political boundaries. In carrying out lawful activities within their own territories States have impacts on each other. These mutual impacts, so long as they have not reached the level of "significant", are considered tolerable. Considering that the obligations imposed on States by these articles deal with activities that are not prohibited by international law, the threshold of intolerance of harm cannot be placed below "significant".

(6) The idea of a threshold is reflected in the Trail Smelter award which used the words "serious consequences"[7bis] as well as the Tribunal in the Lake Lanoux arbitration which relied on the concept "seriously" (gravement).[7ter] A number of conventions have also used "significant", "serious" or "substantial" as the threshold.[8] "Significant" has also been used in other legal instruments and domestic law.[9]

[7bis] Trail Smelter case; United Nations, Reports of International Arbitral Awards, vol. 3, p. 1965.

[7ter] Lake Lanoux Arbitration (France-Spain), ibid., vol. 12, p. 281.

[8] See, for example, article 4 (2) of the Convention on the Regulation of Antarctic Mineral Resource Activities of 2 June 1988, International Legal Materials, vol. 28, p. 868; articles 2 (1) and (2) of the Convention on Environmental Impact Assessment in a Transboundary Context of 25 February 1991 (E/ECE/1250), reprinted in International Legal Materials, vol. 30, p. 800; article I (b) of the Code of Conduct on Accidental Pollution of Transboundary Inland Waters, supra note 7.

[9] See, for example, operative paras. 1 and 2 of General Assembly resolution 2995 (XXVII) of 15 December 1972 concerning cooperation between States in the field of the environment; Recommendation of the Council of the Organisation of Economic Cooperation and Development on Principles Concerning Transfrontier Pollution, 1974, para. 6, OECD, Non-Discrimination in Relation to Transfrontier Pollution: Leading OECD Documents, p. 35, reproduced also in International Legal Materials, vol. 14, p. 246; The Helsinki Rules on the Uses of the Waters of International Rivers, art. 10, International Law Association, Report of the Fifty-second Conference, Helsinki, 1966, p. 496; and art. 5 of the draft Convention on industrial and agricultural use of international rivers and lakes, prepared by the Inter-American Juridical Committee in 1965, OAS, Rios y Lagos Internacionales, p. 132 (4th ed. 1971).

See also the 1980 Memorandum of Intent Concerning Transboundary Air Pollution between the United States and Canada, 32 U.S.T., p. 2541, T.I.A.S. No. 9856; and the 1983 Mexico-United States Agreement to Cooperate in the

(7) The Commission is also of the view that the term "significant", while determined by factual and objective criteria, also involves a value determination which depends on the circumstances of a particular case and the period in which such determination is made. For instance, a particular deprivation, at a particular time might not be considered "significant" because at that specific time, scientific knowledge or human appreciation for a particular resource had not reached a point at which much value was ascribed to that particular resource. But some time later that view might change and the same harm might then be considered "significant".

(8) Subparagraph (b) is self-explanatory in that "harm" for the purpose of the present draft articles would cover harm caused to persons, property or the environment.

(9) Subparagraph (c) defines "transboundary harm" as meaning harm caused in the territory of or in places under the jurisdiction or control of a State other than the State of origin, whether or not the States concerned share a common border. This definition includes, in addition to a typical scenario of an activity within a State with injurious effects on another State, activities conducted under the jurisdiction or control of a State, for example, on the high seas, with effects on the territory of another State or in places under its jurisdiction or control. It includes, for example, injurious impacts on ships or platforms of other States on the high seas as well. It will also include activities conducted in the territory of a State with injurious consequences on, for example, the ships or platforms of another State on the high seas. The Commission cannot forecast all the possible future forms of "transboundary harm". It, however, makes clear that the intention is to be able to draw a line and clearly distinguish a State to which an activity covered by these articles is attributable from a State which has suffered the injurious impact. Those separating boundaries are the territorial boundaries, jurisdictional boundaries and control boundaries.

(10) In subparagraph (d), the term "State of origin" is introduced to refer to the State in the territory or otherwise under the jurisdiction or control of which the activities referred to in article 1 are carried out (see commentary to article 1, paras. (4) to (11).

(11) In subparagraph (e), the term "State likely to be affected" is defined to mean the State on whose territory or in other places under whose jurisdiction or control significant transboundary harm is likely to occur. There may be more than one such State likely to be affected in relation to any given activity.

Solution of Environmental Problems in the Border Area, art. 7, in International Legal Materials, vol. 22, p. 1025 (1983).

The United States has also used the word "significant" in its domestic law dealing with environmental issues. See the American Law Institute, Restatement of the Law, Section 601, Reporter's Note 3, pp. 111-112.

Article 3

Prevention

States shall take all appropriate measures to prevent, or to minimize the risk of, significant transboundary harm.

Commentary

(1) This article, together with article 4, provides the basic foundation for the articles on prevention. The articles set out the more specific obligations of States to prevent, or to minimize the risk of, significant transboundary harm. The present article is in the nature of a statement of principle. It provides that States shall take all appropriate measures to prevent, or to minimize the risk of, significant transboundary harm. The word "measures" refers to all those specific actions and steps that are specified in the articles on prevention and minimization of transboundary harm.

