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Topic:

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

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ANNEX I

REPORT OF THE WORKING GROUP ON INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW

A. Introduction

1. A Working Group under the chairmanship of the Special Rapporteur, Mr. Julio Barboza, was established to consolidate work already done on the topic, and to see if provisional solutions to some unresolved questions could be arrived at, with a view to producing a single text for transmission to the General Assembly.[1] It would then, it was hoped, be possible for the Commission at its forty-ninth session to make informed decisions as to the handling of the topic during the next quinquennium.

2. The Working Group proceeded strictly within the framework of the topic of "International liability for injurious consequences arising out of acts not prohibited by international law". The draft articles set out below are thus limited in scope and residual in character. To the extent that existing or future rules of international law, whether conventional or customary in origin, prohibit certain conduct or consequences (for example, in the field of the environment), those rules will operate within the field of State responsibility and will by definition fall outside the scope of the present draft articles (see article 8 of the draft articles and the commentary thereto below). On the other hand, the field of State responsibility for wrongful acts is neatly separated from the scope of these articles by the permission to the State of origin to pursue the activity "at its own risk" (see article 11, *in fine*, and article 17 below).

3. The present topic is concerned with a different issue from that of responsibility. It consists essentially of two elements. The first element is that of the prevention of transboundary harm arising from acts not prohibited by international law (in other words prevention of certain harmful consequences outside the field of State responsibility). The second element concerns the eventual distribution of losses arising from transboundary harm occurring in the course of performance of such acts or activities. The first element of the draft articles covers prevention in a broad sense, including notification of risks of harm, whether these risks are inherent in the operation of the activity or arise, or are appreciated as arising, at some later stage (see articles 4 and 6 and commentaries thereto below). The second element proceeds on the basis of the principles that, on the one hand, States are not precluded from carrying out activities not prohibited by international law, notwithstanding that there may be a risk of transboundary harm arising from those activities, but that, on the other hand, their freedom of action in that regard is not unlimited, and in particular may give rise to liability for compensation or other relief in accordance with the draft articles notwithstanding the continued characterization of the acts in question as lawful (see articles 3 and 5 and commentaries thereto below). Of particular significance is the principle that the victim of transboundary harm should not be left to bear the entire loss (see article 21 and commentary thereto below).

4. In view of the priorities attached during the forty-eighth session of the Commission to the completion of draft articles on other topics, it has not been possible for the present draft articles to be discussed by the Drafting Committee, nor will they be able to be debated in detail in plenary during the current session. On the other hand the General Assembly in resolution 50/45, paragraph 3 (*c*), urged the Commission to resume work on the present topic "in order to complete the first reading of the draft articles relating to activities that risk causing transboundary harm". The Working Group believes that it would be appropriate in the present circumstances for the Commission to annex to its report to the General Assembly the present report of the Working Group, and to transmit it to Governments for comment as a basis for future work of the Commission on the topic. In doing so the Commission would not be committing itself to any specific decision on the course of the topic, nor to particular formulations, although much of the substance of Chapter I and the whole of Chapter II of the draft articles have been approved by the Commission in earlier sessions.[2]

5. In making this recommendation, the Working Group was conscious of the analogous procedure adopted by the Commission at its forty-fifth session in relation to the report of the Working Group on a draft statute for an international criminal court, which was annexed to the Report of the Commission and, without having had the opportunity in plenary to give the text a full first reading, was transmitted to the General Assembly and to Governments for comment.[3] It was on the basis of these procedures that the Commission was able to deal with the draft statute for an international criminal court, expeditiously at its forty-sixth session.[4] In the circumstances of the present topic, the Working Group believes that the recommendation set out in paragraph 4 above will make available for comment a complete text of draft articles which could form

[1] For the composition of the Working Group, see chapter I, paragraph 9, above.

[2] See *Yearbook* ... *1995*, vol. II (Part Two), p. 85, paras. 371-372.

[3] See *Yearbook* ... *1993*, vol. II (Part Two), p. 20, paras. 98-100 and p. 100, annex.

[4] See *Yearbook* ... *1994*, vol. II (Part Two), pp. 20-74.

the basis for future work on this topic, and thereby put the Commission at its next session in a position to make a fully informed decision about how to proceed.

6. It is on this basis that the Working Group commends the attached draft articles and commentaries to the Commission.

B. Text of the draft articles

CHAPTER I. GENERAL PROVISIONS

Article 1. Activities to which the present articles apply

The present articles apply to:

(*a*) Activities not prohibited by international law which involve a risk of causing significant transboundary harm [; and

(*b*) Other activities not prohibited by international law which do not involve a risk referred to in subparagraph (*a*) but none the less cause such harm;]

through their physical consequences.

Article 2. Use of terms

For the purposes of the present articles:

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

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

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

(*d*) "Affected State" means the State in the territory of which the significant transboundary harm has occurred or which has jurisdiction or control over any other place where such harm has occurred.

Article 3. Freedom of action and the limits thereto

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

Article 4. Prevention

States shall take all appropriate measures to prevent or minimize the risk of significant transboundary harm and, if such harm has occurred, to minimize its effects.

Article 5. Liability

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

Article 6. Cooperation

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

Article 7. Implementation

States shall take the necessary legislative, administrative or other action to implement the provisions of the present articles.

Article 8. Relationship to other rules of international law

The fact that the present articles do not apply to transboundary harm arising from a wrongful act or omission of a State is without prejudice to the existence or operation of any other rule of international law relating to such an act or omission.

CHAPTER II. PREVENTION

Article 9. Prior authorization

States shall ensure that activities referred to in article 1, subparagraph (*a*), 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, subparagraph (*a*).

Article 10. Risk assessment

Before taking a decision to authorize an activity referred to in article 1, subparagraph (*a*), 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 11. Pre-existing activities

If a State, having assumed the obligations contained in these articles, ascertains that an activity referred to in article 1, subparagraph (*a*), is already being carried out in its territory or otherwise under its jurisdiction or control without the authorization as required by article 9, 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 12. Non-transference of risk

In taking measures to prevent or minimize a risk of significant transboundary harm caused by an activity referred to in article 1, subparagraph (*a*), 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 13. Notification and information

1. If the assessment referred to in article 10 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 14. 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 15. 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, subparagraph (*a*), with information relating to that activity, the risk involved and the harm which might result and ascertain their views.

Article 16. 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 17. 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 19.

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 18. 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 17.

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, subparagraph (*a*), the State requiring consultations may claim an equitable share of the cost of the assessment from the State of origin.

Article 19. 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 17, the States concerned shall take into account all relevant factors and circumstances, including:

(*a*) The degree of risk of significant transboundary harm and the availability of means of preventing 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.

CHAPTER III. COMPENSATION OR OTHER RELIEF

Article 20. Non-discrimination

1. A State on the territory of which an activity referred to in article 1 is carried out shall not discriminate on the basis of nationality, residence or place of injury in granting to persons who have suffered significant transboundary harm, in accordance with its legal system, access to judicial or other procedures, or a right to claim compensation or other relief.

2. Paragraph 1 is without prejudice to any agreement between the States concerned providing for special arrangements for the protection of the interests of persons who have suffered significant transboundary harm.

Article 21. Nature and extent of compensation or other relief

The State of origin and the affected State shall negotiate at the request of either party on the nature and extent of compensation or other relief for significant transboundary harm caused by an activity referred to in article 1, having regard to the factors set out in article 22 and in accordance with the principle that the victim of harm should not be left to bear the entire loss.

Article 22. Factors for negotiations

In the negotiations referred to in article 21, the States concerned shall take into account *inter alia* the following factors:

(*a*) In the case of activities referred to in article 1, subparagraph (*a*), the extent to which the State of origin has complied with its obligations of prevention referred to in Chapter II;

(*b*) In the case of activities referred to in article 1, subparagraph (*a*), the extent to which the State of origin has exercised due diligence in preventing or minimizing the damage;

(*c*) The extent to which the State of origin knew or had means of knowing that an activity referred to in article 1 was being or was about to be carried out in its territory or otherwise under its jurisdiction or control;

(*d*) The extent to which the State of origin benefits from the activity;

(*e*) The extent to which the affected State shares in the benefit of the activity;

(*f*) The extent to which assistance to either State is available from or has been provided by third States or international organizations;

(*g*) The extent to which compensation is reasonably available to or has been provided to injured persons, whether through proceedings in the courts of the State of origin or otherwise;

(*h*) The extent to which the law of the injured State provides for compensation or other relief for the same harm;

(*i*) The standards of protection applied in relation to a comparable activity by the affected State and in regional and international practice;

(*j*) The extent to which the State of origin has taken measures to assist the affected State in minimizing harm.

C. Text of the draft articles with commentaries thereto

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

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 of resources, 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".[5] The Tribunal in the *Trail Smelter* case[6] 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 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.[7]

(3) Principle 21 of the Declaration of the United Nations Conference on the Human Environment (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.[8]

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,[9] and by principle 2 of the Rio Declaration on Environment and Development (Rio Declaration).[10] 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 the Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States[11] and in a number of OECD Council Recommendations.[12] 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 Oppenheim stated, this maxim "is applicable to relations of States not less than 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".[13]

(4) The judicial pronouncements and doctrine and pronouncements by international and regional organizations together with non-judicial forms of State practice provide a 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 territories but in such a way as not to cause significant harm to other States.

(5) The present draft articles are arranged in three chapters. Chapter I (articles 1 to 8) delimits the scope of the draft articles as a whole, defines various terms used and states the applicable general principles equally in the context of prevention of and possible liability for transboundary harm. Chapter II (articles 9 to 19) is concerned with the implementation of the principle of prevention stated in article 4 of Chapter I, including with issues of notification, consultation, and so forth. Chapter III (articles 20 to 22) deals with compensation or other relief for harm actually occurring, including compensation which may be available before the national courts of the State of origin or which may flow from arrangements made between that State and one or more other affected States. It is thus concerned with the implementation of the general principle of liability stated in article 5 of Chapter I.

CHAPTER I. GENERAL PROVISIONS

Article 1. Activities to which the present articles apply

The present articles apply to:

[5] *Merits, Judgment, I.C.J. Reports 1949*, pp. 4 et seq., at p. 22.

[6] UNRIAA, vol. III (Sales No. 1949.V.2), pp. 1905 et seq.

[7] Ibid., p. 1965.

[8] *Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972* (United Nations publication, Sales No. E.73.II.A.14 and corrigendum), part one, chap. I.

[9] See in particular articles 2, 30 and 32.

[10] *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992* (A/CONF.151/26/Rev.1 (Vol. I, Vol. I/Corr.1, Vol. II, Vol. III and Vol. III/Corr.1)) (United Nations publication, Sales No. E.93.I.8 and corrigenda), Vol. I: *Resolutions adopted by the Conference*, resolution 1, annex I.

[11] UNEP, *Environmental Law: Guidelines and Principles*, No. 2, *Shared Natural Resources* (Nairobi, 1978).

[12] See OECD Council Recommendations adopted on 14 November 1974: C(74)224 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, *OECD and the Environment* (Paris, 1986), pp. 142, 44 and 45, respectively).

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

(*a*) Activities not prohibited by international law which involve a risk of causing significant transboundary harm [; and

(*b*) Other activities not prohibited by international law which do not involve a risk referred to in subparagraph (*a*) but none the less cause such harm;]

through their physical consequences.

Commentary

(1) Article 1 defines the scope of the articles. It distinguishes between two categories of activities not prohibited by international law: first, those which involve a risk of causing significant transboundary harm (subparagraph (*a*)); and secondly, those which do not involve such a risk but which none the less do cause such harm (subparagraph (*b*)). Subsequently, articles refer in terms of their particular coverage, as appropriate, either to the activities referred to in subparagraph (*a*) or subparagraph (*b*) of article 1, or in certain cases to both.

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

(3) The definition of scope of activities referred to in subparagraph (*a*), now contains four criteria.

