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Texts of draft articles with commentaries thereto, provisionally adopted by the Commission at its forty-sixth session: articles 1, 2 (subparas. (a), (b) and (c)), 11 to 14 bis [20 bis], 15-16 bis and 17-20 - reproduced in Yearbook...1994, vol. II (Part Two)

Topic:
International liability for injurious consequences arising out of acts not prohibited by international law

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for example, fraud, violation of procedural fairness, namely when the party against whom the judgement was rendered was not given sufficient notice to prepare for defence; and a judgement against the public policy of the State where enforcement is sought. These provisions require that the party seeking enforcement must comply with the procedural laws of the State in question for such enforcement. On the basis of the foregoing the Special Rapporteur proposed a provision on enforcement of judgements.⁴⁸³

g. Exceptions to liability

377. Grounds for exceptions to liability, in the existing civil liability conventions, depend upon their subject-matter and the extent of the risk they pose to others and to the environment. The following have been identified as grounds of exceptions to liability: armed conflict; unforeseeable natural phenomenon of exceptional and irresistible character; a result of the wrongful and intentional act of a third party; and gross negligence of the injured party. In the view of the Special Rapporteur, these grounds are equally reasonable as exceptions to liability in respect of the type of activities covered by this topic and accordingly he proposed an article on exceptions.⁴⁸⁴ As regards exceptions to State responsibility for wrongful acts, namely non-compliance with preventive provisions, the grounds for exception are those contained in part one of the draft articles on State responsibility.⁴⁸⁵

h. Statute of limitations

378. Various timetables are provided for in different civil liability conventions to serve as statutes of limita-

⁴⁸³ The text of the proposed article reads as follows:

“Article I. Enforceability of the judgement

“1. Where the final judgements entered by the competent court are enforceable under the laws applied by such court, they shall be recognized in the territory of any other Contracting Party unless:

“(a) The judgement was obtained by fraud;

“(b) Reasonable advance notice of the claim to enable the defendant to present his case under appropriate conditions was not given;

“(c) The judgement was contrary to the public policy of the State in which recognition is sought, or did not accord with the fundamental standards of justice;

“(d) The judgement was irreconcilable with an earlier judgement given in the State in which recognition is sought on a claim on the same subject and between the same parties.

“2. A judgement recognized under paragraph 1 above shall be enforced in any of the Member States as soon as the enforcement formalities required by the Member State have been met. No further review of the merits of the case shall be permitted.”

⁴⁸⁴ The text of the proposed article reads as follows:

“Article J. Exceptions

“1. The operator shall not be liable:

“(a) If the harm was directly attributable to an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character; or

“(b) If the harm was wholly caused by an act or omission done with the intent to cause harm by a third party.

“2. If the operator proves that the harm resulted wholly or partially either from an act or omission by the person who suffered the harm, or from the negligence of that person, the operator may be exonerated wholly or partially from his liability to such person.”

⁴⁸⁵ See footnote 418 above.

tions. They run from one year, under the Convention on International Liability for Damage Caused by Space Objects, to 10 years under the 1963 Vienna Convention on Civil Liability for Nuclear Damage. These timetables were set on the basis of various considerations such as, for example, the time within which harm may become visible and identifiable, the time that might reasonably be necessary to establish a casual relationship between harm and a particular activity, and so forth. In the view of the Special Rapporteur, since the type of activities covered by this topic were more similar to those covered by the Convention on Civil Liability Resulting from Activities Dangerous to the Environment, the three year statute of limitations provided therein would also be appropriate in respect of claims for compensation under this topic. In no case may a procedure be instituted after 30 years from the date of the accident. Accordingly, he proposed an article to that effect.⁴⁸⁶ The article would also take into account whether the activity is of a continuous nature or consists of a series of activities. In his view, the three year statute of limitations should apply to both State and operator liability.

(c) Procedural channels

379. The type of controversies which may arise in respect of the activities covered by these articles will, in most cases, place an individual against a State. For example, if the regime of liability provides for a subsidiary liability of the State, the State may have to appear before the court of another State to defend itself. The report reviewed various possibilities, but found most appropriate the proposal by the Netherlands in the IAEA Standing Committee to the effect of creating a single forum like a mixed claims commission where all kinds of claims involving States and private individuals could be heard and adjudicated.

C. Draft articles on international liability for injurious consequences arising out of acts not prohibited by international law

1. TEXT OF THE DRAFT ARTICLES PROVISIONALLY ADOPTED SO FAR BY THE COMMISSION

380. The text of the draft articles provisionally adopted so far by the Commission are reproduced below.

⁴⁸⁶ The text of the proposed article reads as follows:

“Article K. Time-limits

“Proceedings in respect of liability under these articles shall lapse after a period of three years from the date on which the claimant learned, or could reasonably have been expected to have learned, of the harm and of the identity of the operator or of the State of origin in the case of State liability. No proceedings may be instituted once 30 years have elapsed since the date of the incident which caused the harm. Where the incident consisted of a continuous occurrence, the periods in question shall run from the date on which the incident began and where it consisted of a series of occurrences having the same origin, the periods in question shall run from the date of the last occurrence.”

[CHAPTER I. GENERAL PROVISIONS]⁴⁸⁷*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.

[CHAPTER II. PREVENTION]⁴⁸⁸*Article 11. Prior authorization*⁴⁸⁹

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*⁴⁹⁰

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 [20 bis]. Non-transference of risk

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

Article 15. Notification and information

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

⁴⁸⁷ The designation of the chapter is provisional.

⁴⁸⁸ *Idem.*

⁴⁸⁹ The present numbering is provisional and follows that proposed by the Special Rapporteur in his reports.

⁴⁹⁰ The expression “prevent or minimize the risk” of transboundary harm in this and other articles will be reconsidered in the light of the decision by the Commission as to whether the concept of prevention includes, in addition to measures aimed at preventing or minimizing the risk of occurrence of an accident, measures taken after the occurrence of an accident to prevent or minimize the harm.

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 pursue 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 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.

2. TEXTS OF DRAFT ARTICLES 1, 2, SUBPARAGRAPHS (a), (b) AND (c), 11 TO 14 *bis* [20 *bis*], 15 TO 16 *bis* AND 17 TO 20 WITH COMMENTARIES THERETO, PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS FORTY-SIXTH SESSION

General commentary

(1) The present science-based civilization is marked by the increasingly intensive use in many different forms of resources of the planet for economic, industrial or scientific purposes. Furthermore, the scarcity of natural resources, the need for the more efficient use thereof, the creation of substitute resources and the ability to manipulate organisms and micro-organisms have led to innovative production methods, sometimes with unpredictable consequences. Because of economic and ecological interdependence, activities involving resource use occurring within the territory, jurisdiction or control of a State may have an injurious impact on other States or their nationals. This factual aspect of global interdependence has been demonstrated by events that have frequently resulted in injuries beyond the territorial jurisdiction or control of the State where the activity was conducted. The frequency with which activities permitted by international law, but having transboundary injurious consequences, are undertaken, together with scientific advances and greater appreciation of the extent of their injuries and ecological implications dictate the need for some international regulation in this area.