(2) As a general principle, the obligation in article 3 to prevent or minimize the risk applies only to activities which involve a risk of causing significant transboundary harm, as those terms are defined in article 2. In general, in the context of prevention, a State does not bear the risk of unforeseeable consequences to other States of activities not prohibited by international law which are carried on its territory or under its jurisdiction or control. On the other hand the obligation to "take appropriate measures to prevent, or to minimize the risk of", harm cannot be confined to activities which are already properly appreciated as involving such a risk. The obligation extends to taking appropriate measures to identify activities which involve such a risk, and this obligation is of a continuing character.

(3) This article, then, sets up the principle of prevention that concerns every State in relation to activities covered by article 1. The modalities whereby the State of origin may discharge the obligations of prevention which have been established include, for example, legislative, administrative or other action necessary for enforcing the laws, administrative decisions and policies which the State has adopted. (See article 5 and the commentary thereto.)

(4) The obligation of States to take preventive or minimization measures is one of due diligence, requiring States to take certain unilateral measures to prevent, or to minimize a risk of, significant transboundary harm. The obligation imposed by this article is not an obligation of result. It is the conduct of a State that will determine whether the State has complied with its obligation under the present articles.

(5) An obligation of due diligence as the standard basis for the protection of the environment from harm can be deduced from a number of international

conventions[10] as well as from the resolutions and reports of international conferences and organizations.[11] The obligation of due diligence was discussed in a dispute which arose in 1986 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.[12]

(6) In the Alabama case (United States v. United Kingdom), the Tribunal examined two different definitions of due diligence submitted by the parties. 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, ..."[13]

(7) The United Kingdom defined due diligence as "such care as Governments ordinarily employ in their domestic concerns".[14] 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

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[10] See, for example, article 194, paragraph 1, of the United Nations Convention on the Law of the Sea, supra note 4; articles I, II and VII (2) of the Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter, International Legal Materials, vol. 11, p. 1294; article 2 of the Vienna Convention for the Protection of the Ozone Layer, ibid., vol. 26, p. 1529; article 7, paragraph 5, of the Convention on the Regulation of Antarctic Mineral Resources Activities, supra note 8; article 2, paragraph 1, of the Convention on Environmental Impact Assessment in a Transboundary Context, ibid.; and article 2, paragraph 1, of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, International Legal Materials, vol. 31, p. 1313.

[11] See Principle 21 of the World Charter for Nature, General Assembly resolution 37/7 adopted on 28 October 1982; Principle VI 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.

[12] 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 du Rhin par les produits chimiques, in Annuaire Français de Droit International, vol. 33, 1987, pp. 719-727.

[13] 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. 572-573.

[14] Ibid., p. 612.

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".[15]

(8) 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:

> "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."[16]

(9) In the context of the present articles, 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 States are under an obligation to take unilateral measures to prevent, or to minimize the risk of, significant transboundary harm by activities within the scope of article 1. Such measures include, first, formulating policies designed to prevent or to minimize the risk of transboundary harm and, second, implementing those policies. Such policies are expressed in legislation and administrative regulations and implemented through various enforcement mechanisms.

(10) 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 may not be considered as such at some point in the future. Hence, due diligence in ensuring safety requires a State to keep abreast of technological changes and scientific developments.

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[15] Ibid.

[16] [1932] A.C., p. 580 (H.L.(Sc)).

(11) 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."[17]

(12) 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".[18] It is the view of the Commission that the economic level of States is one of the factors to be taken into account in determining whether a State has complied with its obligation of due diligence. But a State's economic level cannot be used to discharge a State from its obligation under these articles.

(13) The obligation of the State is, first, to attempt to design policies and to implement them with the aim of preventing significant transboundary harm. If that is not possible, then the obligation is to attempt to minimize the risk of such harm. In the view of the Commission, the word "minimize" should be understood in this context as meaning to pursue the aim of reducing to the lowest point the possibility of harm.

Article 4

Cooperation

States concerned shall cooperate in good faith and as necessary seek the assistance of one or more international organization in preventing, or in minimizing the risk of, significant transboundary harm.

Commentary

(1) The principle of cooperation between States is essential in designing and implementing effective policies to prevent, or to minimize the risk of causing, significant transboundary harm. The requirement of cooperation of States extends to all phases of planning and of implementation. Principle 24 of the Stockholm Declaration and Principle 7 of the Rio Declaration recognize cooperation as an essential element in any effective planning for the protection of the environment. More specific forms of cooperation have been stipulated in subsequent articles. They envisage the participation of the State likely to be affected, which is indispensable to enhance the effectiveness of any preventive action. The latter State may know better than anybody else which features of

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[17] Supra note 1.

[18] Supra note 4.

the activity in question may be more damaging to it, or which zones of its territory close to the border may be more affected by the transboundary effects of the activity, such as a specially vulnerable ecosystem, etc.

