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Twelfth report on international liability for injurious consequences arising out of acts not prohibited by international law, by Mr. Julio Barboza, Special Rapporteur

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

[Agenda item 4]

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Twelfth report on international liability for injurious consequences arising out of acts not prohibited by international law, by Mr. Julio Barboza, Special Rapporteur

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* Incorporating documents A/CN.4/475/Corr.1 and Add.1/Corr.1.

CHAPTER I

Prevention

1. It will be recalled that, given the Commission's reluctance to accept the idea of prevention *ex post*, which refers to measures adopted after an incident has occurred, the Special Rapporteur included in his tenth report a section¹ explaining, as clearly as possible, his belief that that type of prevention existed in international practice.² It contained comments³ on two proposed texts,⁴ the first of which would be inserted as paragraph (e) of article 2 (Use of terms) and would define what are referred to therein as "response measures", which are nothing other than measures for prevention *ex post*.

2. The text read as follows:

"Response measures" means any reasonable measures taken by any person in relation to a particular incident to prevent or minimize transboundary harm.

The harm referred to in subparagraph ... includes the cost of preventive measures wherever taken, as well as any further harm that such measures may have caused."

¹ *Yearbook ... 1994*, vol. II (Part One), document A/CN.4/459, chap. I, in particular p. 133, paras. 7–18.

² The Special Rapporteur argued that prevention always took place "prior" to the incident and that prevention *ex post* was a contradiction in terms. This type of prevention is intended to avoid incidents, but there is another type of prevention intended to keep the *effects of an incident* from reaching their maximum potential; in other words, measures to minimize the effects of an incident. Measures of this type have been unanimously considered to be preventive, both in theory and in all conventions dealing with liability for acts not prohibited by law.

³ *Yearbook ... 1994*, vol. II (Part One), document A/CN.4/459, chap. I, p. 133, paras. 19–21.

⁴ *Ibid.*, para. 22.

3. This method was used to avoid an impasse in case the Commission continued to oppose the use of the term "prevention" for *ex post* measures. However, the Special Rapporteur pointed out that calling them "response measures" would mean using a term that differed from the term used in all the relevant conventions—namely, "preventive measures"—and would pose serious problems.

4. It would seem that the Commission was receptive to the arguments put forward and that it now accepts the idea of prevention *ex post*. If this is the case, the Special Rapporteur suggests that the Commission consider that text at its current session and that it agree on a formulation that covers both measures to prevent incidents (prevention *ex ante*) and measures to prevent further harm once an incident has occurred (prevention *ex post*), such as:

"(e) 'Preventive measures' means:

"(i) Measures to prevent or minimize the risk of incidents;

"(ii) Measures taken in relation to an incident which has already occurred to prevent or minimize the transboundary harm it may cause."

Then, a subparagraph could be inserted under letter (g) of the same article, after the definition of harm, stating that:

"(g) *The harm referred to in the preceding paragraph includes the cost of preventive measures under paragraph (e) (ii), as well as any further harm that such measures may have caused.*"

CHAPTER II

Principles

5. At its preceding session, the Commission adopted the principles set forth in articles A to D⁵ (6 to 9 of the num-

bering to be proposed below, chap. IV), but was unable to consider the principle of non-discrimination because the latter had not yet been examined by the Drafting Committee. It would be useful if the Committee could take a decision on that principle at the current session so that the relevant chapter may be provisionally completed.

⁵ For the text of the draft articles provisionally adopted by the Commission, see *Yearbook ... 1995*, vol. II (Part Two), pp. 89 et seq.

CHAPTER III

Liability

6. Two complete reports of the Special Rapporteur have yet to be considered: the tenth report,⁶ which proposes a liability regime for cases of transboundary harm, and the eleventh,⁷ which concerns harm to the environment. The Commission expressed preliminary views on both reports, but decided to use the time it would have spent considering them to enable the Drafting Committee to examine some of the articles on the subject appearing on its agenda; the Committee ultimately adopted those articles.

7. Thus, in the Special Rapporteur's view, it is time to deal with the crux of the matter; namely, liability. Although it is true that harm to the environment is an interesting item, it is also true that, basically, the Commission need only determine what this category comprises, since it has already agreed in principle that the concept of harm should include harm to the environment.

