

Chapter VIII

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

A. Introduction

664. At its forty-ninth session, in 1997, the Commission decided to proceed with its work on the topic “International liability for injurious consequences arising out of acts not prohibited by international law”, dealing first with the issue of prevention under the subtitle “Prevention of transboundary damage from hazardous activities”.³⁴⁴ The General Assembly took note of this decision in paragraph 7 of its resolution 52/156 of 15 December 1997.

665. At the same session, the Commission appointed Mr. Pemmaraju Sreenivasa Rao Special Rapporteur for this part of the topic.³⁴⁵

666. At its fiftieth session, in 1998, the Commission had before it the first report of the Special Rapporteur.³⁴⁶ The report reviewed the Commission’s work on the topic of international liability for injurious consequences arising out of acts not prohibited by international law since it was first placed on the agenda at the thirtieth session, in 1978, focusing in particular on the question of the scope of the draft articles to be elaborated.³⁴⁷ This was followed by an analysis of the procedural and substantive obligations which the general duty of prevention entailed. Having agreed on the general orientation of the topic, the Commission established a Working Group to review the draft articles recommended by the Working Group at the forty-eighth session in the light of the Commission’s decision to focus first on the question of prevention.³⁴⁸

667. Also at its fiftieth session, the Commission referred to the Drafting Committee the draft articles proposed by the Special Rapporteur on the basis of the discussions held in the Working Group.³⁴⁹

668. The Commission considered the report of the Drafting Committee and adopted on first reading a set

of 17 draft articles on prevention of transboundary damage from hazardous activities.³⁵⁰

669. Also at the same session, the Commission decided, in accordance with articles 16 and 21 of its statute, to transmit the draft articles, through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2000.

670. At its fifty-first session, in 1999, the Commission had before it the second report of the Special Rapporteur,³⁵¹ which dealt, inter alia, with the nature of the obligation of prevention; the eventual form of the draft articles; dispute settlement procedures; the salient features of the concept of due diligence and its implementation; the treatment of the concept of international liability in the Commission since the topic was placed on its agenda as well as negotiations on liability issues in other international forums; and the future course of action on the question of liability.

671. Also at that session, the Commission considered the second report of the Special Rapporteur and decided to defer consideration of the question of international liability, pending completion of the second reading of the draft articles on the prevention of transboundary damage from hazardous activities.

B. Consideration of the topic at the present session

672. At the present session, the Commission had before it the report of the Secretary-General containing the comments and observations received from Governments (A/CN.4/509) on the topic.

673. At its 2612th meeting, on 1 May 2000, the Commission decided to establish a Working Group on the topic. The Working Group held five meetings from 8 to 15 May. The Commission considered the oral report of the Chairman of the Working Group at its 2628th meeting, on 26 May.

674. The Commission also had before it the third report of the Special Rapporteur (A/CN.4/510). The Commission considered the report at its 2641st to 2643rd meetings, from 18 to 20 July 2000.

³⁴⁴ *Yearbook* . . . 1997, vol. II (Part Two), p. 59, para. 168.

³⁴⁵ *Ibid.*

³⁴⁶ *Yearbook* . . . 1998, vol. II (Part One), document A/CN.4/487 and Add.1.

³⁴⁷ At that session the Commission established a working group to consider, in a preliminary manner, the scope and nature of the topic, and to report to it thereon. For the report of the Working Group see *Yearbook* . . . 1978, vol. II (Part Two), pp. 150–152.

³⁴⁸ On the basis of the Working Group’s discussions, the Special Rapporteur proposed a revised text for the draft articles (*Yearbook* . . . 1998, vol. II (Part Two), pp. 19–21, footnote 12).

³⁴⁹ See *Yearbook* . . . 1998, vol. I, 2542nd meeting.

³⁵⁰ See *Yearbook* . . . 1998, vol. II (Part Two), pp. 21–23, para. 55.

³⁵¹ *Yearbook* . . . 1999, vol. II (Part One), document A/CN.4/501.