(2) The legal basis for establishing international regulation in respect of these activities has been articulated in State practice and judicial decisions, notably by ICJ in the *Corfu Channel* case in which the Court observed that there were "general and well-recognized principles" of international law concerning "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States."⁴⁹¹ The arbitral tribunal in the *Trail Smelter* case reached a similar conclusion when it stated that, "under the principles of international law, as well as of the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the

⁴⁹¹ *I.C.J. Reports 1949* (see footnote 236 above), p. 22.

territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence."⁴⁹²

(3) Principle 21 of the Stockholm Declaration is also in support of the principle that "States have . . . the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."⁴⁹³ Principle 21 was reaffirmed in General Assembly resolutions 2995 (XXVII) on cooperation between States in the field of the environment, 3129 (XXVIII) on cooperation in the field of the environment concerning natural resources shared by two or more States, and 3281 (XXIX) adopting the Charter of Economic Rights and Duties of States,⁴⁹⁴ and by principle 2 of the Rio Declaration on Environment and Development.⁴⁹⁵ In addition paragraph 1 of General Assembly resolution 2995 (XXVII) further clarified principle 21 of the Stockholm Declaration where it stated that "in the exploration, exploitation and development of their natural resources, States must not produce significant harmful effects in zones situated outside their national jurisdiction". Support of this principle is also found in 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 States⁴⁹⁶ and in a number of OECD Council recommendations.⁴⁹⁷ The draft articles follow the well-established principle of *sic utere tuo ut alienum non laedas* (use your own property so as not to injure the property of another) in international law. As Lauterpacht stated, this maxim "is applicable to relations of States no less than to those of individuals; . . . it is one of those general principles of law . . . which the Permanent Court is bound to apply by virtue of Article 38 of its Statute."⁴⁹⁸

(4) The judicial pronouncements and doctrine and pronouncements by international and regional organizations together with non-judicial forms of State practice provide sufficient basis for the following articles which are intended to set a standard of behaviour in relation to the conduct and the effect of undertaking activities which are not prohibited by international law but could have transboundary injurious consequences. The articles elaborate, in more detail, the specific obligations of States in that respect. They recognize the freedom of States in utilizing their resources within their own terri-

tories but in a way not to cause significant harm to other States.

(5) The Commission decided, at the forty-fourth session in 1992, to approach the topic in stages.⁴⁹⁹ The first stage deals with issues of preventing transboundary harm of activities with a risk of such harm. The following articles are designed to deal only with that particular issue.

[CHAPTER I. GENERAL PROVISIONS]⁵⁰⁰

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.

Commentary

(1) Article 1 defines the scope of the articles designed specifically to deal with measures to be taken in order to prevent transboundary harm of activities with a risk of such harm.

(2) Article 1 limits the scope of the articles to activities not prohibited by international law and carried out in the territory or otherwise under the jurisdiction or control of a State, and which involve a risk of causing significant transboundary harm through their physical consequences. The Commission is aware that additional criteria are necessary to determine with more precision the type of activities within the scope of these articles. It, therefore, intends to consider the issue at a later stage and recommend either a provision defining the activities falling within the scope of these articles or a provision listing such activities or a certain quality of such activities. This definition of scope 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".⁵⁰¹ It emphasizes the distinction between the scope of this topic and that of the topic of State responsibility which deals with "internationally wrongful acts".

(4) The second criterion 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

⁴⁹² UNRIAA (see footnote 410 above), p. 1965.

⁴⁹³ See footnote 213 above.

⁴⁹⁴ See, in particular, articles 2 and 30.

⁴⁹⁵ Report of the United Nations Conference on Environment and Development . . . (see footnote 198 above), annex I.

⁴⁹⁶ See footnote 277 above.

⁴⁹⁷ See the recommendations adopted by the OECD Council in 1974: C(74)224 on the principles concerning transfrontier pollution (Annex title B); C(74)220 on the control of eutrophication of waters; and C(74)221 on strategies for specific water pollutants control (*OECD and the Environment* (see footnote 296 above), pp. 142, 44 and 45, respectively).

⁴⁹⁸ L. Oppenheim, *International Law: A Treatise*, 8th ed., H. Lauterpacht, ed. (London, Longmans, Green, 1955), vol. I: *Peace*, pp. 346-347.

⁴⁹⁹ See paragraph 348 above.

⁵⁰⁰ The designation of the chapter is provisional.

⁵⁰¹ The Commission has not yet changed in the title of the topic the word "acts" by "activities". The Commission's choice of the word "activities" in the articles is on the basis of the recommendation of the Working Group set up by the Commission at the forty-fourth session that "the Commission decided to continue with its working hypothesis that the topic should deal with 'activities'" (*Yearbook . . . 1992*, vol. II (Part Two), para. 348).

the expression "jurisdiction or control of a State" is a more commonly used formula in some instruments,⁵⁰² the Commission also finds it useful to mention 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.

(5) For the purposes of these articles, "territory" refers to areas over which a State exercises its sovereign authority. The Commission draws from past State practice, whereby a State has been held responsible for activities, occurring within its territory, which have injurious extra-territorial effects. In *Island of Palmas* case, Max Huber, the sole arbitrator, stated that "sovereignty" consists not entirely of beneficial rights. A claim by a State to have exclusive jurisdiction over certain territory or events supplemented with a demand that all other States should recognize that exclusive jurisdiction has a corollary. It signals to all other States that the sovereign State will take account of the reasonable interests of all other States regarding events within its jurisdiction by minimizing or preventing injuries to them and will accept responsibility if it fails to do so:

Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. The development of the national organisation of States during the last few centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations.⁵⁰³

(6) Judge Huber then emphasized the obligation which accompanies the sovereign right of a State:

Territorial sovereignty, as has already been said, involves the exclusive right to display the activities of a State. This right has, as corollary, a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and war, together with the rights which each State may claim for its nationals in foreign territory. Without manifesting its territorial sovereignty in a manner corresponding to circumstances, the State cannot fulfil this duty. Territorial sovereignty cannot limit itself to its negative side, i.e. to excluding the activities of other States; for it serves to divide between nations the space upon which human activities are employed, in order to assure them at all points the minimum of protection of which international law is the guardian.⁵⁰⁴

(7) The *Corfu Channel* case is another case in point. There, ICJ held Albania responsible, under international law, for the explosions which occurred in its waters and for the damage to property and human life which resulted from those explosions to British ships. The Court, in that case, relied on international law as opposed to any special agreement which might have held Albania liable. The Court said:

The obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of the minefield in Albanian territorial waters and in warning the approach-

ing British warships of the imminent danger to which the minefield exposed them. Such obligations are based, not on The Hague Convention of 1907, No. VIII, which is applicable in time of war, but on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war, the principle of the freedom of maritime communications, and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.⁵⁰⁵

(8) Although the Court did not specify how "knowingly" should be interpreted where a State is expected to exercise its jurisdiction, it drew certain conclusions from the exclusive display of territorial control by the State. The Court stated that it would be impossible for the injured party to establish that the State had knowledge of the activity or the event which would cause injuries to other States, because of exclusive display of control by the territorial State. The Court said:

On the other hand, the fact of this exclusive territorial control exercised by a State within its frontiers has its bearing upon the methods of proof available to establish the knowledge of that State as to such events. By reason of this exclusive control, the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of facts and circumstantial evidence. This indirect evidence is admitted in all systems of law, and its use is recognized by international decisions. It must be regarded as of special weight when it is based on a series of facts linked together and leading logically to a single conclusion.⁵⁰⁶

(9) In the *Trail Smelter* case, the arbitral tribunal referred to the corollary duty accompanying territorial sovereignty. In that case, although the tribunal was applying the obligations created by a treaty between the United States of America and the Dominion of Canada and had reviewed many of the United States cases, it made a general statement which the tribunal believed to be compatible with the principles of international law. The tribunal held: "under the principles of international law, as well as the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons herein, when the case is of serious consequence and the injury is established by clear and convincing evidence."⁵⁰⁷ The tribunal quoted Eagleton to the effect that "A State owes at all times a duty to protect other States against injurious acts by individuals from within its jurisdiction,"⁵⁰⁸ and noted that international decisions, from the "*Alabama*" case⁵⁰⁹ onward, are based on the same general principle.