8. Having exhausted the issue of prevention, at least for the moment, the Commission should abide by its decision made at its forty-fourth session, in 1992, to the effect that:

... the topic should be understood as comprising both issues of prevention and of remedial measures. However, prevention should be considered first; only after having completed its work on that first part of the topic would the Commission proceed to the question of remedial measures. Remedial measures in this context may include those designed for mitigation of harm, restoration of what was harmed and compensation for harm caused.⁸

9. The Commission cannot postpone this unavoidable task, at the risk of showing negligence with respect to the General Assembly's mandate, particularly since the Commission itself recognized, at its forty-seventh session, that the vital task of identifying the activities to be included in the draft articles would "depend on the provisions on prevention which have been adopted by the Commission and the nature of the obligations on liability which the Commission will be developing".⁹

10. What the Commission must determine at its current session are *the main features of the regime it wishes to apply to liability for acts not prohibited by international law*. In the present report there is an explanation of the regime set out in the schematic outline of the previous Special Rapporteur, Mr. Quentin-Baxter, which was annexed to his fourth report,¹⁰ and of the regimes proposed in the sixth¹¹ and tenth reports of the current Special Rapporteur. These are the three options which have been

proposed thus far and on which the Commission has yet to take a decision. What the Special Rapporteur suggests for this session is that the Commission simply look at the main points of these liability regimes. To this end, he has indicated, for each regime, the articles and paragraphs of the relevant reports which contain essential information. Members of the Commission could also read the rest of the proposed articles in each report on liability to have an idea of how each of the regimes under consideration could operate.

11. It is suggested, then, that the Commission focus on the annex to the fourth report of the previous Special Rapporteur (which could be supplemented, if desired, by a perusal of the entire report); chapters IV and V of the sixth report of the current Special Rapporteur, particularly articles 21, 23 and 28 to 31, which define the regime, and the tenth report, in particular the careful consideration of the whole of chapter II and of sections A, B and C of chapter III, and of the articles included therein.

12. In the following analysis, the Special Rapporteur will discuss only basic concepts in the body of the text; clarifications and complementary concepts will be found in the footnotes.

A. The schematic outline

13. The regime set forth in the schematic outline is only a rough sketch, but the Commission will find in it the information it needs in order to take a decision and in order to develop it further, if it so desires. Some of the articles of the sixth report might also be helpful in order to have an idea of how this part of the schematic outline could be developed.

14. The regime applies to activities carried out in the territory or under the control of one State which *give or may give rise to loss or injury to persons or things within the territory or in places under the control of another State*. In other words, the activities of article 1, proposed by the current Special Rapporteur, would be covered by the outline and the article's provisions would apply to them.

1. PREVENTION

15. *Breach of obligations regarding prevention does not entail any sanction* according to section 2, paragraph 8. In other words, there is no liability for wrongful act in that draft.

2. LIABILITY

16. If transboundary harm arises and there is no prior agreement between the States concerned regarding their rights and obligations, these rights and obligations shall be determined in accordance with the schematic outline. There is an obligation to negotiate such rights and obligations in good faith.

⁶ *Yearbook ... 1994*, vol. II (Part One), p. 133, document A/CN.4/459.

⁷ *Yearbook ... 1995*, vol. II (Part One), p. 51, document A/CN.4/468.

⁸ See *Yearbook ... 1992*, vol. II (Part Two), p. 51, para. 345.

⁹ See *Yearbook ... 1995*, vol. II (Part Two), chap. V, p. 89, para. 408 *in fine*.

¹⁰ *Yearbook ... 1983*, vol. II (Part One), pp. 201 et seq., document A/CN.4/373.

¹¹ *Yearbook ... 1990*, vol. II (Part One), p. 83, document A/CN.4/428 and Add.1.

17. Section 4 establishes in paragraph 2 that the acting State—that is to say the State of origin—shall make reparation to the affected State.¹² The amount of the reparation due is determined by a number of factors.¹³

18. The general ideas of the outline are, therefore, as follows:

(a) Recommendations to States regarding the prevention of incidents due to activities “which give or may give rise to” transboundary harm. In particular, that they should draw up a legal regime between the States concerned which would apply to the activity;

(b) State liability for transboundary harm caused by dangerous activities;¹⁴

- (i) Nature of the liability. *Sine delicto*, since the acts are not prohibited by international law;
- (ii) Attenuation of liability: although, in principle, the innocent victim should not bear the injury, the nature and amount of the reparation must be negotiated in good faith between the parties, taking into consideration a series of factors which may lessen the amount.

B. The regime of the sixth report

19. The draft articles proposed by the Special Rapporteur in the sixth report¹¹ constitute an almost complete draft of the topic.

