United Nations A/CN.4/509

General Assembly

Distr.: General
17 April 2000
English
Original: Arabic/English/French

International Law Commission
Fifty-second session
Geneva, 1 May-9 June and 10 July-18 August 2000

International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities)

Report of the Secretary-General

Contents

00-39352 (E) 020500

I. Introduction

1. On 8 December 1998, the General Assembly adopted resolution 53/102, entitled "Report of the International Law Commission on the work of its fiftieth session". In paragraph 2 of that resolution, the Assembly drew the attention of Governments to the importance, for the Commission, of having their views on the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities) adopted on first reading by the Commission[1] and urged them to submit their comments and observations in writing by 1 January 2000.

2. By a note dated 11 February 1999, the Secretary-General invited Governments to submit their comments pursuant to paragraph 2 of resolution 53/102.

3. As at 12 April 2000, replies had been received from the following five States (on the dates indicated): France (13 August 1999); Lebanon (19 May 1999); Netherlands (24 January 2000); Turkey (7 March 2000); and United Kingdom of Great Britain and Northern Ireland (24 March 2000). The comments and observations relating to the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities) are reproduced in section II below, in an article-by-article manner. Additional replies received will be reproduced as addenda to the present report.

II. Comments and observations received from Governments

General remarks

France

France welcomes the new focus of work on an important subject — prevention of transboundary damage from hazardous activities — which appeared to have reached an impasse.

The draft is satisfactory on the whole. It endeavours to implement a long-standing principle of international law: the non-harmful use of the territory of a State. The draft, which emphasizes the obligation of due diligence, satisfactorily lays down primary rules based chiefly on the rules set out in the Convention on the Law of the Non-Navigational Uses of International Watercourses of 21 May 1997.

The draft can be regarded as restrictive, for two reasons:

- It deals only with harm to States and not harm to areas not subject to any form of sovereignty (the high seas and outer space). As to whether the scope of the draft should be broadened, it is not self-evident that it should;
- The draft stresses the "risk of causing significant transboundary harm". This is a welcome restriction, in comparison with the 1996 draft.

The fact that old article 3 of the 1996 draft has disappeared could be considered unfortunate. That provision, concerning a State's "freedom of action and the limits thereto", is no longer to be found in the 1998 version. It might be advisable to mention that the freedom of a State to carry on activities in its territory is not unlimited and that such freedom is subject to the obligation to prevent or minimize the risk of causing significant transboundary harm. This principle should be set out in the draft, perhaps in the preamble, not necessarily in the operative part of the text. Old article 3 also referred to the consequences of the harm, specifying that the State that caused the harm has specific obligations vis-à-vis the affected State. Here once again, it would be advisable to make some sort of reference to the principle concerned.

Lebanon

It appears from the heading of the draft articles, "International liability for injurious consequences arising out of *acts not prohibited* by international law (prevention of transboundary damage from hazardous activities)", that it is a matter of positive liability arising out of activities that are not prohibited but are hazardous.

It appears from the draft articles that they address a series of duties that are incumbent on States that are the origin of damage while engaging in non-prohibited but hazardous activities giving rise to transboundary

[1] The text of the draft articles with commentaries thereto may be found in the report of the Commission on the work of its fiftieth session, *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), chap. IV.C.2.

damage that has repercussions for the environment, persons or property in other States.

The imposition of these duties entails that in the event they are neglected and transboundary damage occurs, liability will be based on fault and will not be positive liability.

This contradiction must be resolved.

The draft articles are incomplete since they do not address the consequences of failure to perform the duties they impose on States and do not establish provisions concerning liability arising therefrom or identify the relevant conditions and circumstances. This deprives the draft articles of practical usefulness and only raises differences between States that have no legal solution.

It is necessary to await the completion of the draft articles at future sessions of the International Law Commission before detailed views on all the rules they address can be formulated.