(10) In the award in the *Lake Lanoux* case, the tribunal alluded to the principle prohibiting the upper riparian State from altering waters of a river if it would cause serious injury to other riparian States:

Thus, while admittedly there is a rule prohibiting the upper riparian State from altering the waters of a river in circumstance calculated to do serious injury to the lower riparian State, such a principle has no

⁵⁰² See, for example, principle 21 of the Stockholm Declaration (footnote 213 above); article 194, paragraph 2, of the United Nations Convention on the Law of the Sea; principle 2 of the Rio Declaration on Environment and Development (*Report of the United Nations Conference on Environment and Development*) . . . (footnote 198 above), annex I; and article 3 of the Convention on Biological Diversity.

⁵⁰³ UNRIAA, vol. II (Sales No. 1949.V.1), p. 838.

⁵⁰⁴ *Ibid.*, p. 839.

⁵⁰⁵ *I.C.J. Reports 1949* (see footnote 236 above), p. 22.

⁵⁰⁶ *Ibid.*, p. 18.

⁵⁰⁷ See paragraph (2) of the general commentary above.

⁵⁰⁸ UNRIAA (see footnote 410 above), p. 1963; C. Eagleton, *The Responsibility of States in International Law* (New York, New York University Press, 1928), p. 80.

⁵⁰⁹ See footnote 229 above.

application to the present case, since it was agreed by the Tribunal . . . that the French project did not alter the waters of the Carol.⁵¹⁰

(11) Other forms of State practice have also supported the principle upheld in the judicial decisions mentioned above. For example, in 1892 in a border incident between France and Switzerland, the French Government decided to halt the military target practice exercise near the Swiss border until steps had been taken to avoid accidental transboundary injury.⁵¹¹ Also following an exchange of notes, in 1961, between the United States of America and Mexico concerning two United States companies, Peyton Packing and Casuco located on the Mexican border, whose activities were prejudicial to Mexico, the two companies took substantial measures to ensure that their operations ceased to inconvenience the Mexican border cities. Those measures included phasing out certain activities, changing working hours and establishing systems of disinfection.⁵¹² In 1972, Canada invoked the principle in the *Trail Smelter* case against the United States when an oil spill at Cherry Point, Washington, resulted in a contamination of beaches in British Columbia.⁵¹³ There are a number of other examples of State practice along the same line.⁵¹⁴

(12) Principle 21 of the Stockholm Declaration and principle 2 of the Rio Declaration⁵¹⁵ on Environment and Development⁵¹⁶ prescribe principles similar to those of the *Trail Smelter* and *Corfu Channel* cases.

⁵¹⁰ See footnote 191 above.

⁵¹¹ P. Guggenheim, "La pratique suisse (1956)", *Annuaire suisse de droit international* (Zurich), vol. XIV (1957), p. 168.

⁵¹² Whiteman, *Digest*, vol. 6, pp. 258-259.

⁵¹³ See *The Canadian Yearbook of International Law* (Vancouver), vol. XI (1973), pp. 333-334. The principle in the *Trail Smelter* case was applied also by the District Court of Rotterdam in the Netherlands in a case against *Mines Domaniales de Potasse d'Alsace* (see Lammers, op. cit. (footnote 184 above), pp. 196 *et seq.*, at p. 198).

⁵¹⁴ In Dukovany, in former Czechoslovakia, two Soviet-designed 440 megawatt electrical power reactors were scheduled to be operating by 1980. The closeness of the location to the Austrian border led to a demand by the Austrian Ministry for Foreign Affairs for talks with Czechoslovakia about the safety of the facility. This was accepted by the Czechoslovak Government (*Osterreichische Zeitschrift für Aussenpolitik*, vol. 15 (1975), cited in G. Handl, "An international legal perspective on the conduct of abnormally dangerous activities in frontier areas: The case of nuclear power plant siting", *Ecology Law Quarterly* (Berkeley, California), vol. 7, No. 1 (1978), p. 1). In 1973, the Belgian Government announced its intention to construct a refinery at Lanaye, near its frontier with the Netherlands. The Netherlands Government voiced its concern because the project threatened not only the nearby Netherlands national park but also other neighbouring countries. It stated that it was an established principle in Europe that, before the initiation of any activities that might cause injury to neighbouring States, the acting State must negotiate with those States. The Netherlands Government appears to have been referring to an existing or expected regional standard of behaviour. Similar concern was expressed by the Belgian Parliament, which asked the Government how it intended to resolve the problem. The Government stated that the project had been postponed and that the matter was being negotiated with the Netherlands Government. The Belgian Government further assured Parliament that it respected the principles set out in the Benelux accords, to the effect that the parties should inform each other of those of their activities that might have harmful consequences for the other member States (Belgium Parliament, regular session 1972-1973, *Questions et réponses*, bulletin No. 31).

⁵¹⁵ See footnote 213 above.

⁵¹⁶ *Report of the United Nations Conference on Environment and Development* . . . (see footnote 198 above), annex I.

(13) 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 territorial sea or territorial waters. In such situations, if the activity leading to a 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.

(14) The Commission is aware that the concept of "territory" for the purposes of these articles is narrow and therefore the concepts of "jurisdiction" and "control" are also used.

(15) 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.

(16) Sometimes due to 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 four Conventions on the law of the sea adopted at Geneva in 1958 and the United Nations Convention on the Law of the Sea have covered many jurisdictional capacities of the flag State.

(17) 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.

(18) 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.

(19) The Commission takes note of the function of the concept of "control" in international law, which is to attach certain legal consequences to a State whose juris-

diction 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. The Commission relies, in this respect, on the advisory opinion by ICJ in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*.⁵¹⁷ 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.⁵¹⁸

(20) 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 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.

(21) 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 commentary to art. 2). The element of "risk" is intended to limit the scope of the topic, at this stage of the work, to activities with risk and, consequently exclude from the scope activities which, in fact, cause transboundary harm in their normal operation, such as, for example creeping pollution. 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 or those activities which harm the so-called global commons *per se* but without any harm to any other State.

(22) 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.

(23) 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) "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.

...

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 "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,⁵¹⁹ adopted by ECE in

⁵¹⁷ *Advisory Opinion, I.C.J. Reports 1971*, p. 16.

⁵¹⁸ *Ibid.*, p. 54, para. 118.

⁵¹⁹ E/ECE/1225-ECE/ENVWA/16 (United Nations publication, Sales No. E.90.II.E.28).