1. PREVENTION¹⁵

20. Draft article 18 strips the obligations regarding prevention of their “hard” nature, since it does not give the affected State the right to institute proceedings.¹⁶ Although more detailed, the draft articles set forth in the sixth report

¹² This obligation, however, is subject to a condition that did not find any support in the Commission: that the reparation for injury of that kind or character should be in accordance with the *shared expectations* of the States concerned. For the concept and effect of such expectations, see section 4, paras. 2–4, of the schematic outline.

¹³ These include the so-called “shared expectations”, the principles spelled out in section 5 of the schematic outline—*inter alia*, that insofar as may be consistent with these articles, an innocent victim should not be left to bear his loss or injury—the reasonableness of the conduct of the parties and the preventive measures of the State of origin. The factors outlined in section 6 (some of which were adopted in draft outline 20 proposed by the current Special Rapporteur) also play a role as do the matters referred to in section 7, which remained open for consideration by the Commission; however, they are very vague, given the preliminary nature of the schematic outline.

¹⁴ Although the scheme (sect. 7, para. II.1) leaves open the possibility that by a decision of the parties to the negotiation there may be another decision as to where primary and residual liability should lie, and whether the liability of some actors should be channelled through others.

¹⁵ The provisions regarding notification of affected States, the provision of information concerning the dangerous activity and consultations with them regarding a regime, further develop and refine the concepts set forth in the schematic outline.

¹⁶ Unless, of course, such action is provided for in another agreement between the same parties. In any event, there would be a form of sanction for failure to comply. If, at some point subsequent to such failure to comply, there were to be appreciable transboundary harm, the sanction would be that in such a case, the State which did not comply could not invoke the provisions of draft article 23 which enable it to obtain favourable adjustments of the compensation.

do not depart in any significant way from the schematic outline as far as prevention is concerned.

2. LIABILITY

21. There is State liability *sine delicto* for transboundary harm which translates, here again, into a simple obligation to negotiate the determination of the legal consequences of the harm with the affected State or States. The States concerned must take into account that, in principle, the harm must be *compensated in full*, even though the State of origin may, in certain cases, seek a reduction of the compensation payable by it (draft art. 23).¹⁷

22. Thus far, the draft articles do not depart from the general lines of the schematic outline. The Special Rapporteur thought, however, that there seemed to be an undeniable trend in international practice towards introducing into specific activities civil liability for transboundary harm and that he should, therefore, present that possibility to the Commission.¹⁸

23. For that reason, in addition to State liability which is exercised through the diplomatic channel, the draft articles provide for what is called the domestic channel, that is to say, remedy for victims through the domestic courts of law.¹⁹ The aim was merely to establish a *minimum regulation* of the domestic channel.²⁰

24. To summarize, the general thrust of the regime proposed in the sixth report is as follows:

¹⁷ For example, if the State of origin took precautionary measures solely for the purpose of preventing transboundary harm, it could ask for a reduction of the compensation. In order to illustrate the above, take the example of an industry located on the border, upstream on a successive international river, which discharges waste into the water and, consequently, affects only the territory downstream but not the course of the river situated in its own territory.

¹⁸ In the international practice considered, such civil liability *could coexist with State liability only insofar as the latter was residual*, in other words when neither the operator nor his insurance could cover the full amount of the compensation fixed. In such cases, the State would intervene (nuclear conventions, see the tenth report of the Special Rapporteur (footnote 6 above), chap. II, sect. B, paras. 24–29 inclusive). Subsequently, in draft articles such as the ones relating to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (United Nations, *Treaty Series*, vol. 1673, p. 57), the obligation of the State to complete the compensation was made contingent on the condition that the harm would not have been caused had the State not failed to comply (indirect causality).

¹⁹ In order for the domestic channel to coexist with the diplomatic channel, two provisions are needed: (a) one to permit the affected State to initiate the diplomatic claim without having to exhaust all internal remedies of the State of origin (draft art. 28, para. 1), because otherwise the domestic channel would be compulsory and it would be appropriate to use the diplomatic channel only in the cases provided for under general international law, for example where there had been a denial of justice; and (b) one to prevent the State of origin from claiming immunity from jurisdiction (draft art. 28, para. 2) because if it were to do so, the domestic channel would lead nowhere. A claim of immunity from jurisdiction may only be made in respect of enforcement of a judgement.