Netherlands

The Government of the Netherlands is disappointed with the minimalist approach that the draft articles adopt with regard to various matters. This material is regulated extensively in several existing conventions, albeit at sectoral level. The Commission's draft has thus far left the question of liability for damage entirely out of consideration. Even regarding prevention — the primary focus of the text — the draft does not go as far as existing sectoral conventions, as it deals exclusively with hazardous activities (in contrast to activities that definitely cause damage), which are moreover lawful. For the rest, the Netherlands notes the absence of any article on emergencies, as is found in other texts (e.g., article 28 of the Convention on the Law of the Non-navigational Uses of International Watercourses; principle 18 of the Rio Declaration; and the 1982 International Law Association Resolution on Legal Aspects of the Conservation of the Environment). The Netherlands deplores the absence of a provision on the obligation to prevent damage to common areas, i.e., areas beyond the limits of national jurisdiction.

The Netherlands would note that in its commentary to article 2 the Commission refers to a spectrum of activities ranging from activities with "a low probability of causing disastrous harm" to those with "a high probability of causing other significant harm". The Netherlands wonders whether this means that activities with a high probability of causing disastrous harm fall outside the scope of these articles because they would presumably be unlawful. Both the text of article 2 and the commentary to this article require clarification on this point.

Nor do paragraphs 94 and 96 of the Special Rapporteur's first report on the prevention of transboundary damage from hazardous activities (A/CN.4/487) yield a clear answer to the question of whether the activities mentioned fall outside the scope of the articles, although this does seem to be implied. Activities falling into this category are evidently assumed to be prohibited under international law, in contrast to the activities covered by the draft articles.

The Netherlands would favour adding a definition of the term "operator" to article 2, and clarifying the operator's role in other parts of the text. This does not alter the fact that the obligations defined in the draft articles refer to States and not to private individuals or companies such as "operators".

Finally, the Netherlands assumes that military activities fall outside the scope of the draft articles.

Turkey

Turkey, as a country which observes the maintenance of friendly relations in the international arena and in particular within its region, and which considers the cooperation among States for the protection of the environment as a further step in these good relations, attaches great importance to the rules of international law regulating the prevention of transboundary damage from hazardous activities. The formation and application of these rules at the international level would establish the basis for the protection of the environment which is shared by a number of States at a given region. Thus, the rules pertaining to the prevention of transboundary damage should be based on mutual understanding and respect for each State's rights, first and foremost respect for the sovereign rights of States. Viable and generally acceptable solutions could be codified by following the said principles, which also have so far determined the structure of the customary rules in this field.

Certain conventions, *inter alia*, the Convention on the Law of the Non-Navigational Uses of International Watercourses of 21 May 1997, the United

Nations Convention on the Law of the Sea of 10 December 1982, the Convention on the Protection and Use of Transboundary Watercourses and International Lakes of 17 March 1992, the Convention on the Transboundary Effects of Industrial Accidents of 17 March 1992 and the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters of 25 June 1998, are referred to in the commentary sections throughout the draft articles. These conventions, some of which are not yet in force, could not be deemed to be customary rules, and consequently they could not readily be used as reference points for the establishment of the rules for the prevention of transboundary damage from hazardous activities.

In this context, it is worth recalling that Turkey was among those States that voted against the Convention on the Law of the Non-Navigational Uses of International Watercourses on 21 May 1997. That Convention, which to date has been ratified by seven States, a number far below that required for its entry into force, goes beyond the scope of a framework convention and, in contradiction with its intent and nature, establishes a mechanism for planned measures. This has no basis in general and customary international law. Furthermore, this mechanism creates an obvious inequality between States by stipulating that, in order to implement its planned measures, a State belonging to a certain category is obliged to obtain the prior consent, tantamount to a veto right, of another State belonging to a certain other category. It is not appropriate for a framework convention to foresee any compulsory rules regarding the settlement of disputes and not to leave this issue to the discretion of the States concerned. Moreover, the Convention does not make any reference to the indisputable principle of the sovereignty of the watercourse States over parts of international watercourses situated in their territory. The Convention should clearly have established the primacy of the fundamental principles of equitable and reasonable utilization over the obligation not to cause significant harm.

For the reasons outlined above, Turkey has declared that the above-mentioned Convention did not and, in the future, would not have any legal effect for Turkey in terms of general and customary international law.