(4) The first criterion refers back to the title of the topic, namely that the articles apply to "activities not prohibited by international law". It emphasizes the distinction between the scope of this topic and that of the topic of State responsibility which deals with "internationally wrongful acts" (see chap. III, para. 65, above). See article 8 and commentary thereto below.

(5) The second criterion, found in the definition of the State of origin in article 2, subparagraph (*c*), is that the activities to which preventive measures are applicable are "carried out in the territory or otherwise under the jurisdiction or control of a State". Three concepts are used in this criterion: "territory", "jurisdiction" and "control". Even though the expression "jurisdiction or control of a State" is a more commonly used formula in some instruments,[14] the Commission finds it useful to mention also the concept of "territory" in order to emphasize the importance of the territorial link, when such a link exists, between activities under these articles and a State.

(6) 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 the *Island of Palmas* case,[15] 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.[16]

(7) 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.[17]

(8) 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:

[14] See, for example, principle 21 of the Stockholm Declaration (footnote 36 below); the United Nations Convention on the Law of the Sea, art. 194, para. 2; principle 2 of the Rio Declaration (footnote 37 below); and the Convention on Biological Diversity, art. 3.

[15] UNRIAA, vol. II (Sales No. 1949.V.1), p. 829.

[16] Ibid., p. 838.

[17] Ibid., p. 839.

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 approaching 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.[18]

(9) 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.[19]

(10) In the *Trail Smelter* arbitration, the 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 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 reached a similar conclusion (see general commentary, para. 2, *in fine*, above). 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,"[20] and noted that international decisions, from the "*Alabama*"[21] onward, are based on the same general principle.

(11) 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 application to the present case, since it was agreed by the Tribunal . . . that the French project did not alter the waters of the Carol.[22]

(12) 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.[23] 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/United States 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.[24] 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.[25] There are a number of other examples of State practice along the same lines.[26]

(13) Principle 21 of the Stockholm Declaration[27] and principle 2 of the Rio Declaration[28] prescribe principles

[18] *I.C.J. Reports, 1949* (see footnote 5 above), p. 22.

[19] Ibid., p. 18.

[20] UNRIAA (see footnote 6 above), p. 1963; C. Eagleton, *The Responsibility of States in International Law* (New York, New York University Press, 1928), p. 80.

[21] The Geneva Arbitration (The "*Alabama*" case) (United States of America *v.* Great Britain), decision of 14 September 1872 (J. B. Moore, *History and Digest of the International Arbitrations to which the United States has been a Party*, vol. I), pp. 572-573 and 612 respectively.

[22] Original French text of the award in UNRIAA, vol. XII (Sales No. 63.V.3), pp. 281 et seq.; partial translations in A/5409, pp. 194 et seq., paras. 1055-1068; and ILR, *1957* (London), vol. 24 (1961), pp. 101 et seq.

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

[24] M. M. Whiteman, *Digest of International Law* (Washington, D. C.), vol. 6, pp. 258-259.

[25] 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 J. G. Lammers, *Pollution of International Watercourses* (The Hague, Martinus Nijhoff, 1984), pp. 196 et seq., at p. 198).

[26] 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.

[27] See footnote 8 above.

[28] See footnote 10 above.

similar to those enunciated in the *Trail Smelter* and *Corfu Channel* cases.

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

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

(16) Sometimes, because of the location of the activity, there is no territorial link between a State and the activity such as, for example, activities taking place in outer space or on the high seas. The most common example is the jurisdiction of the flag State over a ship. The four Conventions on the law of the sea adopted at Geneva in 1958 and the 1982 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 function of the concept of "control" in international law is to attach certain legal consequences to a State whose jurisdiction over certain activities or events is not recognized by international law; it covers situations in which a State is exercising de facto jurisdiction, even though it lacks jurisdiction *de jure*, such as in cases of intervention, occupation and unlawful annexation which have not been recognized in international law. Reference may be made, in this respect, to the advisory opinion by ICJ in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*.[29] 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.[30]

(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 the jurisdiction of another State. It is the view of the Commission that in such cases, if the jurisdictional State demonstrates that it had been effectively ousted from the exercise of its jurisdiction over the activities covered by these articles, the controlling State would be held responsible to comply with the obligations imposed by these articles.

(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 the commentary to article 2). The words "transboundary harm" are intended to exclude activities which cause harm only in the territory of the State within which the activity is undertaken without any harm to any other State. For discussion of the term "significant", see the commentary to article 2.

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

(23) In this context, it should be stressed that these articles as a whole have a continuing operation and effect, i.e., unless otherwise stated, they apply to activities as carried out from time to time. Thus it is possible that an

[29] *Advisory Opinion, I.C.J. Reports, 1971*, p. 16.

[30] Ibid., p. 54, para. 118.

activity which in its inception did not involve any risk (in the sense explained in paragraph (22) above), might come to do so as a result of some event or development. For example, a perfectly safe reservoir may become dangerous as a result of an earthquake, in which case the continued operation of the reservoir would be an activity involving risk. Or developments in scientific knowledge might reveal an inherent weakness in a structure or materials which carry a risk of failure or collapse, in which case again the present articles might come to apply to the activity concerned in accordance with their terms.

(24) 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.

(25) 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.

(26) Other activities involving transboundary harm. In addition, some members of the Working Group believe that the draft articles should in certain respects apply to activities not prohibited by international law which do in fact cause significant transboundary harm even though they did not at the relevant time involve a risk of doing so in the sense explained above. By no means all of the draft articles are capable of applying to the activities referred to in article 1, subparagraph (*b*), but some may appropriately do so. Other members of the Working Group expressed doubts as to whether any of the draft articles ought to apply to the situations covered by article 1, subparagraph (*b*), although they accepted that this was a possibility which could not be excluded a priori at this stage of the Commission's work. Accordingly article 1, subparagraph (*b*), has been placed in square brackets in the text, and subsequent references to the activities covered by that subparagraph should be understood as provisional. Comment is particularly sought from Governments on the question what, if any, activities to which article 1, subparagraph (*b*), refers should be dealt with in the articles, and in what respects.

(27) As in the case of activities referred to in subparagraph (*a*), the scope of activities in subparagraph (*b*) is defined by the following criteria: they are not "prohibited by international law"; they are "carried out in the territory or otherwise under the jurisdiction or control of a State; and the significant transboundary harm must have been caused by the "physical consequences" of the activities.

Article 2. Use of terms

For the purposes of the present articles:

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

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

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

(*d*) "Affected State" means the State in the territory of which the significant transboundary harm has occurred or which has jurisdiction or control over any other place where such harm has occurred.

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,[31] adopted by ECE in 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

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

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 ultrahazardous activities. The other pole is where there is a high probability of causing other significant harm. This includes activities which have a high probability of causing harm which, while not disastrous, is still significant. But it would exclude activities where there is a very low probability of causing significant transboundary harm. The word "encompasses" 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 mutual impacts, so long as they have not reached the level of "significant", are considered tolerable. Considering that the obligations imposed on States by these articles deal with activities that are not prohibited by international law, the threshold of intolerance of harm cannot be placed below "significant".

(6) The idea of a threshold is reflected in the award in the *Trail Smelter* case which used the words "serious consequences",[32] as well as by the Tribunal in the *Lake Lanoux* case which relied on the concept "seriously" (*gravement*).[33] A number of conventions have also used "significant", "serious" or "substantial" as the threshold.[34] "Significant" has also been used in other legal instruments and domestic laws.[35]

(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.

(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 article 1, paras. (4) to (20) above).

(10) In *subparagraph* (d), the term "affected State" is defined to mean the State on whose territory or in other places under whose jurisdiction or control significant

[32] See footnote 6 above.

[33] See footnote 22 above.

[34] 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 31 above).

[35] 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 12 above); article X of the Helsinki Rules on the Uses of the Waters of International Rivers, (ILA, *Report of the Fifty-second Conference, Helsinki, 1966* (London, 1967), pp. 484 et seq.; reproduced in part in *Yearbook... 1974*, vol. II (Part Two), pp. 357 et seq., document A/CN.4/274, para. 405); 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 (Original Spanish text in OAS, *Rios y Lagos Internacionales (Utilización para fines agricolas e industriales)*, 4th ed. rev. (OEA/Ser.I/VI, CIJ-75 Rev.2) (Washington, D.C., 1971), 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 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, Foreign Relations Law of the United States*, vol. 2 (St. Paul, Minn., American Law Institute Publishers, 1987), section 601, comment (d), p. 105.

transboundary harm occurs. There may be more than one such affected State in relation to any given activity.

Article 3. Freedom of action and the limits thereto

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

Commentary

(1) This article sets forth the principle that constitutes the basis for the entire topic. It is inspired by principle 21 of the Stockholm Declaration[36] and principle 2 of the Rio Declaration.[37] Both principles affirm the sovereign right of States to exploit their own resources, in accordance with the Charter of the United Nations and the principles of international law.

(2) The adopted wording generalizes principle 21 of the Stockholm Declaration, since article 3 is not limited only to activities directed to the exploitation of resources, but encompasses within its meaning all activities in the territory or otherwise under the jurisdiction or control of a State. On the other hand, the limitations referring to the freedom of a State to carry on or authorize such activities are made more specific than in principle 21, since such limitations are constituted by the general obligation that a State has to prevent or minimize the risk of causing significant transboundary harm as well as the specific State obligations owed to other States in that regard.

(3) The activities to which this article applies are defined in article 1. The present article speaks of risk of causing significant transboundary harm, while the other two principles—principle 21 of the Stockholm Declaration and principle 2 of the Rio Declaration—speak of causing transboundary damage. In practical terms, however, prevention or minimization of risk of causing harm is the first step in preventing the harm itself.

(4) In that sense, the principle expressed in this article goes further in the protection of the affected State's rights and interests and is specifically applicable to hazardous activities, that is, activities which involve a risk of causing transboundary harm.

(5) The general obligation to prevent transboundary harm is well established in international law,[38] but article 3 recognizes a general obligation for the State of origin to prevent or minimize the risk of causing transboundary harm, which means that the State must ensure that the operator of an activity as defined by articles 1 and 2 takes all adequate precautions so that transboundary harm will not take place, or if that is impossible due to the nature of the activity, then the State of origin must take all necessary steps to make the operator take such measures as are necessary to minimize the risk.

(6) Article 10 of the draft convention on environmental protection and sustainable development by the Experts Group on Environmental Law of the World Commission on Environment and Development is consistent with the content of the preceding paragraph. It provides that:

> States shall, without prejudice to the principles laid down in articles 11 and 12, prevent or abate any transboundary environmental interference or a *significant risk thereof** which causes substantial harm—i.e. harm which is not minor or insignificant.[39]

(7) The commentary to that article provides that:

> Subject to certain qualifications to be dealt with below, article 10 lays down the well-established basic principle governing transboundary environmental interferences which causes, *or entails a significant risk of causing*,* substantial harm in an area under national jurisdiction of another State or in an area beyond the limits of national jurisdiction.[40]

(8) The commentary to that article further provides that this principle is an implicit consequence of the duty not to cause transboundary harm:

> It should be noted that the principle formulated above does not merely state that States are obliged to prevent or abate transboundary environmental interferences which *actually* cause substantial harm, but also that they are obliged to prevent or abate activities which entail a *significant risk* of causing such harm abroad. The second statement states as a matter of fact *explicitly* what must already be deemed to be *implicit* in the duty to prevent transboundary environmental interferences *actually* causing substantial harm and serves to exclude any misunderstanding on this point.[41]

(9) Making explicit what is implicit in the above-mentioned general obligation of prevention is already an important advance in the law referring to transboundary harm, since it gives clear foundation to all other obliga-

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[36] Principle 21 reads as follows:

"States have, in accordance with the Charter of the United Nations and the principles of the international law, the sovereign right to exploit their own natural 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." (Footnote 8 above.)

[37] Principle 2 reads as follows:

"States have, in accordance with the Charter of the United Nations and the principles of international law, 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." (Footnote 10 above.)

This principle has also been enunciated in article 193 of the United Nations Convention on the Law of the Sea, which reads as follows:

"States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment."