²⁰ As explained in the sixth report of the Special Rapporteur (footnote 11 above), pp. 98–99, paras. 62–63. For example, it did not establish that the liability had to be *sine delicto* (causal, strict) but referred, as far as the basic rules are concerned, to the applicable national law, that is to say, that of the court that ultimately had jurisdiction. It was suggested that States parties should, through their national legislation, give their courts jurisdiction to deal with claims of the type permitted under draft article 28, paragraph 2, that they should give affected States or individuals or legal entities access to their courts (draft art. 29, para. 1) and that they should provide in their legal systems for remedies which permit prompt and adequate compensation (draft art. 29, para. 2).

1. Recommendations to States regarding the prevention of incidents and above all the drawing up of a legal regime between States to govern the activity;
2. State liability for transboundary harm caused by dangerous activities:
 - 2.1 Nature of the liability: *sine delicto* (strict, causal) where the acts giving rise to liability are not prohibited by international law;
 - 2.2 Attenuation of liability: although, in principle, an innocent victim should not have to bear the injury caused, the nature and amount of the reparation must be negotiated in good faith between the parties, taking into consideration a series of factors which may diminish the amount;
3. In addition to the diplomatic channel where one State deals with another State, provision is made for a domestic channel available to individuals or private entities and to the affected State:
 - 3.1 Once a channel has been selected for a specific claim, the other channel may not be used for the same claim;
 - 3.2 Character of the liability: to be established by the domestic legislation of the State of the court having jurisdiction.

25. As the preventive measures are not compulsory, failure to take such measures does not give rise to liability and therefore there is no State liability for a wrongful act. Consequently, there cannot be both responsibility for a wrongful act and at the same time responsibility *sine delicto* in respect of any single incident.

26. The Special Rapporteur points out two features of the system proposed in his sixth report. The first is that if the affected State knows that its subjects may use the domestic channel it may be very reluctant to use the diplomatic channel. The second is that the determination of the type of liability is left to domestic law. This latter feature can easily be changed by including in the draft articles a provision for liability *sine delicto* of the person in charge.

C. The regime of the tenth report

27. It should be recalled that:

(a) As the Special Rapporteur said before, the Commission categorically rejected the suggestion that the obligations concerning prevention should be “soft”. Accordingly, violation of such obligations gives rise to State liability for a wrongful act;

(b) This makes these draft articles extremely unusual and creates many difficulties, since State liability for violation of its obligations in respect of prevention must necessarily coexist with liability *sine delicto* for payment of compensation for injury caused.

28. If compensation for an injury caused followed only from a wrongful act, that is to say as a result of failure by the State to comply with its obligations concerning prevention, *nothing in the draft articles would relate to the*

liability for acts not prohibited by international law. Innocent victims would then be compelled to bear the *onus probandi* and would be left without any remedy when the injury was caused by an act that was not prohibited as a consequence of a dangerous (but lawful) activity. The liability regime, which is becoming increasingly widespread in the world in respect of such activities: that of liability *sine delicto*, would not be applied to compensation for injury caused by dangerous activities. Thus, the area which prompted the inclusion of the item on the Commission’s agenda, namely, that of liability for injurious consequences arising out of acts not prohibited by international law, would be totally unprotected.

29. There is no doubt whatsoever that compensation for transboundary harm arising out of acts not prohibited must be subjected to some form of liability *sine delicto*. In the previous Special Rapporteur’s schematic plan this type of liability is assigned to the State although it is considerably diminished because it is subject to negotiations between the States concerned and to possible readjustments. The sixth report of the current Special Rapporteur follows the same solution and also adds the possibility that the injured may resort to domestic channels.²¹

30. To summarize, the system proposed in the tenth report is as follows:

1. Obligations to prevent incidents are the responsibility of the State. There is State liability for failure to comply with these obligations;
2. Nature of State liability: for wrongful act, with the characteristics and consequences of international law (art. X);
3. Payment of compensation for transboundary harm caused is the responsibility of the operator. Nature of such liability: *sine delicto*.²²

D. The options available to the Commission

31. (a) The decisions already taken by the Commission regarding prevention leave no other alternative than State liability for wrongful acts;

(b) As to some form (whether attenuated or not) of liability *sine delicto*, the Commission has no choice but to introduce it into the draft articles, unless it wishes to renounce the mandate given to it by the General Assembly (international liability for the injurious consequences of acts not prohibited by international law). It can assign liability to the State (schematic outline of the previous Special Rapporteur), to the operator (tenth report of the current Special Rapporteur) or, depending on what the

²¹ See in particular chapter II of the tenth report (footnote 6 above), pp. 134 et seq.