(2) The article requires States concerned to cooperate in good faith. Paragraph 2 of Article 2 of the Charter of the United Nations provides that all Members "shall fulfil in good faith the obligations assumed by them in accordance with the present Charter". The Vienna Convention on the Law of Treaties and the Convention on Succession of States in Respect of Treaties declare in their preambles that the principle of good faith is universally recognized. In addition article 26 and paragraph 1 of article 31 of the Vienna Convention on the Law of Treaties acknowledge the essential place of this principle in the structure of treaties. The decision of the International Court of Justice in the Nuclear Tests case touches upon the scope of the application of good faith. In that case, the Court proclaimed that "[o]ne of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith".[19] This dictum of the Court implies that good faith applies also to unilateral acts.[20] Indeed the principle of good faith covers "the entire structure of international relations".[21]

(3) The arbitration tribunal established in 1985 between Canada and France on disputes concerning filtering with the Gulf of St. Lawrence La Bretagne, held that the principle of good faith was among the elements that afforded a sufficient guarantee against any risk of a party exercising its rights abusively.[22]

(4) The words "States concerned" refer to the State of origin and the State or States likely to be affected. While other States in a position to contribute to the goals of these articles are encouraged to cooperate, they have no legal obligation to do so.

(5) The article provides that States shall as necessary seek the assistance of one or more international organization in performing their preventive obligations as set out in these articles. States shall do so only when it is deemed necessary. The words as necessary are intended to take account of a number of possibilities, including the following:

(6) First, assistance from international organizations may not be appropriate or necessary in every case involving the prevention, or minimization of the risk of, transboundary harm. For example, the State of origin or the State likely to

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[19] Nuclear Tests case (Australia v. France), Order of 22 June 1973, I.C.J. Reports 1973, p. 268.

[20] See M. Virally, review Essay of E. Zoller, La Bonne Foi en Droit International Public, 1977, in Am. J. Int'l L., vol. 77, p. 130.

[21] See R. Rosenstock, "The Declaration of Principles of International Law Concerning Friendly Relations: A Survey", Am. J. Int'l L., vol. 65, p. 734.

[22] International Law Reports, vol. 82, p. 614.

be affected may, themselves, be technologically advanced and have as much or even more technical capability than international organizations to prevent, or to minimize the risk of, significant transboundary harm. Obviously, in such cases, there is no obligation to seek assistance from international organizations.

(7) Second, the term "international organization" is intended to refer to organizations that are relevant and in a position to assist in such matters. Even with the increasing number of international organizations, it cannot be assumed that there will necessarily be an international organization with the capabilities necessary for a particular instance.

(8) Third, even if there are relevant international organizations, their constitutions may bar them from responding to such requests from States. For example, some organizations may be required (or permitted) to respond to requests for assistance only from their member States, or they may labour under other constitutional impediments. Obviously, the article does not purport to create any obligation for international organizations to respond to requests for assistance under this article.

(9) Fourth, requests for assistance from international organizations may be made by one or more States concerned. The principle of cooperation means that it is preferable that such requests be made by all States concerned. The fact, however, that all States concerned do not seek necessary assistance does not discharge the obligation of individual States to seek assistance. Of course, the response and type of involvement of an international organization in cases in which the request has been lodged by only one State will depend on the nature of the request, the type of assistance involved, the place where the international organization would have to perform such assistance, etc.

Article 5

Implementation

States shall take the necessary legislative, administrative or other action including the establishment of suitable monitoring mechanisms to implement the provisions of the present draft articles.

(1) This article states what might be thought to be the obvious, viz., that by virtue of becoming a party to the present articles, States would be required to take the necessary measures of implementation, whether of a legislative, administrative or other character. Article 5 has been included here to emphasize the continuing character of the articles, which require action to be

taken from time to time to prevent, or to minimize the risk of, transboundary harm arising from activities to which the articles apply.[23]

(2) To say that States must take the necessary measures does not mean that they must themselves get involved in operational issues relating to the activities to which article 1 applies. Where these activities are conducted by private persons or enterprises, the obligation of the State is limited to establishing the appropriate regulatory framework and applying it in accordance with these draft articles. The application of that regulatory framework in the given case will then be a matter of ordinary administration, or, in the case of disputes, for the relevant courts or tribunals, aided by the principle of non-discrimination contained in article 16.

Article 6

Relationship to other rules of international law

Obligations arising from the present draft articles are without prejudice to any other obligations incurred by States under relevant treaties of rules of customary international law.

Commentary

(1) It has already been stressed that the present draft articles apply only to activities not prohibited by international law, whether such a prohibition arises in relation to the conduct of the activity or by reason of its prohibited effects. The present draft articles are residual in their operation. They apply only in situations where no more specific international rule or regime governs.