1990. Under section I, subparagraph (f), “‘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 will fall. One pole is where there is a “‘low probability’” of causing “‘disastrous’” harm. This is normally the characteristic of ultra-hazardous 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’” 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 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 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 award in the *Trail Smelter* case which used the words “‘serious consequences’”,⁵²⁰ as well as by the tribunal in the *Lake Lanoux* case which relied on the concept “‘seriously’” (*gravement*).⁵²¹ A number of conventions have also used “‘significant’”, “‘serious’” or “‘substantial’” as the thresh-

old.⁵²² “‘Significant’” has also been used in other legal instruments and domestic laws.⁵²³

(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)* 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, jurisdictional and control boundaries. Therefore, the term “‘transboundary’” in “‘transboundary harm’” should

⁵²² See, for example, article 4, paragraph 2, of the Convention on the Regulation of Antarctic Mineral Resource Activities; article 2, paragraphs 1 and 2, of the Convention on Environmental Impact Assessment in a Transboundary Context and section I, subparagraph (b), of the Code of Conduct on Accidental Pollution of Transboundary Inland Waters (footnote 519 above).

⁵²³ See, for example, paragraphs 1 and 2 of General Assembly resolution 2995 (XXVII) concerning cooperation between States in the field of the environment; paragraph 6 of OECD recommendation C(74)224 on principles concerning transfrontier pollution (footnote 296 above); article X of the Helsinki Rules (footnote 184 above); and article 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, *Ríos y Lagos Internacionales* . . . (footnote 212 above), p. 132).

See also the Memorandum of Intent between the Government of the United States of America and the Government of Canada concerning transboundary air pollution, of 5 August 1980 (*United States Treaties and Other International Agreements, Treaties and Other International Acts Series* (United States Government Printing Office, Washington, D.C., 1981), No. 9856); and article 7 of the Agreement on Cooperation for the Protection and Improvement of the Environment in the Border Area, between Mexico and the United States of America, of 14 August 1983 (ILM, vol. XXII, No. 5 (September 1983), p. 1025).

The United States has also used the word “‘significant’” in its domestic law dealing with environmental issues. See *Restatement of the Law, Third* (footnote 232 above), section 601, Reporter’s Note 3, pp. 111-112.

⁵²⁰ See footnote 410 above.

⁵²¹ See footnote 191 above.

be understood in the context of the expression “within its territory or otherwise under its jurisdiction or control” used in article 1.

(9) In *subparagraph (c)*, 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 art. 1, paras. (4) to (20)).

[CHAPTER II. PREVENTION]⁵²⁴

*Article 11. Prior authorization*⁵²⁵

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

Commentary

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

(2) 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 takes note in this respect that, in the *Trail Smelter* case, the arbitral tribunal stated that the Canadian Government had “the duty . . . to see to it that this conduct should be in conformity with the obligation of the Dominion under international law as herein determined”. The tribunal held that in particular, “the Trail Smelter shall be required to refrain from causing any damage through fumes in the State of Washington”.⁵²⁶ In the view of the Commission, article 11 reflects this requirement.

(3) ICJ, 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.”⁵²⁷

⁵²⁴ The designation of the chapter is provisional.

⁵²⁵ The present numbering is provisional and follows that proposed by the Special Rapporteur in his reports.

⁵²⁶ UNRIAA (see footnote 410 above), p. 1966.

⁵²⁷ See footnote 236 above.

In the view of the Commission, the requirement of prior authorization creates the presumption that activities covered by these articles are taking place in the territory or otherwise under the jurisdiction or control of a State with the knowledge of that State.

(4) The words “in their territory or otherwise under their jurisdiction or control”, are taken from article 1. The expression “activities referred to in article 1” introduces all the requirements of that article for an activity to fall within the scope of these articles.

(5) The second sentence of article 11 contemplates situations where a major change is proposed in the conduct of an activity that is otherwise innocuous, where the change would transform that activity into one which involves a risk of causing significant transboundary harm. The implementation of such a change would also require State authorization. It is obvious that prior authorization is also required for a major change planned in an activity already within the scope of article 1, and that change may increase the risk or alter the nature or the scope of the risk.

Article 12. Risk assessment

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

Commentary

(1) Under article 12, a State, before granting authorization to operators to undertake activities referred to in article 1, should ensure that an assessment is undertaken of the risk of the activity causing significant transboundary harm. This assessment enables the State to determine the extent and the nature of the risk involved in an activity and consequently the type of preventive measures it should take. The Commission feels that as these articles are designed to have global application, they should not be too detailed and 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”.⁵²⁸

(3) The requirement of article 12 is fully consonant with principle 17 of the Rio Declaration on Environment and Development which provides also for impact assess-

⁵²⁸ UNRIAA (see footnote 410 above), p. 1973.

ment 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.⁵²⁹

Requirement of assessment of adverse effects of activities have been incorporated in various forms in many international conventions.⁵³⁰ The most notable is the Convention on Environmental Impact Assessment in a Transboundary Context which is devoted entirely to the procedure to conduct and the substance of impact assessment.

(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 governmental or not, to evaluate the assessment on behalf of the Government and will accept responsibility for the conclusions reached by that authority.

(5) The article does not specify what the content of the risk assessment should be. Obviously the assessment of risk of an activity can only be meaningfully prepared if it relates the risk to the possible harm to which the risk could lead. Most existing international conventions and legal instruments do not specify the content of assessment. There are exceptions, such as the Convention on Environmental Impact Assessment in a Transboundary Context, which provides in detail the content of such assessment.⁵³¹ The General Assembly, in resolution 37/217 on international cooperation in the field of the Environment, took note of conclusion No. 8 of the study of the legal aspects concerning the environment related to off-

shore mining and drilling within the limits of national jurisdiction, made by the Working Group of Experts on Environmental Law, which provides in detail for the content of assessment for offshore mining and drilling.⁵³²

(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. Such an assessment should contain, at least, an evaluation of the possible harmful impact of the activity concerned on persons or property as well as on the environment of other States. This requirement, which is contained in the second sentence of article 12, is intended to clarify further the reference, in the first sentence, to the assessment of "the risk of the activity causing significant transboundary harm". The Commission believes that the additional clarification is necessary for the simple reason that the State of origin will have to transmit the risk assessment to the States which might be suffering harm by that activity. In order for those States to evaluate the risk to which they might be exposed, they need to know what possible harmful effects that activity might have on them as well as the probabilities of the harm occurring.

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

(8) 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 source

⁵²⁹ Report of the United Nations Conference on Environment and Development . . . (see footnote 198 above), annex I.

⁵³⁰ See, for example, articles 205 and 206 of the United Nations Convention on the Law of the Sea; article 4 of the Convention on the Regulation of Antarctic Mineral Resources Activities; article 8 of the Protocol to the Antarctic Treaty on Environmental Protection; article 14, paragraphs (1) (a) and (1) (b), of the Convention on Biological Diversity; article 14 of the ASEAN Agreement on the Conservation of Nature and Natural Resources; Convention for the Protection of the Natural Resources and Environment of the South Pacific Region; article XI of the Kuwait Regional Convention for Cooperation on the Protection of the Marine Environment from Pollution; and the Regional Convention for the Conservation of the Red Sea and Gulf of Aden. 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 radio electric communications of other contracting States or of persons authorized by those Governments. Again, under article 1 of the International Convention concerning the Use of Broadcasting in the Cause of Peace, the contracting parties undertake to prohibit the broadcasting of any transmission of a character as to incite the population of any territory to act in a manner incompatible with the internal order or security of a territory of a contracting party.