[38] This general obligation of States has its foundation in international practice. See the general commentary and the commentary to article 1 above.

[39] *Environmental Protection and Sustainable Development: Legal Principles and Recommendations* (London/Dordrecht/Boston, Graham and Trotman/Martinus Nijhoff, 1987), p. 75.

[40] Ibid.

[41] Ibid., p. 78. However, "[w]hile activities creating a significant risk of causing substantial harm must in principle be prevented or abated, it may well be that, in the case of certain dangerous activities, the unlawfulness will be taken away when all possible precautionary measures have been taken to preclude the materialization of the risk *and the benefits created by the activity must be deemed to far outweigh the benefits to be obtained by eliminating the risk* which would require putting an end to the activity itself". (Ibid., p. 79.)

tions of prevention, and particularly to those of notification, exchange of information and consultation, which originate in the right of the presumably affected State—corresponding to this general obligation of prevention—to participate in the general process of prevention.

(10) Article 3 has two parts. The first part affirms the freedom of action by States and the second part addresses the limitations to that freedom. The first part provides that the freedom of States to conduct or permit activities in their territory or under their jurisdiction or control is not unlimited. This is another way of stating that the freedom of States in such matters is limited. The Commission however, felt that it would be more appropriate to state the principle in a positive form, which presupposes the freedom of action of States, rather than in a negative form which would have emphasized the limitation of such freedom.

(11) The second part of the article enumerates two limitations to such State freedom. First, such freedom is subject to the general obligation to prevent or minimize the risk of causing significant transboundary harm. Secondly, such freedom is subject to any specific obligations owed to other States in that regard. The words "in that regard" refer to preventing or minimizing the risk of causing significant transboundary harm.

(12) The first limitation to the freedom of States to carry on or permit activities referred to in article 1 is set by the general obligation of States to prevent or minimize the risk of causing significant transboundary harm. The general obligation stipulated under this article should be understood as establishing an obligation of conduct. The article does not require that a State guarantee the absence of any transboundary harm, but that it takes all the measures required to prevent or minimize such harm. This understanding is also consistent with the specific obligations stipulated in various articles on prevention.

(13) The meaning and the scope of the obligation of due diligence are explained in paragraphs (4) to (13) of the commentary to article 4.

Article 4. Prevention

States shall take all appropriate measures to prevent or minimize the risk of significant transboundary harm and, if such harm has occurred, to minimize its effects.

Commentary

(1) This article, together with article 6, provides the basic foundation for the articles on prevention. The articles set out the more specific obligations of States to prevent or minimize significant transboundary harm, or, if such harm has occurred, to minimize its effects. The present article is in the nature of a statement of principle. It provides that States shall take all appropriate measures to prevent or minimize the risk of significant transboundary harm or, if such harm has occurred, to minimize its effects. The word "measures" refers to all those specific actions and steps that are specified in the articles on prevention and minimization of transboundary harm.

(2) As a general principle, the obligation in article 4 to prevent or minimize the risk applies only to activities which involve a risk of causing significant transboundary harm, as those terms are defined in article 2. In general, in the context of prevention, a State does not bear the risk of unforeseeable consequences to other States of activities not prohibited by international law which are carried on its territory or under its jurisdiction or control. On the other hand the obligation to "take appropriate measures to prevent or minimize" the risk of harm cannot be confined to activities which are already properly appreciated as involving such a risk. The obligation extends to taking appropriate measures to identify activities which involve such a risk, and this obligation is of a continuing character.

(3) This article, then, sets up the principle of prevention that concerns every State in relation to activities covered by article 1, subparagraph (*a*). The modalities whereby the State of origin may discharge the obligations of prevention which have been established include, for example, legislative, administrative or other action necessary for enforcing the laws, administrative decisions and policies which the State has adopted (see article 7 and the commentary thereto below).

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

(5) An obligation of due diligence as the standard basis for the protection of the environment from harm, can be deduced from a number of international conventions[42] as well as from the resolutions and reports of international conferences and organizations.[43] The obligation of due diligence was discussed in a dispute which arose in 1986 between Germany and Switzerland relating to the pollution of the Rhine by Sandoz; the Swiss Government acknowledged responsibility for lack of due diligence in preventing the accident through adequate regulation of its pharmaceutical industries.[44]

[42] 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.

[43] 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).

[44] 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", *Annuaire français de droit international* (Paris), vol. 33 (1987), pp. 719-727.

(6) In the "*Alabama*" case (United States *v.* Great Britain), the Tribunal examined two different definitions of due diligence submitted by the parties. The United States defined due diligence as:

> [A] diligence proportioned to the magnitude of the subject and to the dignity and strength of the power which is to exercise it; a diligence which shall, by the use of active vigilance, and of all the other means in the power of the neutral, through all stages of the transaction, prevent its soil from being violated; a diligence that shall in like manner deter designing men from committing acts of war upon the soil of the neutral against its will, . . .[45]

(7) Great Britain defined due diligence as "such care as Governments ordinarily employ in their domestic concerns".[46] 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

> [t]he 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.[47]

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

> The rule that you are to love your neighbour becomes, in law, you must not injure your neighbour; and the lawyer's question, "Who is my neighbour?" receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts and omissions which are called in question.[48]

(9) In the context of the present articles, due diligence is manifested in reasonable efforts by a State to inform itself of factual and legal components that relate foreseeably to a contemplated procedure and to take appropriate measures in timely fashion, to address them. Thus States are under an obligation to take unilateral measures to prevent or minimize the risk of significant transboundary harm by activities within the scope of article 1. Such measures include, first, formulating policies designed to prevent or minimize transboundary harm and, secondly, implementing those policies. Such policies are expressed in legislation and administrative regulations and implemented through various enforcement mechanisms.

(10) The Commission believes that the standard of due diligence against which the conduct of a State should be examined is that which is generally considered to be appropriate and proportional to the degree of risk of transboundary harm in the particular instance. For example, activities which may be considered ultra-hazardous require a much higher standard of care in designing policies and a much higher degree of vigour on the part of the State to enforce them. Issues such as the size of the operation; its location; special 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 may not be considered as such at some point in the future. Hence, due diligence in ensuring safety requires a State to keep abreast of technological changes and scientific developments.

(11) The Commission takes note of principle 11 of the Rio Declaration 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.[49]

(12) Similar language is found in principle 23 of the Stockholm Declaration. That principle, however, specifies that such domestic standards are "[w]ithout prejudice to such criteria as may be agreed upon by the international community".[50] It is the view of the Commission that the level of economic development of States is one of the factors to be taken into account in determining whether a State has complied with its obligation of due diligence. But a State's level of economic development cannot be used to discharge a State from its obligation under these articles.

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

Article 5. Liability

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

Commentary

(1) The present articles are concerned with activities which are not prohibited in international law, either intrinsically or as to their effects. That being so, there can—as it were by definition—be no question that the occurrence of significant transboundary harm would give rise to a case of State responsibility, which is concerned with acts which in one respect or another are prohibited by international law, that is, by unlawful acts. See also article 8 and the commentary thereto.

(2) On the other hand, where States carry out activities which are prone to cause and which do cause significant

[45] The "*Alabama*" case (see footnote 21 above), pp. 572-573.

[46] Ibid., p. 612.

[47] Ibid.

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

[49] See footnote 10 above.

[50] See footnote 8 above.

transboundary harm—even if those activities or their effects are not unlawful—a question of compensation for the harm arises, and it is this element which is primarily reflected in the term "international liability". Outside the realm of State responsibility the issue is not one of reparation (in the sense defined in article 42 of the draft articles on State responsibility (see chap. III, sect. D, above)). But compensation or other relief (for example a modification in the operation of the activity so as to avoid or minimize future harm) ought in principle to be available. Otherwise States would be able to externalize the costs of their activities through inflicting some of those costs, uncompensated, on third parties who derive no benefit from those activities, who have no control over whether or not they are to occur but who suffer significant transboundary harm. Thus article 5 states as a basic principle that liability to make compensation or provide other relief may arise from significant transboundary harm caused by activities to which article 1 applies. This basic principle is, however, qualified by the phrase "in accordance with the present articles". The extent to which the articles give rise to compensation or other relief is as stated in Chapter III (Compensation or other relief). This is, of course, without prejudice to any obligation to make compensation or to provide other relief which may exist independently of the present articles such as, for example, in accordance with a treaty to which the States concerned are parties.

(3) It should be noted that in its present formulation the principle stated in article 5 applies both to activities involving risk (art. 1, subpara. (*a*)) and those which cause harm even though the risk that they would do so was not earlier appreciated (art. 1, subpara. (*b*)). It is true that the rationale for liability articulated in the preceding paragraph applies more clearly to activities covered by article 1, subparagraph (*a*), as compared with those covered by article 1, subparagraph (*b*). However, even where activities did not at the time they were carried out involve a risk of causing significant transboundary harm, in the sense defined in article 2, the question of possible compensation or other relief is not to be excluded. To limit liability only to cases involving risk would be to say—*a contrario*—that third States are to be left to bear any losses otherwise incurred as a result of the activities of States of origin (not prohibited by international law), no matter how serious those losses or what the other circumstances may have been. As a matter of general application, a rule of strict liability for all and any losses covered by activities lawfully carried out on the territory of a State or under its jurisdiction or control would be difficult, if not impossible, to sustain. Of course, a treaty may incorporate such a rule, but that does not necessarily show what the rule of general international law would be apart from the treaty. What can be said, however, is that where significant transboundary harm occurs, even though arising from a lawful activity and even though the risk of that harm was not appreciated before it occurred, nonetheless the question of compensation or other relief is not to be excluded. There is no rule in such circumstances that the affected third State must bear the loss. Hence the principle in article 5 can properly apply to all activities covered by article 1, bearing in mind that the formulations in Chapter III of these articles dealing with compensation or other relief are very flexibly drafted and do not impose categorical obligations. This position is however provisional for the reasons explained in paragraph (26) of the commentary to article 1.

(4) The principle contained in article 5 is not new to the Commission. At its fortieth session, in 1988, the Commission stated the following:

> There was general agreement that the principles set out by the Special Rapporteur in paragraph 86 of his fourth report (A/CN.4/413) were relevant to the topic and acceptable in their general outline. Those principles were:
>
> (*a*) The articles must ensure to each State as much freedom of choice within its territory as is compatible with the rights and interests of other States;
>
> (*b*) The protection of such rights and interests require the adoption of measures of prevention and, if injury nevertheless occurs, measures of reparation;
>
> (*c*) In so far as may be consistent with those two principles, an innocent victim should not be left to bear his loss or injury."[51]

(5) The principle of liability and reparation is a necessary corollary and complement to article 4. That article obliges States to prevent or minimize the risk from activities that are not prohibited by international law. Article 5, on the other hand, establishes an obligation to provide compensation or other relief whenever significant transboundary harm occurs. The article thus rejects a regime which would permit the conduct of activities hazardous to other States without any form of compensation or other relief when harm occurs.

(6) The principle of liability is without prejudice to the question of: (*a*) the entity that is liable and must make reparation; (*b*) the forms and the extent of reparation; (*c*) the harm that is subject to reparation; and (*d*) the basis of liability.

(7) These matters are dealt with in various ways in Chapter III of these articles, pursuant to which these issues may be dealt with by the law of the State of origin and through its courts on the basis of non-discrimination (see article 20 and the commentary thereto below), or by negotiation between the State of origin and the affected State or States on the basis of some general criteria there laid down (see articles 21 and 22 and the commentaries thereto below).

(8) In fact, in international practice there are several ways of remedying the transboundary damage caused by a hazardous activity to persons or property, or the environment. One is the absolute liability of the State, as in the Convention on International Liability for Damage Caused by Space Objects, the only case of absolute State liability to be specified by a multilateral treaty. Another way is to channel liability through the operator, leaving the State out of the picture, as in the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment. Still another is to assign to the State some subsidiary liability for that amount of compensation not satisfied by the operator, such as the Convention on Third Party Liability in the Field of Nuclear Energy and the Vienna Convention on Civil Liability for Nuclear Damage.