(2) Thus article 6 intends to make it as clear as may be that the present draft articles are without prejudice to the existence, operation or effect of any other obligations of States under international law relating to an act or omission to which these draft articles might otherwise - i.e. in the absence of such an obligation - be thought to apply. It follows that no inference is to be drawn from the fact that an activity falls within the apparent scope of these draft articles, as to the existence or non-existence of any other rule of international law, including any other primary rule operating within the realm of the law of State responsibility, as to the activity in question or its actual or potential transboundary effects. The reference in article 6 to any other

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[23] This article is similar to paragraph 2 of article 2 of the Convention on Environmental Impact Assessment in a Transboundary Context, which reads: "Each Party shall take the necessary legal, administrative or other measures to implement the provisions of this Convention, including, with respect to proposed activities listed in Appendix I that are likely to cause significant adverse transboundary impact, the establishment of an environmental impact assessment procedure that permits public participation and preparation of the environmental impact assessment documentation described in Appendix II." Supra note 8.

obligations of States covers both treaty obligations and obligations under customary international law. It is equally intended to extend both to rules having a particular application - whether to a given region or a specified activity - and to rules which are universal or general in scope. The background character of the present articles is thus further emphasized.

Article 7

Prior authorization

1. The prior authorization of a State is required for activities within the scope of the present draft articles carried out in its territory or otherwise under its jurisdiction or control as well as for any major change in an activity so authorized. Such authorization shall also be required in case a change is planned which may transform an activity into one falling within the scope of the present draft articles.

2. The requirement of authorization established by a State shall be made applicable in respect of all pre-existing activities within the scope of the present draft articles.

3. In case of a failure to conform to the requirements of the authorization, the authorizing State shall take such actions as appropriate, including where necessary terminating the authorization.

Commentary

(1) This article sets forth the fundamental principle that the prior authorization of a State is required for activities which involve a risk of causing significant transboundary harm undertaken in their territory or otherwise under their jurisdiction or control. 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) It is the view of the Commission that the requirement of authorization obliges a State to ascertain whether activities with a possible risk of significant transboundary harm are 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 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 notes, in this respect, that the Tribunal in the Trail Smelter arbitration held that Canada 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".[24] The Tribunal held that, in particular, "the Trail Smelter shall be required to refrain from causing any

[24] Supra note 7 bis, pp. 1965-66.

damage through fumes in the State of Washington".[25] In the view of the Commission, article 7 is compatible with this requirement.

(3) The International Court of Justice in the Corfu Channel case 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".[26]

(4) The words "in its territory or otherwise under its jurisdiction or control", are taken from article 2. The expression "activities within the scope of the present articles" introduces all the requirements specified in article 1 for an activity to fall within the scope of these articles.

(5) As reflected at the end of the first sentence of paragraph 1 of article 7, prior authorization is also required for a major change planned in an activity already within the scope of article 1 where that change may increase the risk or alter the nature or the scope of the risk. The second sentence of paragraph 1 contemplates situations where a 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.

(6) Paragraph 2 of article 7 emphasizes that the requirement of authorization should be made applicable to all the pre-existing activities falling within the scope of the present articles, once a State adopts the regime contained in these articles. The Commission is aware that it might be unreasonable to require States when they assume the obligations under these articles to apply them immediately in respect of existing activities. A further period of time might be needed in that case for the operator of the activity to comply with the authorization requirements. The Commission is of the view that the decision as to 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. In case the authorization is denied by the State of origin, it is assumed that the State of origin will stop the activity.

(7) Paragraph 3 of article 7 notes the consequences of the failure of an operator to comply with the requirement of authorization. The State of origin, which has the main responsibility to monitor these activities is given the necessary flexibility to ensure that the operator complies with the requirements involved. Where appropriate, that State may terminate the authorization, and thus prohibit the activity from taking place altogether.

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[25] Ibid., p. 1966.

[26] Corfu Channel case (Merits) (United Kingdom/Albania), I.C.J. Reports 1949, p. 22.

Article 8

Impact assessment

Any decision in respect of the authorization of an activity within the scope of the present draft articles shall be based on an evaluation of the possible transboundary harm caused by that activity.

Commentary

(1) Under article 8, 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) Although the impact assessment in the Trail Smelter case may not directly relate to liability for risk, it however emphasized the importance of an assessment of the consequences of an activity causing significant risk. The Tribunal in that case indicated that the study undertaken by well-established and known scientists was "probably the most thorough [one] ever made of any area subject to atmospheric pollution by industrial smoke".[27]

(3) The requirement of article 8 is fully consonant with Principle 17 of the Rio Declaration on Environment and Development which 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."[28]

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[27] Supra note 7 bis, p. 1973-74.

[28] Supra note 1.

Requirement of assessment of adverse effects of activities have been incorporated in various forms in many international agreements.[29] The 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.[30]

(4) The question of who should conduct the assessment is left to States. Such assessment is normally conducted by operators observing certain guidelines set by the States. These matters would have to be resolved by the States themselves through their domestic laws or applicable international instruments. 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

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[29] See, for example, articles 205 and 206 of the United Nations Convention on the Law of the Sea, supra note 4; article 4 of the Convention on the Regulation of Antarctic Mineral Resources Activities, supra note 8; article 8 of the Protocol on Environmental Protection to the Antarctic Treaty of 4 October 1991, International Legal Materials, vol. 30, p. 1461; article 14 (1) (a) and (b) of the United Nations Convention on Biological Diversity of 5 June 1992, doc. DPI/1307; article 14 of the ASEAN Agreement on the Conservation of Nature and Natural Resources of 9 July 1985, UNEP, 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; article XI of the Kuwait Regional Convention for Cooperation on the Protection of the Marine Environment from Pollution of 24 April 1978, United Nations Treaty Series, vol. 1046, p. 120; and the Jeddeh Regional Convention for the Conservation of the Regional Environment of the Red Sea and Gulf of Aden of 14 February 1982, UNEP, Selected Multilateral Treaties in the Field of the 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. Article 10, paragraph 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. 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.