²² Thus, the State is responsible for all the consequences of the wrongful act (cessation, satisfaction, guarantee of non-repetition (see tenth report of the Special Rapporteur (footnote 6 above), pp. 136 et seq., paras. 31–41), but not for compensation which is always the responsibility of private operators, even if they coexist with the failure of the State to comply with its obligations regarding prevention. The operator’s liability is *sine delicto*, since it arises from acts not prohibited by international law and redresses the material harm caused by the dangerous activity under draft article 1.

actor chooses, to the State or operator (sixth report) with some possible changes of detail;

(c) The residual liability of the State can be resolved once the two previous issues have been settled.

CHAPTER IV

Order of the draft articles

32. The Commission observed that the draft articles were not presented in order and that the various partial numberings of the articles adopted by the Drafting Committee, together with the proposed articles (designated by letters) for the chapter on liability, could give rise to confusion.

33. At its forty-eighth session (1988) and at its forty-ninth session (1989), the Commission sent to the Drafting Committee the first ten draft articles, which included two different versions of chapters I (General provisions) and II (Principles): one is that of the fourth report of the Special Rapporteur,²³ and the other is that of his fifth report.²⁴ This set of articles does not present a problem in terms of renumbering, because the draft articles deal with the same content in both versions, although their wording differs.

34. The draft articles which may be adopted in relation to liability may be numbered consecutively (beginning with article 21) following the last article adopted thus far by the Commission.

²³ *Yearbook ... 1988*, vol. II (Part One), pp. 251 et seq., document A/CN.4/413.

²⁴ *Yearbook ... 1989*, vol. II (Part One), pp. 131 et seq., document A/CN.4/423.

Draft articles^{*,5}

CHAPTER I

GENERAL PROVISIONS

Article 1. Scope of the present articles

The present articles apply to activities not prohibited by international law and carried out in the territory or otherwise under the jurisdiction or control of a State which involve a risk of causing significant transboundary harm through their physical consequences.

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) “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;

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

[(d) Definition of “affected State” (fourth and fifth reports);]²⁵

[(e) Definition of “preventive measures” (tenth⁶ or eleventh report,⁷ depending on the Commission’s decision);]

[(f) Definition of “harm” (eighth report²⁶), including environmental harm (eleventh report);]

[(g) Inclusion of the cost of ex-post preventive measures as part of reparation for harm.]

*[Article 3. Attribution (fourth report)/
Assignment of obligations (fifth report)]*

[Conditions for the assignment of the obligations imposed by the present articles (fourth and fifth reports).]²⁷

*[Article 4. Relationship between the present articles
and other international agreements]**

[Relationship between the present articles and other international agreements to which the States parties to the present articles are also parties concerning the

²⁵ In the fourth report, the proposed text of article 2 (e) is as follows:

“‘Affected State’ means the State under whose jurisdiction persons or objects, or the use or enjoyment of areas, are or may be affected.”

In the fifth report, the text is as follows:

“‘Affected State’ means the State in whose territory or under whose jurisdiction persons or objects, the use or enjoyment of areas, or the environment, are or may be appreciably affected.”

²⁶ *Yearbook ... 1992*, vol. II (Part One), pp. 59 et seq., document A/CN.4/443, appendix, sect. C.

²⁷ In the fourth report, article 3 (Attribution), reads as follows:

“The source State shall have the obligations imposed on it by the present articles, provided that it knew or had means of knowing that an activity involving risk was being, or was about to be, carried out in areas under its jurisdiction or control.”

In the fifth report, article 3 (Assignment of obligations) reads as follows:

“1. The State of origin shall have the obligations established by the present articles, provided that it knew or had means of knowing that an activity referred to in article 1 was being, or was about to be, carried out in its territory or in other places under its jurisdiction or control.

“2. Unless there is evidence to the contrary, it shall be presumed that the State of origin has the knowledge or the means of knowing referred to in the preceding paragraph.”

*The articles adopted so far by the Commission are reproduced below without square brackets.

activities referred to in article 1 (fourth and fifth reports).]²⁸

*[Article 5. Absence of effect upon other rules of international law]**

[Application of other rules of international law to transboundary injury arising from wrongful acts or omissions of the State of origin not specified in the present articles (fourth and fifth reports).]²⁹

CHAPTER II

PRINCIPLES**

Article 6. [A] Freedom of action and the limits thereto

The freedom of States to carry on or permit activities in their territory or otherwise under their jurisdiction or control is not unlimited. It is subject to the general obligation to prevent or minimize the risk of causing significant transboundary harm, as well as any specific obligations owed to other States in that regard.