[51] *Yearbook ... 1988*, vol. II (Part Two), p. 18, para. 82.

(9) In other contests, the State may be responsible only in cases where due diligence is breached, in a way similar to that of article 7 of the draft articles on the law of the non-navigational uses of international watercourses,[52] although such a rule may impose an obligation within the framework of State responsibility (and therefore falling outside the scope of the present articles).

(10) In including this article within the set of fundamental principles of the topic, the Commission takes careful note of principle 22 of the Stockholm Declaration[53] and principle 13 of the Rio Declaration[54] in which States are encouraged to cooperate in developing further international law regarding liability and compensation for environmental damage caused by activities within their jurisdiction or control to areas beyond their national jurisdiction. These principles demonstrate the aspirations and preferences of the international community.

(11) It must be noted that the term used is "compensation or other relief". Compensation, that is to say, payment of a sum of money, is hardly applicable to some instances of remedying environmental harm, where restoration is the best solution. Restoration, which is an attempt of returning to the *status quo ante*, may be considered as a form of *restitutio naturalis*. Also in the field of environmental harm, the introduction into a damaged ecosystem of certain equivalent components to those diminished or destroyed is not a monetary compensation, although it may be considered a form of relief. Such a solution is envisaged in certain instruments.[55]

(12) There is significant treaty practice by which States have either identified a particular activity or substance with injurious transboundary consequences and have established a liability regime for the transboundary harm. Activities involving oil transportation, oil pollution and nuclear energy or material are prime targets of these treaties.[56] Some conventions address the question of liability resulting from activities other than those involving oil or nuclear energy or material.[57] Many other treaties refer to the issue of liability without any further clarification as to the substantive or procedural rules of liability. These treaties recognize the relevance of the liability principle to the operation of the treaty without necessarily articulating a precise principle of liability.[58] Other treaties contemplate that a further instrument will be developed by the parties addressing questions of liability arising under the treaties.[59]

(13) The concept of liability has also been developed to a limited extent in State practice. For example, in the *Trail Smelter* case, the smelter company was permitted to continue its activities, but the Tribunal established a permanent regime which called, under certain conditions, for compensation for injury to the United States interests arising from fume emission even if the smelting activities conformed fully to the permanent regime as defined in the decision:

> The Tribunal is of the opinion that the prescribed régime will probably remove the causes of the present controversy and, as said before, will probably result in preventing any damage of a material nature occurring in the State of Washington in the future.
>
> *But since the desirable and expected result of the régime or measure of control hereby required to be adopted and maintained by the Smelter may not occur,** and since in its answer to Question No. 2, the Tribunal has required the Smelter to refrain from causing damage in the State of Washington in the future, as set forth therein, the Tribunal answers to Question No. 4 ... : (*a*) if any damage as defined under Question No. 2 shall have occurred since October 1, 1940, or shall occur in the future, whether through failure on the part of Smelter to comply with the regulations herein prescribed or *notwithstanding the maintenance of the régime,** an indemnity shall be paid for such damage but only when *and if the two Governments shall make arrangements for the disposition of claims for indemnity** ...[60]

(14) In the award in the *Lake Lanoux* case, on the other hand, the Tribunal, responding to Spain's allegation that the French projects would entail an abnormal risk to Spanish interests, stated as a general matter that responsibility would not arise as long as all possible precautions against the occurrence of an injurious event had been taken.[61] The Tribunal made a brief reference to the question of dangerous activities, by stating: "It has not been clearly affirmed that the proposed works [by France] would entail an abnormal risk in neighbourly relations or

[52] *Yearbook ... 1994*, vol. II (Part Two), p. 102.

[53] See footnote 8 above.

[54] See footnote 10 above.

[55] See for example, article 2, paragraph 8, of the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment.

[56] See in particular the International Convention on Civil Liability for Oil Pollution Damage of 1969; the Protocol of 1984 to amend the International Convention on Civil Liability for Oil Pollution Damage; the Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources; the Convention on Third Party Liability in the Field of Nuclear Energy; the Convention on the Liability of Operators of Nuclear Ships; the Vienna Convention on Civil Liability for Nuclear Damage; Convention relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material; and the Convention on Civil Liability for Damage Caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels (CRTD).

[57] See the Convention on International Liability for Damage Caused by Space Objects and the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment.

[58] See in this context the Kuwait Regional Convention for Cooperation on the Protection of the Marine Environment from Pollution; the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter; the Convention for the Protection of the Mediterranean Sea against Pollution; the Convention on the Protection of the Marine Environment of the Baltic Sea Area; the Convention on the Protection of the Black Sea Against Pollution; the Convention on the Transboundary Effects of Industrial Accidents; and the Convention on the Protection and Use of Transboundary Watercourses and International Lakes.

[59] See for example, the Convention on the Regulation of Antarctic Mineral Resource Activities, which makes the development of liability rules a precondition for the exploration and exploitation of mineral resources of Antarctica. The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal provides in article 12 that State parties shall develop a protocol on liability and compensation. See also Bamako the Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa which also provides that States parties to the Convention shall develop a protocol on liability and compensation.

[60] UNRIAA (footnote 6 above), p. 1980.

[61] The Tribunal stated:

"The question was lightly touched upon in the Spanish Counter memorial (p. 86), which underlined the 'extraordinary complexity' of procedures for control, their 'very onerous' character, and the 'risk of damage or of negligence in the handling of the watergates, and of obstruction in the tunnel'. But it has never been alleged that the works

(*Continued on next page.*)

in the utilization of the waters." This passage may be interpreted as meaning that the Tribunal was of the opinion that abnormally dangerous activities constituted a special problem, and that, if Spain had established that the proposed French project would entail an abnormal risk of transboundary harm to Spain, the decision of the Tribunal might have been different.

(15) In the *Nuclear Tests* case, ICJ duly recited Australia's statement of its concerns that

> ... the atmospheric nuclear explosions carried out by France in the Pacific have caused wide-spread radio-active fall-out on Australian territory and elsewhere in the southern hemisphere, have given rise to measurable concentrations of radio-nuclides in foodstuffs and in man, and have resulted in additional radiation doses to persons living in that hemisphere and in Australia in particular; that any radio-active material deposited on Australian territory will be potentially dangerous to Australia and its people and any injury caused thereby would be irreparable; that the conduct of French nuclear tests in the atmosphere creates anxiety and concern among the Australian people; that any effects of the French nuclear tests upon the resources of the sea or the conditions of the environment can never be undone and would be irremediable by any payment of damages; and any infringement by France of the rights of Australia and her people to freedom of movement over the high seas and superjacent airspace could not be undone.[62]

(16) In his dissenting opinion, Judge Ignacio-Pinto, while expressing the view that the Court lacked jurisdiction to deal with the case, stated that:

> ... if the Court were to adopt the contention of the Australian request it would be near to endorsing a novel conception in international law whereby States would be forbidden to engage in any risk-producing activity within the area of their own territorial sovereignty; but that would amount to granting any State the right to intervene preventively in the national affairs of other States.[63]

(17) He further stated that

> ... [i]n the present state of international law, the "apprehension" of a State, or "anxiety", "the risk of atomic radiation", do not in my view suffice to substantiate some higher law imposed on all States and limiting their sovereignty as regards atmospheric nuclear tests.
>
> "Those who hold the opposite view may perhaps represent the figure-heads or vanguard of a system of gradual development of international law, but it is not admissible to take their wishes into account in order to modify the present state of the law."[64]

(18) In a number of incidents States have, without admitting any liability, paid compensation to the victims of significant transboundary harm. In this context, reference should be made to the following.

(19) The series of United States nuclear tests on Eniwetok Atoll on 1 March 1954 caused injuries extending far beyond the danger area. They injured Japanese fishermen on the high seas and contaminated a great part of the atmosphere and a considerable quantity of fish, thus seriously disrupting the Japanese fish market. Japan demanded compensation. In a note dated 4 January 1955, the United States Government, completely avoiding any reference to legal liability, agreed to pay compensation for harm caused by the tests.[65]

(20) In the case of the injuries sustained in 1954 by the inhabitants of the Marshall Islands, then a Trust Territory administered by the United States, the United States agreed to pay compensation. A report of the Committee on Interior and Insular Affairs of the United States Senate stated that, owing to an unexpected wind shift immediately following the nuclear explosion, the 82 inhabitants of the Rongelap Atoll had been exposed to heavy radioactive fallout. After describing the injuries to persons and property suffered by the inhabitants and the immediate and extensive medical assistance provided by the United States, the report concluded: "It cannot be said, however, that the compensatory measures heretofore taken are fully adequate ...".[66] The report disclosed that in February 1960 a complaint against the United States had been lodged with the high court of the Trust Territory with a view to obtaining $8,500,000 as compensation for property damage, radiation sickness, burns, physical and mental agony, loss of consortium and medical expenses. The suit had been dismissed for lack of jurisdiction. The report indicated, however, that enactment of bill No. H.R.1988 (on payment of compensation) presented in the House of Representatives was "needed to permit the United States to do justice to these people".[67] On 22 August 1964, "President Johnson signed into law an act whereby the United States assumed 'compassionate responsibility' to compensate inhabitants of the Rongelap Atoll, in the Trust Territory of the Pacific Islands, for radiation exposures sustained by them as a result of a thermonuclear detonation at Bikini Atoll in the Marshall Islands on March 1, 1954, and there was authorized to be appropriated $950,000 to be paid in equal amounts to the affected inhabitants of Rongelap."[68] According to another report, in June 1982 the Reagan Administration was prepared to pay $100 million to the Government of the Marshall Islands in settlement of all claims against the United States by islanders whose health and property had

(*Footnote 61 continued.*)

envisaged present any other character or would entail any other risks than other works of the same kind which today are found all over the world. *It has not been clearly affirmed that the proposed works would* entail an abnormal risk in neighbourly relations or in the utilization of the waters. As we have seen above, the technical guarantees for the restitution of the waters are as satisfactory as possible. If, despite the precautions that have been taken, the restitution of the waters were to suffer from an accident, such an accident would be only occasional and, according to the two Parties, would not constitute a violation of article 9." (UNRIAA ... (footnote 22 above), pp. 123-124, para. 6 of the award.)

[62] *Nuclear Tests (Australia* v. *France), Interim Protection, Order of 22 June 1973, I.C.J. Reports 1973*, pp. 99 et seq. at p.104. The Court did not rule on merits of the case.

[63] Ibid., p. 132.

[64] Ibid.

[65] The note stated that:

"... The Government of the United States of America has made clear that it is prepared to make monetary compensation as an additional expression of its concern and regret over the injuries sustained.

"... the Government of the United States of America hereby tenders, *ex gratia*, to the Government of Japan, without reference to the question of legal liability, the sum of two million dollars for purposes of compensation for the injuries or damages sustained as a result of nuclear tests in the Marshall Islands in 1954.

"...

"It is the understanding of the Government of the United States of America that the Government of Japan, in accepting the tendered sum of two million dollars, does so in full settlement of any and all claims against the United States of America or its agents, nationals, or juridical entities ... for any and all injuries, losses, or damages arising out of the said nuclear tests."

The Department of State Bulletin (Washington, D.C.), vol. XXXII, No. 812 (17 January 1955), pp. 90-91.

[66] M. M. Whiteman, op. cit. (footnote 24 above), p. 567.

[67] Ibid.

[68] Ibid.

been affected by United States nuclear weapons tests in the Pacific between 1946 and 1963.[69]

(21) In 1948, a munitions factory in Arcisate, in Italy, near the Swiss border, exploded and caused varying degrees of damage in several Swiss communes. The Swiss Government demanded reparation from the Italian Government for the damage sustained; it invoked the principle of good neighbourliness and argued that Italy was liable since it tolerated the existence of an explosives factory, with all its attendant hazards, in the immediate vicinity of an international border.[70]

(22) In 1971, the Liberian tanker "*Juliana*" ran aground and split apart off Niigata, on the west coast of the Japanese island of Honshu. The oil of the tanker washed ashore and extensively damaged local fisheries. The Liberian Government (the flag State) offered 200 million yen to the fishermen for damage, which they accepted.[71] In this affair, the Liberian Government accepted the claims for damage caused by the act of a private person. It seems that no allegations of wrongdoing on the part of Liberia were made at an official diplomatic level.