⁵³¹ 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.)."

⁵³² See document UNEP/GC.9/5/Add.5, annex III.

of energy used in manufacturing an activity, the substances manipulated in production, the location of the activity and its proximity to the border area, and so forth, 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 in itself may be an indication that those activities might have significant transboundary harm.⁵³³ 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.⁵³⁴

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.

Commentary

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

(2) In accordance with this article, when the State "ascertains" that such an activity is being conducted in its territory or otherwise under its jurisdiction or control, when it assumes the obligations under these articles, it should "direct" those responsible for carrying out the activity to obtain the necessary authorization. The ex-

pression "necessary authorization" here means permits required under the domestic law of the State, in order to implement its obligations under these articles.

(3) The Commission is aware that it might be unreasonable to require States when they assume the obligations under these articles to apply them immediately in respect of existing activities. An immediate requirement of compliance could put a State in breach of the article, the moment it assumes the obligations under these articles. In addition, a State, at the moment it assumes the obligations under these articles, might not know of the existence of all such activities within its territory or under its jurisdiction or control. For that reason, the article provides that when a State "ascertains" the existence of such an activity, it should comply with the obligations. The word "ascertain" in this article should not, however, be interpreted so as to justify that States when assuming the obligations under these articles wait until such information is brought to their knowledge by other States or private entities. The word "ascertain" should be understood in the context of the obligation of due diligence, requiring reasonable and good faith efforts by the States to identify such activities.

(4) A certain period of time might be needed for the operator of the activity to comply with the authorization requirements. The Commission is of the view that the choice between whether the activity should be stopped pending authorization or should continue while the operator goes through the process of obtaining authorization should be left to the State of origin. If the State chooses to allow the activity to continue, it does so at its own risk. It is the view of the Commission that in the absence of any language in the article indicating possible repercussions, the State of origin will have no incentive to comply and to do so expeditiously with the requirements of these articles. At the same time, in view of the fact that the Commission has not yet decided on the form and the substance of a liability regime for this topic, the issue cannot be prejudged at this time. Therefore, the expression "at its own risk" is intended: (a) to leave the possibility open for any consequences as the future articles on this topic might impose on the State of origin in such circumstances; and (b) to leave the possibility open for the application of any rule of international law on responsibility in such circumstances.

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

⁵³³ For example, the Convention for the Prevention of Marine Pollution from Land-based Sources provides in article 4 an obligation for parties to eliminate or restrict the pollution of the environment by certain substances and the list of those substances are annexed to the Convention. Similarly, the 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. See also the Protocol for the Protection of the Mediterranean Sea against Pollution from Land-based Sources; and the Agreement for the Protection of the Rhine against Chemical Pollution.

⁵³⁴ See, for example, annex I to the Convention on Environmental Impact Assessment in a Transboundary Context, where a number of activities such as the crude oil refineries, thermal power stations and installations to produce enriched nuclear fuels are identified as possibly dangerous to the environment and requiring environmental impact assessment under the Convention; and annex II of the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, where activities such as the installations or sites for the partial or complete disposal of solid, liquid or gaseous wastes by incineration on land or at sea and the installations or sites for thermal degradation of solid, gaseous or liquid wastes under reduced oxygen supply have been identified as dangerous activities. Annex I of this Convention contains a list of dangerous substances.

(6) The view was expressed by one member of the Commission that the last sentence of article 13 [reading "Pending authorization, the State may permit the continuation of the activity in question at its own risk."] should be deleted; and if this were done, the words " , having assumed the obligations contained in these articles" in the first line of article 13 would not be necessary. The words in question touched on the difficult question of liability which had still to be considered by the Commission; and moreover seemed to predetermine whether the principles being formulated ought or ought not to be in treaty form. It had already been agreed by the Commission that the treaty or other form to be given to the principles should be considered at a later date.

(7) In case the authorization is denied by the State of origin, it is assumed that the State of origin will stop the activity. If the State of origin fails to do so, it will be assumed that the activity is being conducted with the knowledge and the consent of the State of origin and the consequences of this situation remain to be dealt with by the Commission (see para. (4) above).

Article 14. Measures to prevent or minimize the risk⁵³⁵

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

Commentary

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

(2) An obligation of due diligence has been widely used and can also be deduced from a number of international conventions⁵³⁶ as well as from resolutions and reports of international conferences and organizations as the standard basis for the protection of the environment

⁵³⁵ The expression "prevent or minimize the risk" of transboundary harm in this and other articles will be reconsidered in the light of the decision by the Commission as to whether the concept of prevention includes, in addition to measures aimed at preventing or minimizing the risk of occurrence of an accident, measures taken after the occurrence of an accident to prevent or minimize the harm.

⁵³⁶ See, for example, article 194, paragraph 1, of the United Nations Convention on the Law of the Sea; articles I, II and VII, paragraph 2, of the Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter; article 2 of the Vienna Convention for the Protection of the Ozone Layer; article 7, paragraph 5, of the Convention on the Regulation of Antarctic Mineral Resource Activities; article 2, paragraph 1, of the Convention on Environmental Impact Assessment in a Transboundary Context; and article 2, paragraph 1, of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes.

from harm.⁵³⁷ The obligation of due diligence was recently discussed in a dispute between Germany and Switzerland relating to the pollution of the Rhine by Sandoz; the Swiss Government acknowledged responsibility for lack of due diligence in preventing the accident through adequate regulation of its pharmaceutical industries.⁵³⁸

(3) In the "Alabama" case, the tribunal examined two different definitions submitted by the parties, the United States of America and Great Britain, of due diligence. The United States defined due diligence as:

[A] diligence proportioned to the magnitude of the subject and to the dignity and strength of the power which is to exercise it; a diligence which shall, by the use of active vigilance, and of all the other means in the power of the neutral, through all stages of the transaction, prevent its soil from being violated; a diligence that shall in like manner deter designing men from committing acts of war upon the soil of the neutral against its will, . . .⁵³⁹

Great Britain defined due diligence as "such care as governments ordinarily employ in their domestic concerns."⁵⁴⁰ The tribunal seemed to have been persuaded by the broader definition of the standard of due diligence presented by the United States and expressed concern about the "national standard" of due diligence presented by Great Britain. 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".⁵⁴¹

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

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 in question.⁵⁴²

(5) In the context of article 14, due diligence is manifested in reasonable efforts by a State to inform itself of factual and legal components that relate foreseeably to a contemplated procedure and to take appropriate measures in timely fashion, to address them. Thus, in accordance with article 14, States are under an obligation to

⁵³⁷ See principle 21 of the World Charter for Nature (General Assembly resolution 37/7, annex); and principle VI of the Draft principles of conduct for the guidance of States concerning weather modification prepared by WMO and UNEP (M. L. Nash, *Digest of United States Practice in International Law* (United States Government Printing Office, Washington, D.C., 1978), p. 1205).