The present draft articles, in some of their provisions, tend to follow the Convention on the Law of the Non-Navigational Uses of International Watercourses, an approach on which Turkey has serious concerns. The individual points of concern are indicated in the paragraphs below:

It is observed that certain mechanisms are attempted to be established for the projects in their planning phase, in particular in articles 7 to 16. Although some previous conventions have envisioned similar mechanisms, it should be emphasized that those provisions are not customary rules and that they are regulations at the regional level with a limited number of participants. Therefore, a mechanism requiring the prior consent of all States concerned does not have nay precedents in customary international law. It could be concluded that the International Law Commission, in drafting the present articles, has entered into a position of codifying some rules before their establishment by customary law.

A mechanism of this nature is liable to cause certain inequalities among States. Those States which will have reached a relatively advanced stage of industrial development by the time the draft articles are adopted will only have to observe due diligence while managing their already existing enterprises, whereas less developed or developing States will have to comply with further requirements according to the draft articles, i.e., authorization (article 7), impact assessment (article 8), information to the public (article 9), consultation on preventive measures (article 11), exchange of information (article 14), even the suspension of the activities in question (article 13, para. 3). These requirements have the potential to create a kind of discrimination between developed and developing States.

Contrary to previous relevant international documents (e.g., Stockholm Declaration of 1972, Rio Declaration and Agenda 21), the draft articles do not make any reference to the indisputable principle of the sovereignty of States over their natural resources within their territories, which is a fundamental deficiency.

Turkey has so far maintained its position that States should comply with their respective responsibilities in environmental matters, and has taken up various initiatives in its region. The principles of international law and customary rules in the field of environmental law already set out certain means for the protection of the environment. In dealing with the

articles for the prevention of transboundary damage from hazardous activities, the existing rules of customary law should not be eroded. It should further be emphasized that a mechanism seeking the prior consent of all States concerned and a compulsory dispute settlement procedure are not within the constituent parts of customary rules of international law in this field. A widely acceptable body of provisions could only be achieved by avoiding any deviation from the existing customary rules.

United Kingdom of Great Britain and Northern Ireland

The Government of the United Kingdom commends the International Law Commission on the draft articles on prevention of transboundary damage from hazardous activities provisionally adopted on first reading at its fiftieth session in 1998. It welcomes the articles as a useful contribution to the codification and development of international law on the topic.

The United Kingdom supports the formulation of the general duty of prevention in article 3, and considers it to reflect existing international law. However, while it sees value in the development of a duty of consultation and the concept of equitable balancing of interests, it is concerned that, as currently drafted, articles 11 and 12 may have the effect of undermining the general duty of prevention. At any rate the relationship between these articles should be clarified.

There is also room for further refinement of the draft articles in order to clarify other ambiguities and to recognize the weight now given by international environmental law to precautionary action, sustainable development and the polluter-pays principle.

Form that the draft articles should take

Netherlands

As regards the question of what form the draft articles ought to take — a convention, a framework convention or a model law/model rules — the Netherlands finds this difficult to answer at the current stage. On the one hand, an instrument that is non-binding in a legal sense (i.e. a recommendation, model law, model rules) has a certain advantage, in that a convention might well be ratified by too few States. On the other hand, it may be argued that a convention is the appropriate instrument, as the aim is to impose an "obligation of prevention" with specific reference to hazardous though lawful activities. The point of the draft articles is therefore to create a specific regulation to cover this area.

Article 1
Activities to which the present draft articles apply

Netherlands

While acknowledging the desirability of keeping the scope of the articles manageable, which is why the formulation "physical consequences" has been adopted, the Netherlands nonetheless doubts whether the term "physical" is broad enough for this purpose.

Given the fact that elsewhere in the text (see, e.g., paragraph 2 of the Commission's commentary to article 10) mention is made of activities performed by private entities, article 1 too should distinguish, either in the article itself or in the comments on it, between government and private-sector activities.

The Netherlands would note that the sole difference between paragraph 11 of the Commission's comments, dealing with the concept of control as opposed to jurisdiction, and paragraph 10 lies in the duration of the exercise of this "control". It would be a good idea to add a clear example here.