Article 7. [B] Prevention

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

Article 8. [C] Liability and reparation

In accordance with the present articles, liability arises from significant transboundary harm caused by an activity referred to in article 1 and shall give rise to reparation.

Article 9. [D] Cooperation

States concerned shall cooperate in good faith and as necessary seek the assistance of any international organization in preventing or minimizing the risk of significant transboundary harm and, if such harm has occurred, in minimizing its effects both in affected States and in States of origin.

* The Commission may decide not to include these two articles, bearing in mind that it does not normally include final provisions in the draft articles it produces.

²⁸ In the fourth report, article 4 (Relationship between the present articles and other international agreements) reads as follows:

“Where States parties to the present articles are also parties to another international agreement concerning activities or situations within the scope of the present articles, in relations between such States the present articles shall apply, subject to that other international agreement.”

In the fifth report, the same article reads as follows:

“Where States parties to the present articles are also parties to another international agreement concerning activities referred to in article 1, in relations between such States the present articles shall apply, subject to that other international agreement.”

²⁹ The text proposed by the Special Rapporteur reads as follows:

“The fact that the present articles do not specify circumstances in which the occurrence of transboundary harm arises from a wrongful act or omission of the State of origin shall be without prejudice to the operation of any other rule of international law.”

[Article 10. Non-discrimination]

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

Article 11. Prior authorization

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

Article 12. Risk assessment

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

Article 13. Pre-existing activities

If a State, having assumed the obligations contained in these articles, ascertains that an activity involving a risk of causing significant transboundary harm is already being carried out in its territory or otherwise under its jurisdiction or control without the authorization as required by article 11, it shall direct those responsible for carrying out the activity that they must obtain the necessary authorization. Pending authorization, the State may permit the continuation of the activity in question at its own risk.

Article 14. Measures to prevent or minimize the risk

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

*Article 14 bis. Non-transference of risk**

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

Article 15. Notification and information

1. If the assessment referred to in article 12 indicates a risk of causing significant transboundary

** In articles 6–9 the letters in square brackets correspond to the numbering of the draft articles as provisionally adopted by the Commission in 1995.

* It would be preferable to place this article with those dealing with principles.

harm, the State of origin shall notify without delay the States likely to be affected and shall transmit to them the available technical and other relevant information on which the assessment is based and an indication of a reasonable time within which a response is required.

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

Article 16. Exchange of information

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

Article 16 bis. Information to the public

States shall, whenever possible and by such means as are appropriate, provide their own public likely to be affected by an activity referred to in article 1 with information relating to that activity, the risk involved and the harm which might result and ascertain their views.

Article 17. National security and industrial secrets

Data and information vital to the national security of the State of origin or to the protection of industrial secrets may be withheld, but the State of origin shall cooperate in good faith with the other States concerned in providing as much information as can be provided under the circumstances.

Article 18. Consultations on preventive measures

1. The States concerned shall enter into consultations, at the request of any of them and without delay, 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, and cooperate in the implementation of these measures.**

2. States shall seek solutions based on an equitable balance of interests in the light of article 20.

3. If the consultations referred to in paragraph 1 fail to produce an agreed solution the State of origin shall nevertheless take into account the interests of States likely to be affected and may proceed with the activity at its own risk, without prejudice to the right of any State withholding its agreement to pur-

sue such rights as it may have under these articles or otherwise.

Article 19. Rights of the State likely to be affected

1. When no notification has been given of an activity conducted in the territory or otherwise under the jurisdiction or control of a State, any other State which has serious reason to believe that the activity has created a risk of causing it significant harm may require consultations under article 18.

2. The State requiring consultations shall provide a technical assessment setting forth the reasons for such belief. If the activity is found to be one of those referred to in article 1, the State requiring consultations may claim an equitable share of the cost of the assessment from the State of origin.

Article 20. 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 18, 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 or minimizing such risk 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 or minimizing such risk or restoring the environment;

(d) The economic viability of the activity in relation to the costs of prevention demanded by the States likely to be affected and to the possibility of carrying out the activity elsewhere or by other means or replacing it with an alternative activity;

(e) The degree to which the States likely to be affected are prepared to contribute to the costs of prevention;

(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.

** If the Commission adopts a regime of liability for acts not prohibited, it will have to change the wording of this paragraph to include remedial measures.