[30] Supra note 8.

on Environmental Impact Assessment in a Transboundary Context, which provides in detail the content of such assessment.[31] 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.[32]

(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. For the purposes of article 8, however, such an assessment should contain an evaluation of the possible transboundary harmful impact of the activity. Under the terms of article 10, 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

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[31] Article 4 of the Convention 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;

(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.).

[32] Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 51 (A/37/51).

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.

(7) The assessment should 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) 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, 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 use in any activity may in itself be an indication that those activities might cause significant transboundary harm.[33] 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 articles.[34]

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[33] For example, the 1974 Convention for the Prevention of Marine Pollution from Land-based Sources provides in article 4 an obligation for the Parties to eliminate or restrict the pollution of the environment by certain substances and the list of those substances is annexed to the Convention, UNEP, Selected Multilateral Treaties in the Field of the Environment, Ref. Series 3, 1983, p. 430. Similarly, the 1992 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, [IMO 1] LDC.2/Circ. 303; see also the Protocol to the 1976 Convention for the Protection of the Mediterranean Sea against Pollution, ibid.; and the 1976 Convention for the Protection of the Rhine against Chemical Pollution, United Nations, Treaty Series, vol. 1124, p. 375.

[34] 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, supra note 8. 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, European Treaty Series, No. 150.

Article 9

Information to the public

States shall, by such means as are appropriate, provide the public likely to be affected by an activity within the scope of the present draft articles with relevant information relating to that activity, the risk involved and the harm which might result and ascertain their views.

Commentary

(1) Article 9 requires States, whenever possible and by such means as are appropriate, to provide the public likely to be affected, whether their own or that of other States, with information relating to the risk and harm that might result from an activity subject to authorization and to ascertain their views thereon. The article therefore requires States (a) to provide information to the public regarding the activity and the risk and the harm it involves, and (b) to ascertain the views of the public. It is, of course, clear that the purpose of providing information to the public is in order to allow its members to inform themselves and then to ascertain their views. Without that second step, the purpose of the article would be defeated.

(2) The content of the information to be provided to the public includes information about the activity itself as well as the nature and the scope of risk and harm that it entails. Such information is contained in the documents accompanying the notification which is effected in accordance with article 10 or in the assessment which may be carried out by the State likely to be affected under article 13.

(3) This article is inspired by new trends in international law, in general, and environmental law, in particular of seeking to involve, in the decision-making processes, individuals whose lives, health, property and environment might be affected by providing them with a chance to present their views and be heard by those responsible for making the ultimate decisions.

(4) Principle 10 of the Rio Declaration on Environment and Development provides for public involvement in decision-making processes as follows:

> "Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."[35]

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[35] Supra note 1.

(5) A number of other recent international legal agreements dealing with environmental issues have required States to provide the public with information and to give it an opportunity to participate in decision-making processes. Article VII, paragraphs 1 and 2, of the Code of Conduct on Accidental Pollution of Transboundary Inland Waters is relevant in that context:

> "1. In order to promote informed decision-making by central, regional or local authorities in proceedings concerning accidental pollution of transboundary inland waters, countries should facilitate participation of the public likely to be affected in hearings and preliminary inquiries and the making of objections in respect of proposed decisions, as well as recourse to and standing in administrative and judicial proceedings.
>
> 2. Countries of incident should take all appropriate measures to provide physical and legal persons exposed to a significant risk of accidental pollution of transboundary inland waters with sufficient information to enable them to exercise the rights accorded to them by national law in accordance with the objectives of this Code."[36]

Article 16 of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes,[37] article 3, paragraph 8, of the Convention on Environmental Impact Assessment in a Transboundary Context,[38] article 17 of the Convention on the Protection of the Marine Environment of the Baltic Sea Area,[39] and article 6 of the United Nations Framework Convention on Climate Change[40] all provide for information to the public.

(6) There are many modalities for participation in decision-making processes. Reviewing data and information on the basis of which decisions will be based and having an opportunity to confirm or challenge the accuracy of the facts, the analysis and the policy considerations either through administrative tribunals, courts, or groups of concerned citizens is one way of participation in decision-making. In the view of the Commission, this form of public involvement enhances the efforts to prevent transboundary and environmental harm.

(7) The obligation contained in article 9 is circumscribed by the phrase "by such means as are appropriate", which is intended to leave the ways in which such information could be provided to the States, their domestic law requirements and the State policy as to, for example, whether such information should be provided through media, non-governmental organizations, public agencies, local authorities, etc. In the case of the public beyond a State's

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[36] Supra note 7.

[37] Supra note 10.

[38] Supra note 8.

[39] Supra note 33.