With reference to paragraphs 12 and 13 of the comments, the Netherlands would note that on the basis of case law (especially the Gabčíkovo-Nagymaros case, which, although it deals with State responsibility, is also applicable to the material under discussion), the concept of "risk" should include the element of "foreseeability".

Turkey

In article 1 of the draft text, where the scope of application of the draft articles is put forward, four criteria are mentioned for the definition of the scope of activities. The second criterion, which is also 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". It is apparent that the regime

applied within the territory of a State is different from the regime applied in other areas, such as the high seas or outer space. However, the explanation provided in the second criterion, as well as the regulation of article 2, subparagraph (d), might yield an implication that the distinct regimes applied in the aforementioned different areas are getting closer so as to diminish their differing regimes on a more general plane. The differences of regimes pertaining to different areas should not be reduced while they are being regulated by the draft articles.

United Kingdom of Great Britain and Northern Ireland

This article, whose function is to define activities to which the draft articles apply, is of central importance. However, it is unclear in several important respects and needs further consideration. Precise definition of the scope of the articles would be essential were they to be adopted in the form of a binding instrument.

There is uncertainty, first, regarding the nature of activities covered. This could be resolved in a number of ways. For example:

- Activities falling within the scope of article 1 could be identified by reference to a list (the technique used in the Convention on Environmental Impact Assessment in a Transboundary Context (the Espoo Convention);
- The State of origin could also be obliged to designate other activities which involve a risk of causing significant transboundary harm through their physical consequences (as in, for example, the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention), article 6 (1));
- Article 1 could provide a framework for the conclusion of specific agreements by neighbouring States, and/or States in a particular area, and/or States in a particular river basin on more detailed lists of activities falling within the scope of this article.

Doubtless there may be other ways of clarifying the scope of article 1. But in any event clarification is needed because there could be a number of different interpretations of article 1, and this would lead to avoidable disputes between States about the scope of the articles.

Furthermore, the United Kingdom assumes that the articles are not intended to apply to groups of activities each of which would have a minimal transboundary impact but which, when taken together, would cause transboundary harm. If this is correct, there may be some room for clarification of article 1, by providing that the draft articles apply to "any activity" (in the singular) not prohibited by international law which involves a risk of causing significant transboundary harm.

Article 2
Use of terms

France

With regard to article 2, it should be made clear what is meant in subparagraph (a) by the term "significant transboundary harm". Although the commentary to this provision does provide a few indications in that connection, the drafting of this subparagraph is not explicit enough. A definition of "significant transboundary harm" is essential, because the scope of the obligation to prevent harm depends on it. The International Law Commission should therefore consider the definition further. It would also be preferable to take an alternative and not a cumulative approach. The expression "risk of causing significant transboundary harm" should cover a low probability of causing disastrous harm *or* (not *and*) a high probability of causing other significant harm. There would thus be a relationship between the two probabilities.

The wording of subparagraph (c), concerning the identification of the areas covered by the draft, is ambiguous. The expression "places under the jurisdiction or control of a State" would appear to refer to such places as the continental shelf, the exclusive economic zone and oil platforms. The question is whether it also covers objects (ships and aircraft). France believes that objects should not be included. Subparagraph (e) appears to exclude objects. It would be preferable to limit the draft to areas under the jurisdiction or control of States.

In subparagraph (e), the expression "any other place" is too vague and should be made more specific. Moreover, the expression "State likely to be affected" could in some cases reinforce wrongful claims by a

State to a territory. The term "control" could also give rise to difficulties in some instances, even though it naturally does not permit prejudgement of the lawfulness under international law of the control exercised over a given territory.

Netherlands

See the remarks already made in the general comments on activities with a "high probability of disastrous harm".

For the rest, the Netherlands considers the use of the term "attributable" in paragraph 9 of the commentary inappropriate, as it evokes associations with the regime for State responsibility.

There is a need for a definition of the term "operator" here. See the general comments above.

Turkey

See comments under article 1, above.

United Kingdom of Great Britain and Northern Ireland

The definition of "transboundary harm" in subparagraph (c) may need modification, for at the moment it does not specify any causal relationship between the activities in the State of origin and the transboundary harm occurring in the other State. This could be remedied by providing that "transboundary harm" means harm which is caused by an activity in the territory of the State of origin or in other places under its jurisdiction or control and which occurs in the territory of or in other places under the jurisdiction or control of another State, whether or not the States concerned share a common border.