⁵³⁸ See *The New York Times*, 11, 12 and 13 November 1986, pp. A 1, A 8 and A 3, respectively. See also A. C. Kiss, "Tchernobale' ou la pollution accidentelle du Rhin par des produits chimiques", in *Annuaire français de droit international* (Paris), vol. 33 (1987), pp. 719-727.

⁵³⁹ The "Alabama" case (see footnote 229 above).

⁵⁴⁰ *Ibid.*, p. 612.

⁵⁴¹ *Ibid.*

⁵⁴² United Kingdom, *The Law Reports, House of Lords, Judicial Committee of the Privy Council* (London, 1932), p. 580.

take unilateral measures to prevent or minimize the risk of transboundary harm of the activities within the scope of article 1. Such measures include, first, formulating policies designed to prevent or minimize transboundary harm and, secondly, implementing those policies. Such policies are expressed in legislation and administrative instructions and implemented through various enforcement mechanisms. The word "ensure" in the phrase "to ensure that all necessary measures are adopted" is intended to require a particularly high standard in State behaviour *viz.*, to be rigorous in designing and implementing policies directed at minimizing transboundary harm.

(6) The Commission believes that the standard of due diligence against which the conduct of a State should be examined is that which is generally considered to be appropriate and proportional to the degree of risk of transboundary harm in the particular instance. For example, activities which may be considered ultra-hazardous require a much higher standard of care in designing policies and a much higher degree of vigour on the part of the State to enforce them. Issues such as the size of the operation; its location; special climatic conditions; materials used in the activity; and whether the conclusions drawn from the application of these factors in a specific case are reasonable are among the factors to be considered in determining the due diligence requirement in each instance. The Commission also believes that what would be considered a reasonable standard of care or due diligence may change with time; what might be considered an appropriate and reasonable procedure, standard or rule at one point in time might not be considered as such at some point in the future. Therefore, due diligence requires a State to keep abreast of technological changes and scientific developments and to determine not only that equipment for a particular activity is working properly, but also that it meets the most current specifications and standards.

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

States shall enact effective environmental legislation. Environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply. Standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries.⁵⁴³

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".⁵⁴⁴ It is the view of the Commission that the economic level of States is one of the factors which is taken into account in determining whether an appropriate standard of due diligence has been exercised by a State. But a State's economic level cannot be used to discharge a State from its obligation under this article.

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

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

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

(11) The references made to the "due diligence" criterion in the preceding paragraphs of the commentary to article 14 gave rise to concern on the part of one member of the Commission. It was, in his view, a difficult criterion to apply, particularly when facts were complex; and could lead to the unfortunate result that certain risks of transboundary harm, which would be included if the "all appropriate measures" standard provided for in the text of article 14 was applied, may be excluded under the "due diligence" criterion. The question of the appropriateness of the "due diligence" criterion would need to be further examined in the course of the second reading of the articles by the Commission.

Article 14 bis [20 bis]. Non-transference of risk

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

Commentary

(1) This article states a general principle of non-transference of risk. It calls on States when taking measures to prevent or minimize a risk of causing significant transboundary harm to ensure that the risk is not "simply" transferred, directly or indirectly, from one area to another or transformed from one type of risk to another. This article is inspired by the new trend in environmental law, beginning with its endorsement by the United Nations Conference on the Human Environment, to design comprehensive policy for protecting the environment.⁵⁴⁵ Principle 13 of the general principles for assessment and control of marine pollution suggested by the Intergovernmental Working Group on Marine Pollution

⁵⁴³ Report of the United Nations Conference on Environment and Development . . . (see footnote 198 above), annex I.

⁵⁴⁴ See footnote 213 above.

⁵⁴⁵ *Ibid.*

and endorsed by the United Nations Conference on the Human Environment provides:

Action to prevent and control marine pollution (particularly direct prohibitions and specific release limits) must guard against the effect of simply transferring damage or hazard from one part of the environment to another.⁵⁴⁶

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

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

Section II, paragraph 2, of the Code of Conduct on Accidental Pollution of Transboundary Inland Waters also states a similar principle:

In taking measures to control and regulate hazardous activities and substances, to prevent and control accidental pollution, to mitigate damage arising from accidental pollution, countries should do everything so as not to transfer, directly or indirectly, damage or risks between different environmental media or transform one type of pollution into another.⁵⁴⁷

(3) The Rio Declaration on Environment and Development discourages States, in principle 14, from relocating and transferring to other States activities and substances harmful to the environment and human health. This principle, even though aimed primarily at a different problem, is rather more limited than principle 13 of the general principles for assessment and control of marine pollution, the United Nations Convention on the Law of the Sea and the Code of Conduct on Accidental Pollution of Transboundary Inland Waters mentioned in paragraph (1) above. Principle 14 reads:

States should effectively cooperate to discourage or prevent the relocation and transfer to other States of any activities and substances that cause severe environmental degradation or are found to be harmful to human health.⁵⁴⁸

(4) The expression “simply transferred . . . or transformed” is concerned with precluding actions that purport to prevent or minimize but, in fact, merely externalize the risk by shifting it to a different sequence or activity without any meaningful reduction of said risk (see principle 13 of the general principles for assessment and control of marine pollution cited in paragraph (1) above). The Commission is aware that, in the context of this topic, the choice of an activity, the place in which it should be conducted and the use of measures to prevent or reduce risk of its transboundary harm are, in general, matters that have to be determined through the process of finding an equitable balance of interests of the parties concerned; obviously the requirement of this article should be understood in that context. It is, however, the view of the Commission that in the process of finding an equitable balance of interests, the parties should take into account the general principle provided for in the article.

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

Article 15. Notification and information

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

Commentary

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

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

(3) The obligation to notify other States of the risk of significant harm to which they are exposed is reflected in the *Corfu Channel* case, in which ICJ characterized the duty to warn as based on “elementary considerations of humanity”.⁵⁴⁹ 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 organizations, conferences and meetings, and studies by intergovernmental and international non-governmental organizations.⁵⁵⁰

⁵⁴⁹ See footnote 236 above.

⁵⁵⁰ For treaties dealing with prior notification and exchange of information in respect of watercourses, see the 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 (chap. III, sect. D, above).

⁵⁴⁶ Report of the United Nations Conference on the Human Environment . . . (ibid.), annex III.

⁵⁴⁷ See footnote 519 above.

⁵⁴⁸ Report of the United Nations Conference on Environment and Development . . . (see footnote 198 above), annex I.

(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. Examples are article 3 of the Convention on Environmental Impact Assessment in a Transboundary Context, which provides for an elaborate system of notification, and articles 3 and 10 of the Convention on the Transboundary Effects of Industrial Accidents. 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.⁵⁵¹

(5) The procedure for notification has been established by a number of OECD resolutions. For example, in respect of certain chemical substances, the annex to 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 economy and trade of other States.⁵⁵² OECD recommendation 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.⁵⁵³

(6) The principle of notification is well established in the case of environmental emergencies. Principle 18 of the Rio Declaration on Environment and Development,⁵⁵⁴ article 198 of the United Nations Convention on the Law of the Sea; article 2 of the Convention on Early Notification of a Nuclear Accident; article 14, paragraphs 1 (d) and 3, of the Convention on Biological Diversity; and article 5, paragraph 1 (c), of the International Convention on Oil Pollution Preparedness, Response and Cooperation all require notification.