[40] International Legal Materials, vol. 31, p. 851.

borders, information may be provided, as appropriate, through the good offices of the State concerned, if direct communication is not feasible or practical.

(8) Further, the State that might be affected, after receiving notification and information from the State of origin, shall by such means as are appropriate, inform those parts of its own public likely to be affected before responding to the notification.

Article 10[13]

Notification and information

1. If the assessment referred to in article 8 indicates a risk of causing significant transboundary harm, the State of origin shall, pending any decision on the authorization of the activity, provide the States likely to be affected with timely notification thereof and shall transmit to them the available technical and other relevant information on which the assessment is based.

2. The response from the States likely to be affected shall be provided within a reasonable time.

Commentary

(1) Article 10 deals with a situation in which the assessment undertaken by a State, in accordance with article 8, indicates that the activity planned does indeed pose a risk of causing significant transboundary harm. This article, together with articles 9, 11, 13 and 14, 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 10 calls on a State to notify other States which 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 to minimize the risk of 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".[41] This principle is recognized 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

[41] Supra note 26, p. 22.

organizations, conferences and meetings, and studies by intergovernmental and international non-governmental organizations.[42]

(4) In addition to the utilization of international watercourses, the principle of notification has also been recognized in respect of other activities with transboundary effects. For example, article 3 of the Convention on Environmental Impact Assessment in a Transboundary Context[43] and articles 3 and 10 of the Convention on the Transboundary Effects of Industrial Accidents.[44] 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."[45]

(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.[46] OECD resolution C(74)224 of 14 November 1974 on the "Principles concerning transfrontier pollution" in its "Principle of information and consultation" requires notification and consultation prior to undertaking an activity which may create a risk of significant transboundary pollution.[47]

(6) The principle of notification is well established in the case of environmental emergencies. Principle 18 of the Rio Declaration on Environment and Development,[48] article 198 of the United Nations Convention on the Law of

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[42] 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, Official Records of the General Assembly, Forty-ninth Session, Supplement No. 10 (A/49/10), p. 236.

[43] Article 3 of the Convention provides for an elaborate system of notification, supra note 8.

[44] International Legal Materials, vol. 31, p. 1333.

[45] Supra note 1.

[46] OECD, OECD and the Environment, 1986, p. 89, para. 4, of the Annex.

[47] Ibid., p. 142.

[48] Supra note 1.

the Sea,[49] article 2 of the Convention on Early Notification of a Nuclear Accident,[50] article 14 (1) (d) and (3) of the United Nations Convention on Biological Diversity,[51] and article 5 (1) (c) of the International Convention on Oil Pollution Preparedness, Response and Cooperation[52] 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 8. 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 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 1 also addresses the situation where the State of origin, despite all its efforts and diligence, is unable to identify all the States which may be affected prior to authorizing the activity and only 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 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.

(10) Paragraph 2 addresses the need for the States concerned to respond within a reasonable time. The determination of what is "reasonable time" depends on several factors. It is generally a period of time that should allow the States concerned to evaluate the data involved and arrive at their own conclusion. This is a requirement that is conditioned by cooperation and good faith.

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[49] Supra note 4.

[50] International Legal Materials, vol. 25, p. 1369.

[51] Supra note 29.

[52] International Legal Materials, vol. 30, p. 735.

Article 11

Consultations on preventive measures

1. The States concerned shall enter into consultations, at the request of any of them, with a view to achieving acceptable solutions regarding measures to be adopted in order to prevent, or minimize the risk of, causing significant transboundary harm.

2. States shall seek solutions based on an equitable balance of interests in the light of article 12.

3. If the consultations referred to in paragraph 1 fail to produce an agreed solution, the States of origin shall nevertheless take into account the interests of States likely to be affected in case it decides to authorize the activity to be pursued at its own risk, without prejudice to the rights of any State likely to be affected.

Commentary

(1) Article 11 requires the States concerned, that is the State of origin and the States that are likely to be affected, to enter into consultations in order to agree on the measures to prevent, or to minimize the risk of causing, significant transboundary harm. Depending upon the time at which article 11 is invoked, consultations may be prior to authorization and commencement of an activity or during its performance.

(2) The Commission has attempted to maintain a balance between two equally important considerations in this article. First, the article deals with activities that are not prohibited by international law and that, normally, are important to the economic development of the State of origin. But second, it would be unfair to other States to allow those activities to be conducted without consulting them and taking appropriate preventive measures. Therefore, the article provides neither a mere formality which the State of origin has to go through with no real intention of reaching a solution acceptable to the other States, nor does it provide a right of veto for the States that are likely to be affected. To maintain a balance, the article relies on the manner in which, and purpose for which, the parties enter into consultations. The parties must enter into consultations in good faith and must take into account each other's legitimate interests. The parties consult each other with a view to arriving at an acceptable solution regarding the measures to be adopted to prevent, or to minimize the risk of, significant transboundary harm.

(3) It is the view of the Commission that the principle of good faith is an integral part of any requirement of consultations and negotiations. The obligation to consult and negotiate genuinely and in good faith was recognized in the Lake Lanoux award where the Tribunal stated that:

> "Consultations and negotiations between the two States must be genuine, must comply with the rules of good faith and must not be mere formalities.