1. INTRODUCTION BY THE SPECIAL RAPPORTEUR
OF HIS THIRD REPORT

675. In his introduction of the draft articles on prevention of transboundary damage from hazardous activities,³⁵² the Special Rapporteur noted that they essentially constituted progressive development on the topic, for no one set of universally accepted procedures was applicable in the sphere of prevention. His work, and that of the Commission, was guided by the need to evolve procedures enabling States to act in a concerted manner rather than in isolation.

676. One question that had arisen during consideration of the draft articles in the Sixth Committee was whether the duty of due diligence was in any way diluted by the requirement for States to negotiate a regime taking account of an equitable balance of interests where a risk of significant transboundary harm existed. As was indicated in the third report, the Special Rapporteur's view was that article 12 adopted on first reading merely defined the obligation in a mutually acceptable manner and only facilitated identifying and defining that obligation.

677. The most important point addressed in the third report was the question whether the Commission still needed to address the subtopic of prevention of transboundary damage from hazardous activities within the broader categorization of "acts not prohibited by international law".

678. The question was dealt with in chapter V of the third report. While State responsibility dealt with wrongful acts, international liability dealt with compensation for damage arising out of acts which were not necessarily prohibited by international law. Furthermore, prevention was essentially a question of the management of risk. The phrase "acts not prohibited by international law", originally intended to distinguish these activities from those covered by the topic of State responsibility, might not be necessary or, indeed, appropriate to define the scope of the regime on prevention. However, the concept could not be dispensed with easily. There was concern that if it was not emphasized that the activity was not prohibited, it could arguably be prohibited as a result of the failure of due diligence obligations. On this point the Special Rapporteur noted that none of the authorities he had surveyed had indicated that non-compliance with the obligation of due diligence made the activity itself prohibited. It did, however, give rise to a right of consultation between those who were likely to be affected and those who were promoting the activity, which was built into the entire concept of due diligence. In his opinion, deleting the reference to the words "acts not prohibited by international law" might not create further problems, and might even secure a greater consensus for the draft articles.

679. The Special Rapporteur indicated that in chapter IV he had sought to address the great concern expressed by a number of States that by emphasizing the principle of prevention in isolation, rather than linking it to international cooperation, capacity-building and the broader

themes of sustainable development, States would be discouraged from adopting the regime.

680. In order to encourage a broader consensus on the draft articles, the Special Rapporteur was of the view that necessary attention be paid to this concern in the preamble.

681. The Special Rapporteur indicated that some of the draft articles adopted on first reading had been changed, though these modifications were mainly of a drafting nature.

682. As regards article 2, he noted that subparagraph (a) had been redrafted in the light of comments made, so as to eliminate possible confusion because of the conjunction "and" used in the version adopted on first reading. The idea that the risk involved for the purpose of the draft articles was within a particular range from a high probability to a low probability of causing significant harm had been made more explicit. Subparagraph (f) was new, but it had been deemed necessary because of the frequent occurrence of the term "States concerned" in the draft articles.

683. The only change made to article 4 was the insertion of the word "competent" in order to highlight that not all international organizations in general were involved.

684. In relation to article 6, he noted that paragraph 1 was a redrafted version of the principle of prior authorization, but that the changes introduced were of a purely drafting nature in the light of comments made. Although the changes made to paragraph 2 were also essentially of a drafting nature, he felt that the provision could still face problems in its implementation with respect to acquired rights and foreign investment which could even lead to international claims. However, those were matters which should be sorted out by States in accordance with domestic law requirements and their international obligations.

685. Article 7 now contained the word "environmental" in the title and emphasized that any assessment of the environmental impact must, in particular, be based on the transboundary harm likely to be caused by the hazardous activity.

686. Article 8 simply introduced the term "States concerned", so as to indicate that both the State of origin and the States likely to be affected had a duty to provide their public with relevant information relating to the hazardous activity.