(23) Following the accidental spill of 12,000 gallons of crude oil into the sea at Cherry Point, in the State of Washington, and the resultant pollution of Canadian beaches, the Canadian Government addressed a note to the United States Department of State in which it expressed its grave concern about this "ominous incident" and noted that "the government wishes to obtain firm assurances that full compensation for all damages, as well as the cost of clean-up operations, will be paid by those legally responsible".[72] Reviewing the legal implications of the incident before the Canadian Parliament, the Canadian Secretary of State for External Affairs stated:

> We are especially concerned to ensure observance of the principle established in the 1938 Trail smelter arbitration between Canada and the United States. This has established that one country may not permit the use of its territory in such a manner as to cause injury to the territory of another and shall be responsible to pay compensation for any injury so suffered. Canada accepted this responsibility in the Trail smelter case and we would expect that the same principle would be implemented in the present situation. Indeed, this principle has already received acceptance by a considerable number of states and hopefully it will be adopted at the Stockholm conference as a fundamental rule of international environmental law.[73]

(24) Canada, referring to the precedent of the *Trail Smelter* case, claimed that the United States was responsible for the extraterritorial damage caused by acts occurring under its territorial control, regardless of whether the United States was at fault. The final resolution of the dispute did not involve the legal principle invoked by Canada; the private company responsible for the pollution offered to pay the costs of the clean-up operations.

(25) In 1973, a major contamination occurred in the Swiss canton of Bâle-Ville owing to the production of insecticides by a French chemical factory across the border. The contamination caused damage to the agriculture and environment of that canton and some 10,000 litres of milk per month had to be destroyed.[74] The Swiss Government apparently intervened and negotiated with the French authorities in order to halt the pollution and obtain compensation for the damage.

(26) During negotiations between the United States and Canada regarding a plan for oil prospecting in the Beaufort Sea, near the Alaskan border, the Canadian Government undertook to guarantee payment of any damage that might be caused in the United States by the activities of the private corporation that was to undertake the prospecting.[75] Although the private corporation was to furnish a bond covering compensation for potential victims in the United States, the Canadian Government accepted liability on a subsidiary basis for payment of the cost of transfrontier damage should the bonding arrangement prove inadequate.[76]

(27) In connection with the construction of a highway in Mexico, in proximity to the United States border, the United States Government, considering that, notwithstanding the technical changes that had been made in the project at its request, the highway did not offer sufficient guarantees for the security of property situated in United States territory and reserved its rights in the event of damage resulting from the construction of the highway. In a note addressed on 29 July 1959 to the Mexican Minister of Foreign Relations, the United States Ambassador to Mexico concluded:

> "In view of the foregoing, I am instructed to reserve all the rights that the United States may have under international law in the event that damage in the United States results from the construction of the highway."[77]

(28) In the case of the Rose Street canal, both the United States and Mexico reserved the right to invoke the accountability of the State whose construction activities might cause damage in the territory of the other State.[78]

(29) In the correspondence between Canada and the United States regarding the United States Cannikin underground nuclear tests on Amchitka, Canada reserved its rights to compensation in the event of damage.[79]

(30) Treaty practice shows a clear tendency in imposing no-fault (*sine delicto*) liability for extraterritorial harm on the operators of activities or their insurers.[80] This is standard practice in treaties primarily concerned with commercial activities. Some conventions, regulating activities undertaken mostly by private operators, impose

[69] The *International Herald Tribune*, 15 June 1982, p. 5.

[70] P. Guggenheim, op cit. (footnote 23 above), p. 169.

[71] *The Times* (London), 1 October 1974; *Revue générale de droit international public* (Paris), vol. 80 (July-September 1975), p. 842.

[72] *The Canadian Yearbook of International Law, 1973* (Vancouver, B.C.), vol. XI (1973), pp. 333-334.

[73] Ibid., p. 334.

[74] L. Caflisch, "La pratique suisse en matière de droit international public 1973", *Annuaire suisse de droit international* (Zurich), vol. XXX (1974), p. 147. The facts about the case and the diplomatic negotiations that followed are difficult to ascertain.

[75] *International Canada* (Toronto), vol. 7, No. 3 (1976), pp. 84-85.

[76] Ibid.

[77] Whiteman, op. cit. (footnote 24 above), vol. 6, p. 262.

[78] Ibid., pp. 264-265.

[79] *International Canada* (Toronto), vol. 2, 1971, pp. 97 and 185.

[80] See for example, in the area of oil pollution, the International Convention on Civil Liability for Oil Pollution Damage; the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage; the Convention on Civil Liability for

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certain obligations upon the State to ensure that its operators abide by those regulations. If the State fails to do so, it is held liable for the injuries the operator causes either for the whole compensation or that portion of it not satisfied by the operator.[81]

(31) On the other hand, the Convention on International Liability for Damage Caused by Space Objects holds the launching State absolutely liable for transboundary damage. This Convention is unique because, at the time of its conclusion, it was anticipated that the activities being regulated, because of their nature, would be conducted only by States. The Convention is further unique in that it allows the injured party the choice as to whether to pursue a claim for compensation through domestic courts or to make a direct claim against the State through diplomatic channels.

(32) It must be noted that the trend of requiring compensation is pragmatic rather than grounded in a consistent concept of liability. Liability of private operators, their insurers, and possibly States takes many forms. Nonetheless, it is legitimate to induce from the rather diverse practice surveyed above the recognition—albeit on some occasions *de lege ferenda*—of a principle that liability should flow from the occurrence of significant transboundary harm arising from activities such as those referred to in article 1, even though the activities themselves are not prohibited under international law—and are therefore not subject to the obligations of cessation or *restitutio in integrum*. On the other hand that principle cannot, in the present state of international practice, be affirmed without qualification, hence the need to refer to the implementation of the general principle through the provisions contained elsewhere in these articles.

Article 6. Cooperation

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

Commentary

(1) The principle of cooperation between States is essential in designing and implementing effective policies to prevent or minimize the risk of causing significant transboundary harm. The requirement of cooperation of States extends to all phases of planning and of implementation. Principle 24 of the Stockholm Declaration[82] and principle 7 of the Rio Declaration[83] recognize cooperation as an essential element in any effective planning for the protection of the environment. More specific forms of cooperation have been stipulated in the articles in Chapter II (Prevention), in particular articles 13 to 18. They envisage the participation of the affected State, which is indispensable to enhance the effectiveness of any preventive action. The affected State may know better than anybody else which features of the activity in question may be more damaging to it, or which zones of its territory close to the border may be more affected by the transboundary effects of the activity, such as a specially vulnerable ecosystem.

(2) The article requires States concerned to cooperate in good faith. Article 2, paragraph 2, of the Charter of the United Nations provides that all Members "shall fulfil in good faith the obligations assumed by them in accordance with the present Charter". The Vienna Convention on the Law of Treaties and the Vienna Convention on Succession of States in Respect of Treaties declare in their preambles that the principle of good faith is universally recognized. In addition article 26 and article 31, paragraph 1, of the Vienna Convention on the Law of Treaties acknowledge the essential place of this principle in the structure of treaties. The decision of ICJ in the *Nuclear Tests* case touches upon the scope of the application of good faith. In that case, the Court proclaimed that "[o]ne of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith."[84] This dictum of the Court implies that good faith applies also to unilateral acts.[85] Indeed the principle of good faith covers "the entire structure of international relations".[86]

(3) The arbitration tribunal established in 1985 between Canada and France on disputes concerning filleting within the Gulf of St. Lawrence by "*La Bretagne*", held that the principle of good faith was among the elements that afforded a sufficient guarantee against any risk of a party exercising its rights abusively.[87]

(4) The words "States concerned" refer to the State of origin and the affected State or States. While other States in a position to contribute to the goals of these articles are

(*Footnote 80 continued.*)

Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources; the Protocol of 1984 to amend the International Convention on Civil Liability for Oil Pollution Damage. In the area of nuclear energy and material, see the Convention on Third Party Liability in the Field of Nuclear Energy; the Convention Supplementary to the Paris Convention of 29 July 1960 on Third Party Liability in the Field of Nuclear Energy; the Convention on the Liability of Operators of Nuclear Ships; the Vienna Convention on Civil Liability for Nuclear Damage; the Convention relating to civil liability in the field of maritime carriage of nuclear material; and in the area of other activities, the Convention on International Liability for Damage Caused by Space Objects and the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment.

[81] See, for example, article III of the Convention on the Liability of Operators of Nuclear Ships, and article 8 of the Convention on the Regulation of Antarctic Mineral Resource Activities.

[82] See footnote 8 above.

[83] See footnote 10 above.

[84] *Nuclear Tests* (see footnote 62 above), p. 268.

[85] See M. Virally, "Review essay: Good faith in public international law", *American Journal of International Law*, vol. 77, No. 1 (January 1983), p. 130.

[86] See R. Rosenstock, "The Declaration of principles of international law concerning friendly relations: A survey", *American Journal of International Law* (Washington, D.C.), vol. 65, No. 5 (October 1971), p. 734.

[87] *Dispute concerning Filleting within the Gulf of St. Lawrence ("La Bretagne") (Canada* v. *France)* (ILR, vol. 82 (1990), pp. 590 et seq., at p. 614).

encouraged to cooperate, they have no legal obligation to do so.

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

(6) First, assistance from international organizations may not be appropriate or necessary in every case involving the prevention or minimization of transboundary harm. For example, the State of origin or the affected State may, themselves, be technologically advanced and have as much or even more technical capability than international organizations to prevent or minimize significant transboundary harm. Obviously, in such cases, there is no obligation to seek assistance from international organizations.

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

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

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

(10) The latter part of the article speaks of minimizing the effects "both in affected States and in States of origin". It anticipates situations in which, due to an accident, there is, in addition to significant transboundary harm, massive harm in the State of origin itself. These words are, therefore, intended to present the idea that, in many ways, significant harm is likely to be a nuisance for all the States concerned, harming the State of origin as well as the other States. Hence, transboundary harm should, to the extent possible, be looked at as a problem requiring common endeavours and mutual cooperation to minimize its negative consequences. These words, of course, do not intend to impose any financial costs on the affected State for minimizing harm or clean-up operation in the State of origin.

Article 7. Implementation

States shall take the necessary legislative, administrative or other action to implement the provisions of the present articles.

Commentary

(1) This article states what might be thought to be the obvious, namely, that by virtue of becoming a party to the present articles, States would be required to take the necessary measures of implementation, whether of a legislative, administrative or other character. Article 7 has been included here both to emphasize the continuing character of the articles, which require action to be taken from time to time to prevent or minimize transboundary harm arising from activities to which the articles apply, as well as providing for liability in certain circumstances if significant transboundary harm should none the less occur.[88]

(2) To say that States must take the necessary measures does not mean that they must themselves get involved in operational issues relating to the activities to which article 1 applies. Where these activities are conducted by private persons or enterprises, the obligation of the State is limited to establishing the appropriate regulatory framework and applying it in accordance with these draft articles. The application of that regulatory framework in the given case will then be a matter of ordinary administration, or, in the case of disputes, for the relevant courts or tribunals, aided by the principle of non-discrimination contained in article 21.

Article 8. Relationship to other rules of international law

The fact that the present articles do not apply to transboundary harm arising from a wrongful act or omission of a State is without prejudice to the existence or operation of any other rule of international law relating to such an act or omission.