Article 3
Prevention

Netherlands

The Netherlands considers it desirable to include the term "due diligence" in the text of the article in order to emphasize the obligation to make every effort and to exercise due care. The obligation to take "all appropriate measures" to prevent risk as currently formulated in this article is only one modality of "due diligence". The following wording of article 3 is suggested: "States shall exercise due diligence in order to prevent, or to minimize the risk of, significant transboundary harm."

As regards the question of whether the obligation of prevention should be seen as an obligation of conduct or an obligation of result, the Netherlands doubts whether this is a useful distinction, given that this very distinction was eliminated in the second reading of the Commission's draft articles on State responsibility.

Paragraph 17 of the Commission's commentary refers to the "operator". The Netherlands would reiterate the remarks it made on this term in its general comments above.

Article 4
Cooperation

France

In the case of article 4, the corresponding commentary focuses more on good faith than on cooperation. This article should in fact be divided into two parts: one dealing with cooperation in good faith between States and the other with cooperation between States and international organizations.

Netherlands

The Netherlands considers that article 4 needs to be moved to a different place in the text. The obligation to cooperate should not be mentioned until the material obligations referred to in the previous articles have been fully elaborated.

The phrase "as necessary" is unduly limiting; "where appropriate" would be preferable. In addition, the Netherlands would suggest adding the qualifier "competent" to "international organizations". Certain organizations such as the International Atomic Energy Agency and the International Maritime Organization should perhaps be mentioned by name in the comments. The comments should also point out that "international organizations", in this context, includes non-governmental organizations.

Article 5
Implementation

France

With regard to article 5, which requires States to take internal action, including the establishment of monitoring mechanisms, in implementation of the draft articles, one might ask why it is placed in the part of the draft dealing with prevention.

Netherlands

The Netherlands favours adding the qualifier "permanent" to "monitoring mechanisms".

The use of the words "becoming a party to" in paragraph 1 of the commentary wrongly anticipates the eventual legal form to be taken by the articles.

Article 6
Relationship to other rules of international law

Netherlands

The Netherlands considers that this article is in the wrong place. It interrupts the series of obligations imposed on States, and should be moved either to a place immediately following article 1 or to the end of the text.

Article 7
Authorization

France

With respect to article 7, one might ask whether it is appropriate for public international law to specify the consequences under domestic law of non-compliance with an internal measure. This provision could possibly be added to article 5.

Netherlands

The Netherlands would point out that draft article 7 fails to address the following points:

– The obligation of States to designate activities for which authorization is compulsory;

– Paragraph 3 should provide for a transitional period before existing activities would have to comply with the requirements laid down in the authorization;

– Following on from paragraph 3, States should be placed under an obligation to halt any activities being conducted without authorization;

– Both current paragraph 3 and the suggested addition should include the possibility of suspending as well as terminating authorization;

– As the purpose is to arrive at continuous prevention, and hence at constant monitoring, authorization should be granted for a set period of time.

The Netherlands would suggest reformulating paragraph 2 as follows:

> "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. Authorizations already issued by the State for pre-existing activities shall be reviewed in order to comply with the present draft articles."

Concerning authorization granted for specific activities by private companies, the Netherlands would note that there should be a system of notification from companies to the State. After all, private companies enjoy a measure of protection in the draft articles (see the draft article on industrial secrets); they therefore also have certain obligations.

Partly in the light of article 5, the Netherlands believes that States should be required to pass legislation to impose on private companies the obligation to inform the State about any activities of the kind discussed here at all times.

United Kingdom of Great Britain and Northern Ireland

Paragraph 1 should be revised so that it clearly imposes an obligation rather than seeming simply to state a fact. For example, it could be formulated so as to provide that States shall require prior authorization to be obtained for activities within the scope of the draft articles carried out in their territory or otherwise under their jurisdiction or control, as well as for any major change in any activity so authorized.