> The rules of reason and good faith are applicable to procedural rights and duties relative to the sharing of the use of international rivers."[53]

(4) With regard to this particular point about good faith, the Commission also relies on the judgement of the International Court of Justice in the Fisheries Jurisdiction (United Kingdom v. Iceland) case. There the Court stated that: "[t]he task [of the parties] will be to conduct their negotiations on the basis that each must in good faith pay reasonable regard to the legal rights of the other".[54] The Commission also finds the decision of the Court in the North Sea Continental Shelf cases (Federal Republic of Germany v. Denmark and Federal Republic of Germany v. Netherlands)[55] on the manner in which negotiations should be conducted relevant to this article. In those cases the Court ruled as follows:

> "(a) the parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement; they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it."[56]

Even though the Court in this judgement speaks of "negotiations", the Commission believes that the good faith requirement in the conduct of the parties during the course of consultation or negotiations are the same.

(5) The purpose of consultations is for the parties to find acceptable solutions regarding measures to be adopted in order to prevent, or to minimize the risk of, significant transboundary harm. The words "acceptable solutions", regarding the adoption of preventive measures, refers to those measures that are accepted by the parties within the guidelines specified in paragraph 2. Generally, the consent of the parties on measures of prevention will be expressed by means of some form of an agreement.

(6) The parties should obviously aim, first, at selecting those measures which may avoid any risk of causing significant transboundary harm or, if that is not possible, which minimize the risk of such harm. Under the terms of article 4, the parties are required, moreover, to cooperate in the implementation of such measures. This requirement, again, stems from the view of the Commission that

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[53] Supra note 7 ter.

[54] Fisheries Jurisdiction (United Kingdom v. Iceland) case, Merits, Judgement of 25 July 1974, I.C.J. Reports 1974, para. 78.

[55] North Sea Continental Shelf cases (Federal Republic of Germany v. Denmark and Federal Republic of Germany v. Netherlands), Judgement of 20 February 1969, I.C.J. Reports 1969, especially paras, 85 and 87.

[56] Ibid., para. 85.

the obligation of due diligence, the core base of the provisions intended to prevent, or to minimize the risk of, significant transboundary harm, is of a continuous nature affecting every stage related to the conduct of the activity.

(7) Article 11 may be invoked whenever there is a question about the need to take preventive measures. Such questions obviously may arise as a result of article 10, because a notification to other States has been made by the State of origin that an activity it intends to undertake may pose a risk of causing significant transboundary harm, or in the course of the exchange of information under article 14 or in the context of article 13 on procedures in the absence of notification.

(8) Article 11 has a broad scope of application. It is to apply to all issues related to preventive measures. For example, when parties notify under article 10 or exchange information under article 14 and there are ambiguities in those communications, a request for consultations may be made simply in order to clarify those ambiguities.

(9) Paragraph 2 provides guidance for States when consulting each other on preventive measures. The parties shall seek solutions based on an equitable balance of interests in light of article 12. Neither paragraph 2 of this article nor article 12 precludes the parties from taking account of other factors which they perceive as relevant in achieving an equitable balance of interests.

(10) Paragraph 3 deals with the possibility that, despite all efforts by the parties, they cannot reach an agreement on acceptable preventive measures. As explained in paragraph (3) above, the article maintains a balance between the two considerations, one of which is to deny the States likely to be affected a right of veto. In this context, the Commission recalls the Lake Lanoux award where the Tribunal noted that, in certain situations, the party that was likely to be affected might, in violation of good faith, paralyse genuine negotiation efforts.[57] To take account of this possibility, the article provides that the State of origin is permitted to go ahead with the activity, for the absence of such an alternative would, in effect, create a right of veto for the States likely to be affected. The State of origin, while permitted to go ahead with the activity, is still obligated to take into account the interests of the States likely to be affected. As a result of consultations, the State of origin is aware of the concerns of the States likely to be affected and is in even a better position to seriously take them into account in carrying out the activity. In addition, the State of origin conducts the activity "at its own risk".

(11) The last part of paragraph 3 also protects the interests of States likely to be affected. This is intended to have a broad scope so as to include such rights as the States likely to be affected have under any rule of international law, general principles of law, domestic law, etc.

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[57] Supra note 7 ter, p. 128.

Article 12

Factors involved in an equitable balance of interests

In order to achieve an equitable balance of interests as referred to in paragraph 2 of article 11[17], the States concerned shall take into account all relevant factors and circumstances, including:

(a) the degree of risk of significant transboundary harm and the availability of means of preventing such harm, or minimizing the risk thereof or of repairing the harm;

(b) the importance of the activity, taking into account its overall advantages of a social, economic and technical character for the State of origin in relation to the potential harm for the States likely to be affected;

(c) the risk of significant harm to the environment and the availability of means of preventing such harm, or minimizing the risk thereof or restoring the environment;

(d) the degree to which the States of origin and, as appropriate, States likely to be affected are prepared to contribute to the costs of prevention;

(e) the economic viability of the activity in relation to the costs of prevention and to the possibility of carrying out the activity elsewhere or by other means or replacing it with an alternative activity;

(f) the standards of protection which the States likely to be affected apply to the same or comparable activities and the standards applied in comparable regional or international practice.