Commentary

(1) It has already been stressed that the present articles apply only to activities not prohibited by international law, whether such a prohibition arises in relation to the conduct of the activity or by reason of its prohibited effects. The present draft articles are residual in their

[88] This article is similar to article 2, paragraph 2, of the Convention on Environmental Impact Assessment in a Transboundary Context, which reads:

"Each Party shall take the necessary legal, administrative or other measures to implement the provisions of this Convention, including, with respect to proposed activities ... that are likely to cause significant adverse transboundary impact, the establishment of an environmental impact assessment procedure that permits public participation and preparation of the environmental impact assessment documentation described ..."

operation. They apply only in situations where no more specific international rule or regime governs.

(2) Thus article 8 intends to make it as clear as may be that the present articles are without prejudice to the existence, operation or effect of any other rule of international law relating to an act or omission to which these articles might otherwise—that is to say, in the absence of such a rule—be thought to apply. It follows that no inference is to be drawn from the fact that an activity falls within the apparent scope of these draft articles, as to the existence or non-existence of any other rule of international law, including any other primary rule operating within the realm of the law of State responsibility, as to the activity in question or its actual or potential transboundary effects. The reference in article 8 to any other rule of international law is intended to cover both treaty rules and rules of customary international law. It is equally intended to extend both to rules having a particular application—whether to a given region or a specified activity—and to rules which are universal or general in scope. The background character of the present articles is thus further emphasized.

CHAPTER II. PREVENTION

Article 9. Prior authorization

States shall ensure that activities referred to in article 1, subparagraph (*a*), 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, subparagraph (*a*).

Commentary

(1) This article imposes an obligation on States to ensure that activities which involve 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. The article serves as an introduction to Chapter II which is concerned with the implementation of the principle of prevention set out in article 4.

(2) It is the view of the Commission that the requirement of authorization obliges a State to ascertain whether activities with a possible risk of significant transboundary harm are taking place in its territory or otherwise under its jurisdiction or control and that the State should take the measures indicated in these articles. This article requires the State to take a responsible and active role in regulating activities taking place in their territory or under their jurisdiction or control with possible significant transboundary harm. The Commission notes, in this respect, that the Tribunal in the *Trail Smelter* arbitration held that Canada had "the duty ... to see to it that this conduct should be in conformity with the obligation of the Dominion under international law as herein determined". 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".[89] In the view of the Commission, article 9 is compatible with 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".[90] 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 2. The expression "activities referred to in article 1, subparagraph (*a*)" introduces all the requirements of that article for an activity to fall within the scope of these articles.

(5) The second sentence of article 9 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, subparagraph (*a*), and that change may increase the risk or alter the nature or the scope of the risk.

Article 10. Risk assessment

Before taking a decision to authorize an activity referred to in article 1, subparagraph (*a*), 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 10, a State, before granting authorization to operators to undertake activities referred to in article 1, subparagraph (*a*), should ensure that an assessment is undertaken of the risk of the activity causing significant transboundary harm. This assessment enables the State to determine the extent and the nature of the risk involved in an activity and consequently the type of preventive measures it should take. The Commission feels that as these articles are designed to have global application, they cannot be too detailed. They should contain only what is necessary for clarity.

(2) Although the impact assessment in the *Trail Smelter* case may not directly relate to liability for risk, it however emphasized the importance of an assessment of the consequences of an activity causing significant risk. The

[89] UNRIAA (see footnote 6 above), p. 1966.

[90] See footnote 5 above.

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".[91]

(3) The requirement of article 10 is fully consonant with principle 17 of the Rio Declaration which provides also for impact assessment of activities that are likely to have a significant adverse impact on the environment:

> Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.[92]

Requirement of assessment of adverse effects of activities have been incorporated in various forms in many international agreements.[93] 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 or not governmental, to evaluate the assessment on behalf of the Government and will accept responsibility for the conclusions reached by that authority.

(5) The article does not specify what the content of the risk assessment should be. Obviously the assessment of risk of an activity can only be meaningfully prepared if it relates the risk to the possible harm to which the risk could lead. Most existing international conventions and legal instruments do not specify the content of assessment. There are exceptions, such as the Convention on Environmental Impact Assessment in a Transboundary Context, which provides in detail the content of such assessment.[94] 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 offshore 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.[95]

(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 10, 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 trans-

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[91] UNRIAA (see footnote 6 above), p. 1973.

[92] *Report of the United Nations Conference on Environment and Development* (see footnote 10 above), annex I.

[93] 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 radioelectric 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.

[94] 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.)."

[95] See document UNEP/GC.9/5/Add.5, annex III.

boundary harm have some general characteristics which are identifiable and could provide some indication to States as to which activities might fall within the terms of these articles. For example, the type of the source of energy used in manufacturing, the location of the activity and its proximity to the border area, 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 may in itself be an indication that those activities might cause significant transboundary harm.[96] 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.[97]

Article 11. Pre-existing activities

If a State, having assumed the obligations contained in these articles, ascertains that an activity referred to in article 1, subparagraph (*a*), is already being carried out in its territory or otherwise under its jurisdiction or control without the authorization as required by article 9, 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 11 is intended to apply in respect of activities within the scope of article 1, subparagraph (*a*), 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 expression "necessary authorization" here means permits required under the domestic law of the State, in order to implement its obligations under these articles.

(3) The Commission is aware that it might be unreasonable to require States 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 States merely to wait until such information is brought to their knowledge by other States or private entities. The word "ascertain" should be understood in the context of the obligation of due diligence, requiring reasonable and good faith efforts by the States to identify such activities.

(4) A certain period of time might be needed for the operator of the activity to comply with the authorization requirements. The Commission is of the view that the choice between whether the activity should be stopped pending authorization or should continue while the operator goes through the process of obtaining authorization should be left to the State of origin. If the State chooses to allow the activity to continue, it does so at its own risk. It is the view of the Commission that absent any language in the article indicating possible repercussions, the State of origin will have no incentive to comply and to do so expeditiously with the requirements of these articles. Therefore, the expression "at its own risk" is intended: (*a*) to provide, in case harm were to occur, a link to the negotiations on the nature and extent of compensation or other relief contemplated in Chapter III; 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. The reservation of these members extended also to the use of these words in article 17, 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 liability open, to be the subject of negotiations under Chapter III. They also felt that the deletion of those words would change the fair balance the article maintains between the interests of the State of origin and the States likely to be affected.

(6) In case the authorization is denied by the State of origin, it is assumed that the State of origin will stop the activity. If the State of origin fails to do so, it will be assumed that the activity is being conducted with the

[96] 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.

[97] 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.

knowledge and the consent of the State of origin and, if harm occurs, this situation will be amongst the factors indicated in article 22 for negotiations on compensation or other relief, in particular subparagraph (*a*).

Article 12. Non-transference of risk

In taking measures to prevent or minimize a risk of significant transboundary harm caused by an activity referred to in article 1, subparagraph (*a*), 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.[98] Principle 13 of the general principles for assessment and control of marine pollution suggested by the Intergovernmental Working Group on Marine Pollution and endorsed by the United Nations Conference on the Human Environment provides:

> Action to prevent and control marine pollution (particularly direct prohibitions and specific release limits) must guard against the effect of simply transferring damage or hazard from one part of the environment to another.[99]

(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.[100]

(3) The Rio Declaration discourages States, in principle 14, from relocating and transferring to other States activities and substances harmful to the environment and human health. This principle, even though primarily aimed at a different problem, is rather more limited than principle 13 of the 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 paragraphs (1) and (2) 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.[101]

(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 article 195 of the United Nations Convention on the Law of the Sea and are intended to set a much higher degree of care for the States in complying with their obligations under this article.

Article 13. Notification and information

1. If the assessment referred to in article 10 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 13 deals with a situation in which the assessment undertaken by a State, in accordance with article 10, indicates that the activity planned does indeed pose a risk of causing significant transboundary harm. This article, together with articles 14, 15, 17 and 18, provides for a set of procedures essential to balancing the interests of all the States concerned by giving them a reasonable opportunity

[98] See footnote 8 above.

[99] *Report of the United Nations Conference on the Human Environment* ... (ibid.), annex III.

[100] See footnote 31 above.

[101] See footnote 10 above.

to find a way to undertake the activity with satisfactory and reasonable measures designed to prevent or minimize transboundary harm.

(2) Article 13 calls on a State to notify other States which are likely to be affected by the activity that is planned. The activities here include both those that are planned by the State itself and by private entities. The requirement of notification is an indispensable part of any system designed to prevent or 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".[102] 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.[103]

(4) In addition to the utilization of international watercourses, the principle of notification has also been recognized in respect of other activities with transboundary effects, for example, article 3 of the Convention on Environmental Impact Assessment in a Transboundary Context, 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 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.[104]

(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.[105] 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.[106]

(6) The principle of notification is well established in the case of environmental emergencies. Principle 18 of the Rio Declaration on Environment and Development,[107] article 198 of the United Nations Convention on the Law of 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 10. 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 which may be affected prior to authorizing the activity and only after the activity is undertaken gains that knowledge. In accordance with this paragraph, the State of origin, in such cases, is under the obligation to make such notification without delay. The reference to 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 14. 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 14 deals with steps to be taken after an activity has been undertaken. The purpose of all these steps is

[102] See footnote 5 above.

[103] 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 (*Yearbook . . . 1994*, vol. II (Part Two), pp. 111-113).

[104] See footnote 10 above.

[105] *OECD and the Environment* . . . (see footnote 12 above), p. 89, para. 4.

[106] Ibid., p. 142, sect. E.

[107] See footnote 10 above.

the same as previous articles, that is to say, to prevent or minimize the risk of causing significant transboundary harm.

(2) Article 14 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 14, is whatever would be useful, in the particular instance, for the purpose of prevention of risk of significant harm. Normally such information comes to the knowledge of the State of origin. However, when the State that is likely to be affected has any information which might be useful for 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 exchanging information, either between the parties or through providing the information to an international organization which makes it available to other States.[108] 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 14 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 14 comes into operation only when States have any information which is relevant to preventing or minimizing transboundary harm.

[108] 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 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 31 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.

Article 15. 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, subparagraph (*a*), with information relating to that activity, the risk involved and the harm which might result and ascertain their views.

Commentary

(1) Article 15 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.

(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 13 or in the assessment which may be carried out by the State likely to be affected under article 18.

(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 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.[109]

(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

[109] See footnote 10 above.

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.[110]

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 accuracy of the facts, the analysis and the policy considerations either through administrative tribunals, courts, or groups of concerned citizens is one way of participation in decision-making. In the view of the Commission, this form of public involvement enhances the efforts to prevent transboundary and environmental harm.

(7) The obligation contained in article 15 is circumscribed by the phrase "whenever possible and by such means as are appropriate". The words "whenever possible" are assigned here 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 the ways which such information could be provided to the States, their domestic law requirements and the State policy as to, for example, whether such information should be provided through media, non-governmental organizations, public agencies, local authorities, and so forth.

(8) Article 15 limits the obligation of each State to providing such information to its own public. The words "States shall ... provide 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 16. 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 16 is intended to create a narrow exception to the obligation of States to provide information in accordance with articles 13, 14 and 15. 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 watercourses[111] also provides for a similar exception to the requirement of disclosure of information.

(2) Article 16 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 16 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 16 relies on the good faith cooperation of the parties.

Article 17. 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 19.

[110] See footnote 31 above.

[111] See chapter VII, footnote 257, above.

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 17 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 17 is invoked, consultations may be prior to authorization and commencement of an activity or during its performance.

(2) The Commission has attempted to maintain a balance between two equally important considerations in this article. First, the article deals with activities that are not prohibited by international law and that, normally, are important to the economic development of the State of origin. But second, it would be unfair to other States to allow those activities to be conducted without consulting them and taking appropriate preventive measures. Therefore, the article provides neither a mere formality which the State of origin has to go through with no real intention of reaching a solution acceptable to the other States, nor does it provide a right of veto for the States that are likely to be affected. To maintain a balance, the article relies on the manner in which, and purpose for which, the parties enter into consultations. The parties must enter into consultations in good faith and must take into account each other's legitimate interests. The parties consult each other with a view to arriving at an acceptable solution regarding the measures to be adopted to prevent or 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* case[112] 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".[113] The Commission also finds the decision of the Court in the *North Sea Continental Shelf* cases (Federal Republic of Germany *v.* Denmark; Federal Republic of Germany *v.* Netherlands) 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.[114]

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 are 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 17 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 13, because a notification to other States has been made by the State of origin that an activity it intends to undertake may pose a risk of causing significant transboundary harm; or in the course of the exchange of information under article 14 or in the context of article 18 on the rights of the State likely to be affected.