Paragraph 3 should apply both to unauthorized activities and those which fail to conform to the

conditions of an authorization. This would be clearer if it were recast to provide that, in cases of failure to obtain authorization or to conform to the conditions specified in such authorization, the State of origin must take appropriate action, including, where necessary, terminating any authorization.

It would be also helpful to include in paragraph 3 some words that would require the State of origin to take action to stop an activity which is unauthorized or whose authorization has been terminated.

Article 8
Impact assessment

France

In article 8, it should be clarified that not only transboundary harm but anything affecting the environment has an environmental impact. It would be appropriate to return to the principle set out in article 10 of the 1996 draft, which concerned risk assessment and obliged a State to assess the possible consequences of the activity undertaken for the environment of other States.

Netherlands

The Netherlands proposes that in this article too (as in article 7) the term "authorization" should be qualified by "prior".

The Netherlands favours including an appendix that would describe the minimum content of an environmental impact assessment, and inserting a reference to the appendix in the article.

United Kingdom of Great Britain and Northern Ireland

The United Kingdom notes that the impact assessment required by article 8 appears to be limited to an evaluation of the possible *transboundary* harm caused by the activity in question. It doubts whether it is feasible to assess the possible transboundary harm caused by an activity without carrying out a full environmental impact assessment which relates to the *entire* environmental impact of a proposed activity. The Commission may wish to consider revising this article accordingly.

In any event, as article 10 and the title to article 8 refer to "assessment" rather than "evaluation", for the sake of consistency the text of article 8 should be brought into alignment by replacing "evaluation" by "assessment".

Article 9
Information to the public

Netherlands

The Netherlands suggests including the element of public participation in decision-making, following the example of the Rio Declaration. It also suggests that the efforts to disseminate public information and to ascertain the views of the general public referred to in this article should be linked to the granting of authorization, for instance by adding the words "prior to any authorization".

United Kingdom of Great Britain and Northern Ireland

The United Kingdom is in full agreement with the purpose of this article as set out in the commentary to it, but considers that this is not adequately reflected in the text of the article. It should be made clear that the public likely to be affected includes the public of the State of origin as well as that of other States. It may also be desirable to define "the public likely to be affected" accordingly in article 2.

The article should also be expanded to encompass the other elements of principle 10 of the Rio Declaration, which is set out in paragraph (4) of the commentary, so as to require that the State of origin must afford the public the opportunity to participate in the decision-making processes and provide effective access to judicial and administrative proceedings, including redress and remedy.

Article 10
Notification and information

Netherlands

The Netherlands would point out that the phrase "notification thereof" in paragraph 1 is ambiguous. Does it refer solely to the risk described or equally to the results of the assessment? The Netherlands suggests making the intended meaning more explicit by adding the word "all" to "other relevant information" and by

replacing "thereof" by the phrase "of the risk and the assessment".

It is recommended that a reference to the *Lake Lanoux* case be added to the commentary to draft article 10.

Article 10, paragraph 1, refers to the obligation to notify the States likely to be affected, whereas paragraph 9 of the accompanying comments acknowledges that the State of origin may not always be able to identify all these States. This point is related to the problem noted above by the Netherlands, that the text fails to address the question of the risk of damage to common areas (see comments under "General remarks", above).

United Kingdom of Great Britain and Northern Ireland

It is implicit in paragraph 2 that the State of origin is required to postpone a final decision on authorization until the "reasonable time" in which affected States have to respond has elapsed. This should be made explicit, for example, by requiring the State of origin to wait a reasonable time before taking a decision on authorization of the activity in order to give the States likely to be affected an opportunity to respond to the notification.

Article 11
Consultations on preventive measures

Netherlands

Paragraph 1

Whereas article 10 refers to notification *pending* any decision on the authorization of the activity, the commentary to article 11, paragraph 1, on consultations (which would logically come after notification) refer to a time either preceding the granting of authorization or a later stage (i.e., when the hazardous activity is already going on). The Netherlands favours adding a provision along the following lines: "Such consultations should preferably take place prior to authorization." This would not only protect the interests of the State likely to be affected, but indirectly protect those of the State of origin as well.