(7) Where assessment reveals the risk of causing significant transboundary harm, in accordance with *paragraph 1*, the State which plans to undertake such activity has the obligation to notify the States which may be affected. The notification shall be accompanied by available technical information on which the assessment is based. The reference to "available" technical and other relevant information is intended to indicate that the obligation of the State of origin is limited to transmitting the technical and other information which was developed in relation to the activity. This information is generally revealed during the assessment of the activity in accordance with article 12. Paragraph 1 assumes that technical information resulting from the assessment includes not only what might be called "raw" data, namely fact sheets, statistics, and the like, 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 2* addresses the situation in which the State of origin, despite all its efforts and diligence, is unable to identify all the States that may be affected prior to authorizing the activity, but 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 "without delay". The reference "without delay" is intended to require that the State of origin should make notification as soon as the information comes to its knowledge and it has had an opportunity, within a reasonable time, to determine that certain other States are likely to be affected by the activity.

Article 16. Exchange of information

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

Commentary

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

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

(3) The information that is required to be exchanged, under article 16, is whatever would be useful, in the particular instance, for the purpose of preventing the risk of significant harm. Normally such information comes to the knowledge of the State of origin. However, when the State that is likely to be affected has any information which might be useful for the purpose of prevention, it should make it available to the State of origin.

(4) The requirement of exchange of information is fairly common in conventions designed to prevent or reduce environmental and transboundary harm. These conventions provide for various ways of gathering and

⁵⁵¹ *Report of the United Nations Conference on Environment and Development* . . . (see footnote 198 above), annex I.

⁵⁵² *OECD and the Environment* (see footnote 296 above), annex, p. 89, para. 4.

⁵⁵³ *Ibid.*, p. 142, sect. E.

⁵⁵⁴ *Report of the United Nations Conference on Environment and Development* . . . (see footnote 198 above), annex I.

exchanging information, either between the parties or through providing the information to an international organization which makes it available to other States.⁵⁵⁵ In the context of these articles, where the activities are most likely to involve a few States, the exchange of information is effected between the States directly concerned. Where the information might affect a large number of States, relevant information may be exchanged through other avenues, such as for example, competent international organizations.

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

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

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.

Commentary

(1) Article 16 *bis* requires States, whenever possible and by such means as are appropriate, to provide their own public 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 their 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.

⁵⁵⁵ For example, article 10 of the Convention on the Protection of Marine Pollution from Land-based Sources, article 4 of the Vienna Convention for the Protection of the Ozone Layer and article 200 of the United Nations Convention on the Law of the Sea speak of individual or joint research by the States parties on prevention or reduction of pollution and of transmitting to each other directly or through a competent international organization the information so obtained. The Convention on Long-range Transboundary Air Pollution provides for research and exchange of information regarding the impact of activities undertaken by the State parties to the Convention. Examples are found in other instruments such as section VI, subparagraph 1 (b) (iii) of the Code of Conduct on Accidental Pollution of Transboundary Inland Waters (footnote 519 above); article 17 of the Convention on Biological Diversity; and article 13 of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes.

(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 15 or in the assessment which may be carried out by the State likely to be affected under article 19.

(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.⁵⁵⁶

(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. Section 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.⁵⁵⁷

Article 16 of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes; Article 3, paragraph 8, of the Convention on Environmental Impact Assessment in a Transboundary Context; Article 17 of the Convention on the Protection of the Marine Environment of the Baltic Sea Area and Article 6 of the United Nations Framework Convention on Climate Change 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 accu-

⁵⁵⁶ *Report of the United Nations Conference on Environment and Development . . .* (see footnote 198 above), annex I.

⁵⁵⁷ See footnote 519 above.

racy 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 16 *bis* is circumscribed by the phrase “whenever possible and by such means as are appropriate”. The words “whenever possible” which are assigned a normative rather than factual reference are intended to take into account possible constitutional and other domestic limitations where such right to hearings, may not exist. The words “by such means as are appropriate” are intended to leave to the States the ways which such information could be provided, 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 and local authorities.

(8) Article 16 *bis* limits the obligation of each State to providing such information to its own public. The words “States shall . . . give to their own public” does not obligate a State to provide information to the public of another State. For example, the State that might be affected, after receiving notification and information from the State of origin, shall, when possible and by such means as are appropriate, inform those parts of its own public likely to be affected before responding to the notification.

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.

Commentary

(1) Article 17 is intended to create a narrow exception to the obligation of States to provide information in accordance with articles 15, 16 and 16 *bis*. In the view of the Commission, States should not be obligated to disclose information that is vital to their national security or is considered an industrial secret. This type of clause is not unusual in treaties which require exchange of information. Article 31 of the draft articles on the law of the non-navigational uses of international watercourses⁵⁵⁸ also provides for a similar exception to the requirement of disclosure of information.

(2) Article 17 includes industrial secrets in addition to national security. In the context of these articles, it is highly probable that some of the activities which come within the scope of article 1 might involve the use of sophisticated technology involving certain types of information which are protected even under domestic law.

Normally, domestic laws of States determine the information that is considered an industrial secret and provide protection for them. This type of safeguard clause is not unusual in legal instruments dealing with exchange of information relating to industrial activities. For example, article 8 of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes and article 2, paragraph 8, of the Convention on Environmental Impact Assessment in a Transboundary Context provide for similar protection of industrial and commercial secrecy.

(3) Article 17 recognizes the need for balance between the legitimate interests of the State of origin and the States that are likely to be affected. It, therefore, requires the State of origin that is withholding information on the grounds of security or industrial secrecy, to cooperate in good faith with the other States in providing as much information as can be provided under the circumstances. The words “as much information as can be provided” include for example, the general description of the risk and the type and the extent of harm to which a State may be exposed. The words “under the circumstances” refer to the conditions invoked for withholding the information. Article 17 relies on the good faith cooperation of the parties.

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

Commentary

(1) Article 18 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 minimize the risk of causing significant transboundary harm. Depending upon the time at which article 18 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

⁵⁵⁸ See chap. III, sect. D, above.

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 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 award in the *Lake Lanoux* case⁵⁵⁹ 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 and that the rules of reason and good faith are applicable to procedural rights and duties relative to the sharing of the use of international rivers.

(4) With regard to this particular point about good faith, the Commission also relies on the judgment of ICJ 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".⁵⁶⁰ The Commission also finds the decision of the Court in the *North Sea Continental Shelf* cases 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.⁵⁶¹

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

(5) Under *paragraph 1*, the States concerned shall enter into consultations at the request of any of them. That is either the State of origin or any of the States likely to be affected. The parties shall enter into consultations "without delay". The expression "without delay" is intended to avoid those situations where a State, upon being requested to enter into consultations, would make unreasonable excuses to delay consultations.

(6) The purpose of consultations is for the parties: (a) to find acceptable solutions regarding measures to be adopted in order to prevent or minimize the risk of significant transboundary harm; and (b) to cooperate in the implementation of those measures. 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.

(7) 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. Once those measures are selected, the parties are required, under the last clause of *paragraph 1*, to cooperate in their implementation. This requirement, again, stems from the view of the Commission that the obligation of due diligence, the core base of the provisions intended to prevent or minimize significant transboundary harm, is of a continuous nature affecting every stage related to the conduct of the activity.