(9) Article 17 has a broad scope of application. It is to apply to all issues related to preventive measures. For example, when parties notify under article 13 or exchange information under article 14 and there are ambiguities in

[112] See footnote 22 above.

[113] *Merits, I.C.J. Reports 1974*, p. 33, para. 78.

[114] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 47, para. 85.

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 19. Neither paragraph 2 of this article nor article 19 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.[115] To take account of this possibility, the article provides that the State of origin is permitted to go ahead with the activity, for the absence of such an alternative would, in effect, create a right of veto for the States likely to be affected. The State of origin, while permitted to go ahead with the activity, is still obligated to take into account the interests of the States likely to be affected. As a result of consultations, the State of origin is aware of the concerns of the States likely to be affected and is in even a better position to seriously take them into account in carrying out the activity. In addition, the State of origin conducts the activity "at its own risk". This expression is also used in article 11 (Pre-existing activities). The explanations given in paragraph (4) of the commentary to article 11 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 18. 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 17.

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, subparagraph (*a*), 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 13, 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 18 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 18, 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,[116] 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 17. 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, subparagraph (*a*), 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, subparagraph (*a*). In the former case, the parties must conduct their consultations in accordance with article 17 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.

(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

[115] See footnote 22 above.

[116] See chapter VII, footnote 257, above.

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, subparagraph (*a*). In such cases, the State of origin may be requested to pay an equitable 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 10; (*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 10, 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 13 and to provide technical information.

Article 19. 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 17, the States concerned shall take into account all relevant factors and circumstances, including:

(*a*) The degree of risk of significant transboundary harm and the availability of means of preventing 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 paragraph 2 of article 17, 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.[117]

(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 the environment. The Commission emphasizes the particular importance of protection of the environment. The Commission considers principle 15 of the Rio Declaration relevant to this subparagraph where it states:

> 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.[118]

(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 possibility that the same or comparable results may be reached by another activity with no risk, or much lower risk, of significant transboundary harm.

(8) *Subparagraph* (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 that the State of origin comply with a much higher standard of prevention than would be operative in the States likely to be affected. This factor, however, is not in itself conclusive. There may be situations in which the State of origin would be expected to apply standards of prevention to the activity that are higher than those applied in the States likely to be affected, 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 higher than those applied in a State of origin which because of its stage of development may have (and, indeed, have need of) few if any regulations on the standards of prevention. Taking into account other factors, the State of origin may have to apply its own standards of prevention which are higher than those of the States likely to be affected.

(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.

CHAPTER III. COMPENSATION OR OTHER RELIEF

General commentary

(1) As explained in the commentary to article 5, the articles on this topic do not follow the principle of "strict" or "absolute" liability as commonly known. They recognize that while these concepts are familiar and developed in the domestic law in many States and in relation to certain activities in international law, they have not yet been fully developed in international law, in respect to a larger group of activities such as those covered by article 1.[119] As in domestic law, the principle of justice and fairness as well as other social policies indicate that those who have suffered harm because of the activities of others should be

[117] *Streitsache des Landes Württemberg und des Landes Preussen gegen das Land Baden (Württemberg and Prussia* v. *Baden), betreffend die Donauversinkung*, German Staatsgerichtshof, 18 June 1927, *Entscheidungen des Reichsgerichts in Zivilsachen* (Berlin), vol. 116, appendix, pp. 18 et seq.; see also *Annual Digest of Public International Law Cases, 1927 and 1928*, A. McNair and H. Lauterpacht, eds. (London, Longmans, 1931), vol. 4, p. 131; see also *Kansas* v. *Colorado* (1907), *United States Reports*, vol. 206 (1921), p. 100, and *Washington* v. *Oregon* (1936), ibid., vol. 297 (1936), p. 517, and ILA, *Report of the Sixty-second Conference, Seoul, 1986* (London, 1987), pp. 275-278.

[118] See footnote 10 above.

[119] For the development of the concept of "strict or absolute liability" in torts in domestic law and also in international law, see the study prepared by the Secretariat entitled "Survey of liability regimes relevant to the topic of international liability for injurious consequences arising out of acts not prohibited by international law" (*Yearbook ... 1995*, vol. II (Part One), document A/CN.4/471).

compensated. (See also commentary to article 5). Thus Chapter III provides two procedures through which injured parties may seek remedies: pursuing claims in the courts of the State of origin, or through negotiations between the State of origin and the affected State or States. These two procedures are, of course, without prejudice to any other arrangements on which the parties may have agreed, or to the due exercise of the jurisdiction of the courts of the States where the injury occurred. The latter jurisdiction may exist in accordance with applicable principles of private international law: if it exists, it is not affected by the present articles.

(2) When relief is sought through the courts of the State of origin, it is in accordance with the applicable law of that State. If a remedy is sought through negotiations, article 22 sets out a number of factors which should guide the parties to reach an amicable settlement.

(3) The specification of the nature and the extent of compensation obviously rests on an initial determination that significant transboundary harm from an activity referred to in article 1 has occurred. Such a factual determination will be effected by national courts when the injured parties bring their complaints to them and by the States themselves when negotiations have been chosen as the mode for securing remedies.

(4) In these instances of State practice in which, when compensation for significant transboundary harm arising from the types of activities referred to in article 1 has been paid, it has taken a variety of forms either payment of a lump sum to the injured State, so that it may settle individual claims (normally through the application of national law), or payment directly to individual claimants. The forms of compensation prevailing in relations between States are, on the whole, similar to those existing in national law. Indeed, some conventions provide that national legislation is to govern the question of compensation. When damages are monetary, States have generally sought to select readily convertible currencies.[120]

(5) Article 7 of Chapter I on the implementation of these articles, which requires States to take legislative, administrative or other action to implement the provisions of the present articles should be interpreted, in relation to Chapter III, as including an obligation to provide victims of transboundary harm of activities conducted in their territory or otherwise under their jurisdiction or control with substantive and procedural rights to remedies.

Article 20. Non-discrimination

1. A State on the territory of which an activity referred to in article 1 is carried out shall not discriminate on the basis of nationality, residence or place of injury in granting to persons who have suffered significant transboundary harm, in accordance with its legal system, access to judicial or other procedures, or a right to claim compensation or other relief.

2. Paragraph 1 is without prejudice to any agreement between the States concerned providing for special arrangements for the protection of the interests of persons who have suffered significant transboundary harm.

Commentary

(1) This article sets out the basic principle that the State of origin is to grant access to its judicial and other procedures without discrimination on the basis of nationality, residence or the place where the damage occurred.

(2) *Paragraph 1* contains two basic elements, namely, non-discrimination on the basis of nationality or residence and non-discrimination on the basis of where the harm occurred. The rule set forth obliges States to ensure that any person, whatever his nationality or place of residence, who has suffered significant transboundary harm as a result of activities referred to in article 1 should, regardless of where the harm occurred or might occur, receive the same treatment as that afforded by the State of origin to its nationals in case of domestic harm. This obligation does not intend to affect the existing practice in some States of requiring that non-residents or aliens post a bond, as a condition of utilizing the court system, to cover court costs or other fees. Such a practice is not "discriminatory" under the article, and is taken into account by the phrase "in accordance with its legal system".

(3) Paragraph 1 also provides that the State of origin may not discriminate on the basis of the place where the damage occurred. In other words, if significant harm is caused in State A as a result of an activity referred to in article 1 in State B, State B may not bar an action on the grounds that the harm occurred outside its jurisdiction.

(4) *Paragraph 2* indicates that the rule is residual. Accordingly, States concerned may agree on the best means of providing relief to persons who have suffered significant harm, for example through a bilateral agreement. Chapter II of the articles encourages the States concerned to agree on a special regime dealing with activities with the risk of significant transboundary harm. In such arrangements, States may also provide for ways and means of protecting the interests of the persons concerned in case of significant transboundary harm. The phrase "for the protection of the interests of persons who have suffered" has been used to make it clear that the paragraph is not intended to suggest that States can decide by mutual agreement to discriminate in granting access to their judicial or other procedures or a right to compensation. The purpose of the inter-State agreement should always be the protection of the interests of the victims of the harm.

(5) Precedents for the obligation contained in this article may be found in international agreements and in recommendations of international organizations. For example, the Convention on the Protection of the Environment between Denmark, Finland, Norway and Sweden of 19 February 1974 provides as follows:

> Any person who is affected or may be affected by a nuisance caused by environmentally harmful activities in another Contracting State shall have the right to bring before the appropriate Court or Administrative Authority of that State the question of the permissibility of such activities, including the question of measures to prevent damage, and to appeal against the decision of the Court of the Administrative Authority to the same extent and on the same terms as a legal entity of the State in which the activities are being carried out.

[120] Ibid.

The provisions of the first paragraph of this article shall be equally applicable in the case of proceedings concerning compensation for damage caused by environmentally harmful activities. The question of compensation shall not be judged by rules which are less favourable to the injured party than the rules of compensation of the State in which the activities are being carried out.[121]

The OECD Council has adopted a recommendation on implementation of a regime of equal right of access and non-discrimination in relation to transfrontier pollution. Paragraph 4 (*a*) of that recommendation provides as follows:

Countries of origin should ensure that any person who has suffered transfrontier pollution damage or is exposed to a significant risk of transfrontier pollution, shall at least receive equivalent treatment to that afforded in the country of origin in cases of domestic pollution and in comparable circumstances, to persons of equivalent condition or status . . . .[122]

Article 21. Nature and extent of compensation or other relief

The State of origin and the affected State shall negotiate at the request of either party on the nature and extent of compensation or other relief for significant transboundary harm caused by an activity referred to in article 1, having regard to the factors set out in article 22 and in accordance with the principle that the victim of harm should not be left to bear the entire loss.

Commentary

(1) In addition to access to courts of the State of origin under article 20, article 21 provides for another procedure through which the nature and the extent of compensation could be determined: negotiation between the affected State and the State of origin. The article does not suggest that this procedure is necessarily to be preferred over resort to national courts. It merely recognizes that there may be circumstances in which negotiation may prove to be either the only way to obtain compensation or relief, or that, taking into account the circumstances of a particular situation, the more diplomatically appropriate one. For example, in a particular incident of transboundary harm, the affected State itself, apart from its citizens or residents, may have suffered significant harm and the States concerned may prefer to settle the matter through negotiations. There may also be situations in which it would be impractical or impossible for the injured citizens or residents of the injured State to lodge complaints in the courts of the State of origin, either because of the large number of injured persons, the procedural obstacles or because of the distance between the State of origin and the affected State, or the lack of economic means for the injured persons to pursue claims in the courts of the State of origin, or the absence of any remedies in the substantive law of the State of origin.

(2) The intention of the article is, however, to allow injured persons to undertake suits in the courts of the State of origin, and, while that procedure is pending, not to seek negotiations on those claims. At the same time, if the States concerned decide to settle the matter through negotiations, lodging complaints in the courts of the State of origin should be postponed pending the outcome of negotiations. Of course, such negotiations should provide effective remedies for the individual injured parties. The article does not intend to apply to negotiations where States, due to other bilateral arrangements, deprive, by mutual consent, injured parties from effective remedies.

(3) The article sets out two criteria on the basis of which the nature and the extent of compensation or other relief should be determined. The first criterion is in the light of a set of factors listed in article 22; the second, the principles that anyone who engages in an activity of the nature referred to in article 1, subparagraph (*a*), assumes the risk of adverse consequences as well as the benefit of the activity and, with regard to activities referred to in article 1, subparagraph (*b*), "the victim of harm should not be left to bear the entire loss". This second criterion rests on a fundamental notion of humanity that individuals who have suffered harm or injury due to the activities of others should be granted relief. It finds deep resonance in the modern principles of human rights.