Paragraph 3

The Netherlands has taken note of the dissenting opinion of one member of the Commission, given in paragraph 12 of the commentary, that the appointment of an independent and impartial fact-finding commission, as provided for in article 17, should have priority over a unilateral decision to proceed with the activity in question in the absence of an agreed solution between the States concerned. The Netherlands would note that a fact-finding mechanism set up for the purposes of article 11 should be regarded as an autonomous mechanism, to be distinguished, chronologically as well as in terms of content, from that provided for in draft article 17. This comment does not detract from the Netherlands' view on the fact-finding commission as envisaged (see the Government's comments on article 17 below).

United Kingdom of Great Britain and Northern Ireland

It would frustrate the purpose of this article if the State of origin were to authorize an activity or allow it to proceed while the required consultations were continuing. To avoid this it might be appropriate to add a final paragraph providing that the State of origin must not authorize an activity until consultations pursuant to this article have been concluded. It would be necessary in this context to indicate how the time-frame for consultations should be determined. The most suitable method might be for the States concerned to agree on a time-frame for consultations. The last part of article 5 of the Espoo Convention provides a useful precedent:

> "The Parties shall agree, at the commencement of such consultations, on a reasonable time-frame for the duration of the consultation period."

As regards the substance of the consultations, the United Kingdom assumes that the purpose is not to detract from the State of origin's duty of prevention in article 3, but rather to discuss a mutually acceptable choice of measures to give effect to that duty. The relationship between these articles needs to be clarified in the text of the draft articles.

Article 12
Factors involved in an equitable balance of interests

France

Article 12, entitled "Factors involved in an equitable balance of interests", is intended to provide guidance to States that have entered into consultations in an endeavour to achieve an equitable balance of interests. The goal is to strike a reasonable balance between the interests of the State carrying on the activity and the interests of States likely to be affected. One might ask whether, with such an approach, this article might overcompensate by obliging States likely to be affected — because they are at a more advanced level of development than the State that carried on the activity — to bear part of the cost of prevention. This is in fact what subparagraph (d) indicates.

France believes that the combination of subparagraphs (c) and (f) should not lead to the prevention threshold being lowered.

Netherlands

The Netherlands is of the opinion that the fact that the State of origin has an economic interest in the proposed activities should be taken into account in the application of article 12.

The Netherlands is of the opinion that the distinction between subparagraphs (a) and (c) is in need of clarification.

United Kingdom of Great Britain and Northern Ireland

The United Kingdom is concerned that the balance of this article may detract too far from the duty of prevention in article 3; its acceptability will ultimately depend on how the relationship between the duty of prevention and the concept of equitable balancing is defined (see the last paragraph of the United Kingdom's comments under article 11, above).

In particular, subparagraph (d) appears inconsistent with this duty in implying that the State of origin has a choice whether to comply with article 3 in full or at all. The preparedness of the State of origin to contribute to the costs of prevention should only be relevant where the affected State is proposing measures over and above the requirements of article 3, for example to the level of its own national standards, and is willing to contribute to the additional costs. Subparagraph (d) should be clarified to this effect or deleted.

Moreover, the United Kingdom is unclear how the process of equitable balancing proposed in article 12 fits with certain other internationally accepted principles of international environmental law, notably sustainable development, precautionary action, the polluter-pays principle, and as reflected in, *inter alia*, the Rio Declaration. Consideration should be given to incorporating in article 12, or elsewhere in the draft articles, the importance of ensuring that decisions on measures taken to prevent or minimize the risk of harm take full account of the following:

- That the needs of the present generation should be met without compromising the ability of future generations to meet their own needs;
- That lack of scientific certainty owing to insufficient relevant scientific information and knowledge regarding the risk of significant transboundary harm should not prevent the State of origin from taking a decision with regard to an activity in order to prevent or minimize the potential risk;
- That the costs of pollution prevention, control and reduction measures should be borne by the polluter.

Article 13
Procedures in the absence of notification

France

Article 13 takes a pre-contentious perspective. Paragraph 3 of the article did not appear in the 1996 draft. It requires the State of origin to introduce appropriate and feasible measures to minimize the risk and, where appropriate, to suspend the activity in question for a period of six months if the other State requests it to do so in the course of consultations. There is a difference between article 11, paragraph 3, and article 13, paragraph 3: in the first case, it is the State of origin that takes the initiative and is responsible for taking the necessary action to prevent or minimize the risk of causing harm; in the second case, it is the requesting State that takes the initiative.