(8) Article 18 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 15, 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 16 or in the context of article 19 on the rights of the State likely to be affected.

(9) Article 18 has a broad scope of application. It is to apply to all issues related to preventive measures. For example, when parties notify under article 15 or exchange information under article 16 and there are ambiguities in those communications, a request for consultations may be made simply in order to clarify those ambiguities.

(10) *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 20 (Factors involved in a balance of interests). Neither *paragraph 2* of this article nor article 20 precludes the parties from taking account of other factors which they perceive as relevant in achieving an equitable balance of interests.

(11) *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 award in the *Lake Lanoux* case 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.⁵⁶² To take account of this possibility, the article

⁵⁵⁹ See footnote 191 above.

⁵⁶⁰ *Fisheries Jurisdiction* (see footnote 196 above), p. 33, para. 78.

⁵⁶¹ *North Sea Continental Shelf* (ibid.), p. 47, para. 85.

⁵⁶² See footnote 191 above.

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". This expression is also used in article 13 (Pre-existing activities). The explanations given in paragraph (4) of the commentary to article 13 on this expression also apply here.

(12) The last part of paragraph 3 also protects the interests of States likely to be affected, by allowing them to pursue any rights that they might have under these articles or otherwise. The word "otherwise" 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, and the like.

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 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.

Commentary

(1) This article addresses the situation in which a State, although it has received no notification about an activity in accordance with article 15, becomes aware that an activity is being carried out in another State, either by the State itself or by a private entity and believes that the activity carries a risk of causing it significant harm.

(2) This article is intended to protect the rights and the legitimate interests of States that have reason to believe that they are likely to be adversely affected by an activity. Article 19 enables them to request consultations and imposes a coordinate obligation on the State of origin to accede to the request. In the absence of article 19, the States likely to be affected cannot compel the State of origin to enter into consultations. Similar provisions have been provided for in other legal instruments. Article 18 of the draft articles on the law of the non-navigational uses of international watercourses,⁵⁶³ and

article 3, paragraph 7, of the Convention on Environmental Impact Assessment in a Transboundary Context also contemplate a procedure by which a State likely to be affected by an activity can initiate consultations with the State of origin.

(3) *Paragraph 1* allows a State which has serious reason to believe that the activity being conducted in the territory, or otherwise under the jurisdiction or control of another State, has created a risk of causing it significant harm to require consultations under article 18. The words "serious reason" are intended to preclude other States from creating unnecessary difficulties for the State of origin by requesting consultations on mere suspicion or conjecture. Of course, the State claiming that it has been exposed to a significant risk of transboundary harm will have a far stronger case when it can show that it has already suffered injury as the result of the activity.

(4) Once consultations have begun, the States concerned will either agree that the activity is one of those covered by article 1, and the State of origin should therefore take preventive measures; or the parties will not agree and the State of origin will continue to believe that the activity is not within the scope of article 1. In the former case, the parties must conduct their consultations in accordance with article 18 and find acceptable solutions based on an equitable balance of interests. In the latter case, namely where the parties disagree on the very nature of the activity, no further step is anticipated in the paragraph. The Commission will revert to this issue once it has discussed the question of ways and means of settlement of disputes.

(5) This paragraph does not apply to situations in which the State of origin is still at the planning stage of the activity, for it is assumed that the State of origin may still notify the States likely to be affected. However, if such notification is not effected, the States likely to be affected may require consultations as soon as the activity begins. Consultation may also be requested at the very early stages of the activity such as, for example, the stage of construction.

(6) *Paragraph 2*, in its first sentence, attempts to strike a fair balance between the interests of the State of origin that has been required to enter into consultations and the interests of the State which believes it has been affected or that it is likely to be affected by requiring the latter State to provide justification for such a belief and support it with documents containing its own technical assessment of the alleged risk. The State requesting consultations must, as mentioned above, have a "serious reason" for believing that there is a risk and it is likely to suffer harm from it. Taking into account that that State has not received any information from the State of origin regarding the activity and therefore may not have access to all the relevant technical data, the supporting documents and the assessment required of it need not be complete, but should be sufficient to provide a reasonable ground for its assertions. The expression "serious reason" should be interpreted in that context.

(7) The second sentence of paragraph 2 deals with financial consequences, if it is proved that the activity in question is within the scope of article 1. In such cases, the State of origin may be requested to pay an equitable

⁵⁶³ See chap. III, sect. D, above.

share of the cost of the technical assessment. It is the view of the Commission that such a sharing of the assessment cost is reasonable for the following reasons: (a) the State of origin would have had, in any case, to make such an assessment in accordance with article 12; (b) it would be unfair to expect that the cost of the assessment should be borne by the State that is likely to be injured by an activity in another State and from which it receives no benefit; and (c) if the State of origin is not obliged to share the cost of assessment undertaken by the State likely to be affected, that might serve to encourage the State of origin not to make the impact assessment it should itself have made in accordance with article 12, thereby externalizing the costs by leaving the assessment to be carried out by those States likely to be affected.

(8) The Commission, however, also envisages situations in which the reasons for the absence of notification by the State of origin might be completely innocent. The State of origin might have honestly believed that the activity posed no risk of causing significant transboundary harm. For that reason the State likely to be affected may claim "an equitable share of the cost of the assessment". These words mean that if, following discussion, it appears that the assessment does not manifest a risk of significant harm, the matter is at an end and obviously the question of sharing the cost does not even arise. But if such a risk is revealed, then it is reasonable that the State of origin should be required to contribute an equitable share of the cost of the assessment. This may not be the whole cost for, in any event, the State likely to be affected would have undertaken some assessment of its own. The share of the State of origin would be restricted to that part of the cost which resulted directly from that State's failure to effect a notification in accordance with article 15 and to provide technical information.

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.

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 article 18, paragraph 2, 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 or minimizing such risk 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 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.⁵⁶⁴

(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 or minimizing such a risk and the possibility of restoring

⁵⁶⁴ See footnote 242 above.

the environment. The Commission emphasizes the particular importance of protection of the environment. The Commission considers principle 15 of the Rio Declaration on Environment and Development relevant to this paragraph where it states:

Where 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.⁵⁶⁵

(6) The Commission is aware that the concept of transboundary harm as used in subparagraph (a) might be broadly interpreted and could include harm to the environment. But the Commission makes a distinction, for the purpose of this article, between harm to some part of the environment which could be translated into value deprivation to individuals, and be measurable by standard economic means, on the one hand, and harm to the environment not susceptible to such measurement, on the other. The former is intended to be covered by subparagraph (a) and the latter to be covered by subparagraph (c).

(7) *Subparagraph (d)* 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 demanded by the States likely to be affected. 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 "conducting [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 alternative activity" is intended to take account of the possibil-

ity 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 (e)* provides that one of the elements determining the choice of preventive measures is the willingness of the 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.

(9) *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 the State of origin to 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, that is to say, where the State of origin is a highly developed State and applies domestically established environmental law regulations. These regulations may be substantially stricter 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.

(10) States should also take into account the standards of prevention applied to the same or comparable activities in other regions or, if there are such, 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.

⁵⁶⁵ Report of the United Nations Conference on Environment and Development (see footnote 198 above), annex I.