(4) The principle that the victim of harm should not be left to bear the entire loss, implies that compensation or other relief may not always be full. There may be circumstances in which the victim of significant transboundary harm may have to bear some loss. The criteria in article 22 are to guide the negotiating parties when they deal with that issue.

(5) The words "nature and the extent of compensation or other relief" are intended to indicate that remedies for transboundary harm may take forms other than compensation. In State practice, in addition to monetary compensation, compensation has occasionally taken the form of removing the danger or effecting a *restitutio in integrum*. In some circumstances, the remedy of a significant transboundary harm may be the restoration of the environment. That was the case, for example, in the Palomares incident, in 1966, when nuclear bombs dropped on Spanish territory and near the coasts of Spain, following a collision between a United States nuclear bomber and a supply plane. The United States removed the causes of danger from Spain by retrieving the bombs and by removing the contaminated Spanish soil and burying it in its own territory.[123] A clean-up operation is not restitution,

[121] Similar provisions may be found in article 2, paragraph 6, of the Convention on Environmental Impact Assessment in a Transboundary Context; the Guidelines on responsibility and liability regarding transboundary water pollution, part II.B.8, prepared by the ECE Task Force on responsibility and liability regarding transboundary water pollution (document ENVWA/R.45, annex); and paragraph 6 of the Draft ECE Charter on environmental rights and obligations, prepared at a meeting of Senior Advisers to ECE Governments on Environmental and Water Problems, 25 February-1 March 1991 (document ENVWA/R.38, annex I).

[122] OECD document C(77)28 (Final), annex in *OECD and the Environment* . . . (footnote 12 above), p. 171. To the same effect is principle 14 of the "Principles of conduct in the field of the environment for the guidance of States in the conservation and harmonious utilization of natural resources shared by two or more States", adopted by the Governing Council of UNEP in 1978 (decision 6/14 of 19 May 1978) (footnote 11 above). A discussion of the principle of equal access may be found in S. Van Hoogstraten, P. Dupuy and H. Smets, "Equal right of access: Transfrontier pollution", *Environmental Policy and Law*, vol. 2, No. 2 (June, 1976), p. 77.

[123] *The New York Times*, 12 April 1966, p. 28. Also following the nuclear tests conducted in the Marshall Islands, the United States reportedly spent nearly $110 million to clear up several of the islands of the Eniwetok Atoll so that they could again become habitable (see *International Herald Tribune*, 15 June, 1982, p. 5).

but the intention and the policy behind it may make it remedial.

(6) Negotiations may be triggered at the request of either State of origin or the affected State. The article, however, does not intend to bar negotiation between the State of origin and private injured parties or negotiations between the injured parties and the operator of the activity causing the significant transboundary harm.

(7) It is the general principle of law that negotiation should be in "good faith". See the commentary to article 6, paragraphs (2) and (3), above.

(8) Some members of the Working Group felt that injured private parties should be given the choice of which of the two procedures to follow. In their view, in some circumstances, negotiation may not provide as favourable remedy as the courts of the State of origin would have produced, since a number of other bilateral issues between the two negotiating States may affect their view on this particular matter.

Article 22. Factors for negotiations

In the negotiations referred to in article 21, the States concerned shall take into account, *inter alia*, the following factors:

(*a*) In the case of activities referred to in article 1, subparagraph (*a*), the extent to which the State of origin has complied with its obligations of prevention referred to in Chapter II;

(*b*) In the case of activities referred to in article 1, subparagraph (*a*), the extent to which the State of origin has exercised due diligence in preventing or minimizing the damage;

(*c*) The extent to which the State of origin knew or had means of knowing that an activity referred to in article 1 was being or was about to be carried out in its territory or otherwise under its jurisdiction or control;

(*d*) The extent to which the State of origin benefits from the activity;

(*e*) The extent to which the affected State shares in the benefit of the activity;

(*f*) The extent to which assistance to either State is available from or has been provided by third States or international organizations;

(*g*) The extent to which compensation is reasonably available to or has been provided to injured persons, whether through proceedings in the courts of the State of origin or otherwise;

(*h*) The extent to which the law of the injured State provides for compensation or other relief for the same harm;

(*i*) The standards of protection applied in relation to a comparable activity by the affected State and in regional and international practice;

(*j*) The extent to which the State of origin has taken measures to assist the affected State in minimizing harm.

Commentary

(1) The purpose of the article is to provide guidance for the States negotiating the nature and the extent of compensation or other relief. In reaching a fair and equitable result, all relevant factors and circumstances must be weighed. The words "*inter alia*" are to indicate that the article does not purport to present an exhaustive list of factors.

(2) *Subparagraph* (a) links the relationship between Chapter II and the issue of liability for compensation, on the one hand, and the nature and extent of such compensation or other relief, on the other. It makes clear that while the obligations of prevention stipulated in Chapter II in relation to activities involving a risk of significant transboundary harm are not intended to be considered so-to-speak, hard obligations, that is their non-fulfilment would not entail State responsibility, it would certainly affect the extent of liability for compensation and the amount of such compensation or other relief. Flagrant lack of care and concern for the safety and interest of other States is contrary to the principle of good neighbourly relations. Exposing other States to risk would be an important factor in creating the expectation of who should bear liability for compensation and to what extent. If it becomes evident that had the State of origin complied with the standards for preventive measures in Chapter II, significant transboundary harm would not have occurred or, at least, not to the extent that it did, that finding could affect the extent of liability and the amount of compensation, not to speak of the conclusion that the State of origin should also provide compensation. If, however, non-compliance by the State of origin of the preventive measures proves to have had no effect on the occurrence of transboundary harm or the extent of such harm, then this factor may be irrelevant. This situation is analogous to that provided for in paragraph 2 (*c*) of article 45 of the draft articles on State responsibility which states that in order to provide full reparation, the injured State may be entitled to obtain from the wrongdoing State satisfaction which may include "in cases of gross infringement of the rights of the injured State, damages reflecting the gravity of the infringement" (see chap. III, sect. D, above).

(3) *Subparagraph* (b) provides that account should be taken of the extent to which the State of origin has exercised due diligence to prevent or minimize the damage. This factor is one other element which determines the good faith of the State of origin in exercising good neighbourliness and due diligence by demonstrating concern for the interests of other States which were negatively affected by the transboundary harm. The influence of this factor increases when the State of origin has taken such additional measures, after having already complied with the preventive measures of Chapter II.

(4) *Subparagraph* (c) sets out an important factor of notice—that is the State of origin knew or had means of knowing that an activity referred to in article 1 was being carried out in its territory, yet took no action. This factor is relevant, obviously, when the State of origin has failed to comply with the preventive measures of Chapter II and raises, as a defence, its lack of knowledge of the activity.

(5) Clearly, a State can comply with preventive measures only when it is aware of the activities that are being

conducted in its territory or otherwise under its jurisdiction or control. A State is not expected to take preventive measures in respect of a clandestine activity in its territory for which it had no means of knowing, despite all reasonable exercise of due diligence.

(6) This factor is drawn from the dictum of ICJ in the *Corfu Channel* case, where the Court found that it was the obligation of Albania to notify the existence of mines in its territorial waters, not only by virtue of the Convention Relative to the Laying of Automatic Submarine Contact Mines (The Hague Convention No. VIII of 1907), but also of "certain general and well recognized principles, namely: elementary considerations of humanity, even more enacting in peace than in war, ... and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States."[124] A failure by the State of origin to prove that it had no knowledge of the activity or had no means of knowing that such activity was being conducted in its territory, or otherwise under its jurisdiction or control, is a proof of its failure to exercise due diligence as set out in subparagraphs (*a*) and (*b*).[125]

(7) *Subparagraph* (d) and *subparagraph* (e) point to the extent to which the State of origin and the affected State are expected to share the burden for providing compensation and relief based on the benefit they themselves receive from the activity causing transboundary harm.

(8) *Subparagraph* (e) refers back to one of the elements justifying liability for compensation in case of significant transboundary harm, namely States should not externalize the cost of their progress and development by exposing other States to the risk of activities for which they alone are the direct beneficiaries. If the affected State is also a beneficiary of the activity which has caused the significant transboundary harm, taking into account other factors, particularly those involving due diligence, the affected State may be expected to share some of the costs as well. This factor is not intended to affect negatively the extent of compensation or other relief of injured private parties.

(9) *Subparagraph* (f) brings into play two elements: assistance available to the State of origin either by a third State or an international organization; and assistance available to the affected State by a third State or an international organization. As regards the former, if assistance to prevent or minimize significant transboundary harm was offered by a third State or was available through an international organization and the State of origin, simply through neglect or lack of concern for the interests of the affected State, did not take up on those opportunities, it is an indication of its failure to exercise due diligence. Regarding the latter, the affected State is also expected to be vigilant in minimizing harm to itself, even when caused by an activity outside its territory. Therefore, when opportunities to mitigate damages are available to the affected State by an offer from a third State or are available through an international organization and the affected State does not take advantage of such opportunities, it too fails to meet the due diligence standards. If, on the other hand, the affected State receives such assistance, the extent of such assistance could be relevant in the determination of the extent and the amount of compensation or other relief.

(10) *Subparagraph* (g) takes into account two possibilities: first, negotiations may take place before the private injured parties pursue claims in the courts of the State of origin or through negotiation with the operator of the activity that caused the transboundary harm; or such negotiations may take place during or after such procedures have been completed. In either case, this factor is relevant in determining whether the injured parties have been or will be given fair compensation or other relief.

(11) *Subparagraph* (h) points to one of the elements in determining the validity of the expectations of the parties involved in transboundary harm with respect to compensation and other relief. The extent to which the law of the affected State provides compensation for certain specific types of harm is relevant in assessing the validity of expectation of compensation for a particular harm. If an injured person in the affected State would have had no possible action under the law of the affected State, one cannot conclude that the affected State views such harm as non-compensable. A contextual examination of the law is required in order to determine whether other Government procedures provide a functional equivalent. The point is that harm should be compensated. It should not lead to "windfalls". On the other hand, the law of the affected State may also provide compensation for a much larger category of harm and or at a level substantially higher than that provided for in the law of the State of origin. These comparative issues should be taken into account in negotiation between States.

(12) *Subparagraph* (i) also points to the shared expectation of the parties involved in a significant transboundary harm as well as to the exercise of due diligence and good neighbourliness. If, notwithstanding the preventive measures of Chapter II, the standard of protection applied in the conduct of the same or similar activities in the injured State was substantially less than that applied by the State of origin in respect of the activity causing the transboundary harm, it would not be persuasive if the affected State were to complain that the State of origin did not meet appropriate standard of due diligence. Similarly, if the State of origin can demonstrate that its standards of protection are comparable with those at the regional or international level, it would have a better defence to accusations of breach of due diligence.

(13) *Subparagraph* (j) is relevant in determining the extent to which the State of origin exercised due diligence and good neighbourliness. In certain circumstances the State of origin might be in a better position to assist the affected State to mitigate harm due to its knowledge of the source and the cause of transboundary harm. Such assistance, therefore, should be encouraged, since the primary objective is to prevent or minimize harm.[126]

[124] See footnote 5 above.

[125] In the *Corfu Channel* case, ICJ found that no attempt had been made by Albania to prevent the disaster and it therefore held Albania "responsible under international law for the explosion ... and for the damage and loss of human life ..." (ibid.), p. 36.

[126] For example, in 1972, in the Cherry Point incident, the "*World Bond*", a tanker registered in Liberia, leaked 12,000 gallons of crude oil into the sea while unloading at the refinery of the Atlantic Richfield Corporation, at Cherry Point, in the State of Washington. The oil spread to Canadian waters and befouled five miles of beaches in British Columbia. Prompt action was taken both by the refinery and by the authorities on either side of the frontier to contain and limit the damage, so that injury to Canadian waters and shorelines could be minimized (see footnote 72 above).