In the latter case, the question is whether the State has the freedom to take the action that it itself considers appropriate or whether it must take action in consultation with the State of origin or, where appropriate, with an international organization.

Paragraph 3 of article 13 should be deleted. It casts suspicions on a State that has not anticipated the consequences of its activities (a sort of presumption of bad faith). Moreover, the six-month period gives rise to problems. It would be better to specify a reasonable period of time in the light of circumstances.

Article 14
Exchange of information

Netherlands

As noted above in the general comments, there is no provision for emergencies here, regarding matters such as the exchange of information.

Article 15
National security and industrial secrets

France

Article 15 is appropriate because a State should not be obliged to reveal certain information, but the article should be reworded. The term "industrial secrets" is too restrictive. The following wording would be preferable: "data and information vital to the national security of the State or protected by intellectual property rights".

Netherlands

As noted above in the general comments, the position of the "operators" mentioned in various parts of the text requires clarification. This matter is also relevant in the context of article 15.

Article 16
Non-discrimination

France

In the case of article 16, the question is whether it is desirable to dispense with the forms of inter-State redress for which provision was made in article 21 of the 1996 draft and which no longer appear in the 1998 version. The title of the article should be changed because the article's purpose is to give aliens access to a State's courts. Non-discrimination is just one procedural aspect among others concerning access to such courts. The title of article 16 should therefore be "Access to courts".

Netherlands

The Netherlands considers this draft article, as it now stands, to be very meagre. Its essence, i.e., that the State of origin must grant access to its judicial and other procedures, should be accorded a far more prominent place in the article, and should precede the reference to the principle of non-discrimination.

The Netherlands would suggest introducing the element of *lis pendens* into the text, for instance by referring to proceedings before the World Bank Inspection Panel. Furthermore, a more wide-ranging non-discrimination provision (in relation both to access to the courts and to redress), as in the Convention on the Law of the Non-navigational Uses of International Watercourses, would be helpful. In this light, it is recommended that the phrase "Unless the States concerned have agreed otherwise" be replaced by the phrase "Without prejudice to other internationally agreed procedures and other mechanisms of relief", and that the words "to seek protection" be replaced by the words "to obtain protection".

In connection with this draft article, the Netherlands would recall that a previous version of the draft (the draft articles drawn up by a Working Group of the ILC in 1996[2]) included a draft article on the "Nature and extent of compensation or other relief". The Netherlands would suggest including this article again, and placing it after article 16.

Article 17
Settlement of disputes

France

Even though article 17, concerning settlement of disputes, does not give rise to any particular difficulties, one might ask how the independent and impartial fact-finding commission referred to in

[2] *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10), annex I.

paragraph 2 is to be set up, and whether the body in question could also be a conciliation commission.

In any event, the settlement-of-disputes provisions do not really belong in the draft, and it would be preferable for the matter to be dealt with by the diplomatic conference established to negotiate the convention.

Netherlands

As regards the procedure for settling disputes relating to the application and interpretation of the articles, the Netherlands favours a more effective procedure than that currently envisaged. For instance, the wording of the provision on the appointment of a fact-finding commission is weak. It would be useful to take as an example the provision for settling disputes in article 33 of the Convention on the Law of the Non-navigational Uses of International Watercourses, where the fact-finding commission is given far wider powers, including the power to make proposals for conciliation. It would also be advisable to alter the period of time to be observed before adopting this procedure to three months, following the example of the United Nations Convention on the Law of the Sea.

See also the comments of the Netherlands in relation to article 11, paragraph 3.

Turkey

The establishment of compulsory rules for the settlement of disputes should be avoided. The provisions regarding the dispute settlement mechanisms should be flexible enough to allow the States concerned to determine the most efficient way of resolving any outstanding issues among them in conformity with the nature of such issues. The principle of free choice of means, as laid down in Article 33 of the Charter of the United Nations and reiterated in some other international instruments, should be observed.