Commentary

(1) The purpose of this article is to provide some guidance for States which are engaged in consultations seeking to achieve an equitable balance of interests. In reaching an equitable balance of interests, the facts have to be established and all the relevant factors and circumstances weighed.

(2) The main clause of the article provides that in order "to achieve an equitable balance of interests as referred to in paragraph 2 of article 11, the States concerned shall take into account all relevant factors and circumstances". The article proceeds to set forth a non-exhaustive list of such factors and circumstances. The wide diversity of types of activities which is covered by these articles, and the different situations and circumstances in which they will be conducted, make it impossible to compile an exhaustive list of factors relevant to all individual cases. Some of the factors may be relevant in a particular case, while others may not, and still other factors not contained in the list may prove relevant. No priority or weight is assigned to the factors and circumstances listed, since some of them may be more important in certain cases while others may deserve to be accorded greater weight in other cases. In general, the factors and circumstances indicated will allow the

parties to compare the costs and benefits which may be involved in a particular case.

(3) Subparagraph (a) compares the degree of risk of significant transboundary harm to the availability of means of preventing such harm or minimizing the risk thereof and the possibility of repairing the harm. For example, the degree of risk of harm may be high, but there may be measures that can prevent the harm or reduce that risk, or there may be possibilities for repairing the harm. The comparisons here are both quantitative and qualitative.

(4) Subparagraph (b) compares the importance of the activity in terms of its social, economic and technical advantages for the State of origin and the potential harm to the States likely to be affected. The Commission in this context recalls the decision in the Donauversinkung case where the court stated that:

> "The interests of the States in question must be weighed in an equitable manner one against another. One must consider not only the absolute injury caused to the neighbouring State, but also the relation of the advantage gained by the one to the injury caused to the other."[58]

(5) Subparagraph (c) compares, in the same fashion as subparagraph (a), the risk of significant harm to the environment and the availability of means of preventing such harm, or minimizing the risk thereof and the possibility of restoring the environment. The Commission emphasizes the particular importance of protection of the environment. The Commission considers Principle 15 of the Rio Declaration relevant to this subparagraph where it states: "[w]here there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."[59]

(6) Subparagraph (d) provides that one of the elements determining the choice of preventive measures is the willingness of the State of origin and States likely to be affected to contribute to the cost of prevention. For example, if the States likely to be affected are prepared to contribute to the expense of preventive measures, it may be reasonable, taking into account other factors, to expect the State of origin to take more costly but more effective preventive measures. This however should not underplay the cost-effective measures the State of origin is obliged to take in the first instance to take appropriate measures as required under article 3.

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[58] Wurttemberg and Prussia v. Baden (Donauversinkung case) (1927) in Entscheidungen des Reichsgerichts in Zivilsachen (Berlin, de Gruyter), vol. 116, Appendix, pp. 18-45 (1927), in Annual Digest of Public International Law Cases, (1927-1928) (London, 1931), p. 131; see also Kansas v. Colorado (1907) 206 US 100, and Washington v. Oregon (1936) 297 US 517.

[59] Supra note 1.

(7) Subparagraph (e) introduces a number of factors that must be compared and taken into account. The economic viability of the activity must be compared to the costs of prevention. The cost of the preventive measures should not be so high as to make the activity economically non-viable. The economic viability of the activity should also be assessed in terms of the possibility of changing the location, or conducting it by other means, or replacing it with an alternative activity. The words "carrying out the activity ... by other means" intends to take into account, for example, a situation in which one type of chemical substance used in the activity, which might be the source of transboundary harm, could be replaced by another chemical substance; or mechanical equipment in the plant or the factory could be replaced by different equipment. The words "replacing [the activity] with an alternative activity" is intended to take account of the possibility that the same or comparable results may be reached by another activity with no risk, or much lower risk, of significant transboundary harm.

(8) Subparagraph (f) compares the standard of prevention demanded of the State of origin to that applied to the same or comparable activity in the State likely to be affected. The rationale is that, in general, it might be unreasonable to demand that the State of origin comply with a much higher standard of prevention than would be operative in the States likely to be affected. This factor, however, is not in itself conclusive. There may be situations in which the State of origin would be expected to apply standards of prevention to the activity that are higher than those applied in the States likely to be affected, i.e., where the State of origin is a highly developed State and applies domestically established environmental law regulations. These regulations may be substantially higher than those applied in a State of origin which because of its stage of development may have (and, indeed, have need of) few if any regulations on the standards of prevention. Taking into account other factors, the State of origin may have to apply its own standards of prevention which are higher than those of the States likely to be affected

(9) States should also take into account the standards of prevention applied to the same or comparable activities in other regions or, if they exist, the international standards of prevention applicable for similar activities. This is particularly relevant when, for example, the States concerned do not have any standard of prevention for such activities, or they wish to improve their existing standards.