687. Article 9, without attempting to alter the substance of the previous article, brought out the requirement of suspending any final decision on prior authorization of the hazardous activity until a response from the States likely to be affected was received within a reasonable time, which in any case should not exceed a period of six months.

688. Article 10 left it open to States concerned to fix the time-frame for the duration of the consultations. A new paragraph had been added to the revised article, reproducing paragraph 3 of article 13 as adopted on first reading with only one change. The provision inserted in the article emphasized that the State of origin might agree to suspend

³⁵² The draft preamble and revised draft articles 1 to 19, as proposed by the Special Rapporteur, are reproduced in paragraph 721 below.

the activity in question for a reasonable period of time instead of the period of six months which had been suggested under the prior drafting. Moving that paragraph was considered necessary as reference to article 10 was made under article 12. The procedure to be followed would be the same, even if it was initiated at the request of States likely to be affected, but in that case, to the extent that it was applicable, such a procedure would have to deal with operations already authorized by the State of origin and in progress.

689. The text of articles 11, 12, 13, 15 and 19 corresponded to that of articles 12, 13,³⁵³ 14, 16 and 17 as adopted on first reading. Article 14 now included the words “or concerning intellectual property”.

690. New articles 16 and 17 had been added in response to suggestions made by States. Their addition in the framework of prevention had been considered justified since contingency measures or measures of preparedness were required to be put in place by every State as a measure of prevention or precaution. The content of these articles was essentially based on similar articles contained in the Convention on the Law of the Non-Navigational Uses of International Watercourses. Article 18 reproduced the text of article 6 as adopted on first reading and had been moved in the interest of better presentation.

691. As regards the preamble he proposed, the Special Rapporteur noted that it was essential in order to accommodate, at least partially, the views of several States which had emphasized the right to development, a balanced approach to deal with the environment and development, the importance of international cooperation and the limits to freedom of States. They were ideas which pervaded the draft articles, and it was hoped that such a preamble, rather than specific articles dealing with those principles, would offer a reasonable basis for most States to accept the set of articles proposed. Such a preamble was also appropriate to a framework convention, which was the form in which the articles could be recommended for adoption.

2. SUMMARY OF THE DEBATE

692. The Commission commended the Special Rapporteur for his revised version of the draft articles which took into account the various comments made by States and most members were of the view that the draft articles were ready for adoption.

693. The point was made that there was some difficulty with the emphasis, particularly in paragraphs 18 to 49 of the second report,³⁵⁴ on the duty of due diligence. Caution was needed, since reliance on that concept could create the very confusion with issues of State responsibility that the Special Rapporteur was trying to avoid. The point was also made that that reference to due diligence carried the implication that the draft would not apply to intentional or reckless conduct.

694. For his part, the Special Rapporteur noted that if a State undertook an activity that risked causing transboundary harm, it was expected to make the necessary assessments, arrange authorization and subsequently review the project to ensure that it conformed to a certain standard. The element of *dolus* or the intention or legality of the activity was not relevant to the purposes of the draft articles. If the activity was prohibited, other consequences would inevitably ensue and a State continuing such activity would have to take full responsibility for the consequences. Deleting the phrase “activities not prohibited by international law” would therefore make little difference, if the activities were illegal and were seen as such by States. In his view, the draft articles were concerned rather with mismanagement and the need for vigilance by all the States involved.

695. In relation to the legal nature of the principles, it was stated that the draft articles were a self-contained set of primary rules on risk management or prevention, and the work on the topic mainly entailed primary obligations of due diligence in essentially procedural form. The future convention would be without prejudice to higher standards and more specific obligations under other environmental treaties. The reference to customary international law in article 18 should be construed as relating solely to obligations under customary international law, not to the freedom of action. Non-compliance with the future convention would entail State responsibility unless procedures were developed as *leges speciales* under treaties on specific cases of pollution. The draft articles therefore did not overlap with State responsibility.

696. Regarding the scope of the draft articles, the Special Rapporteur expressed that they would cover all activities, including military ones, if they caused transboundary harm, assuming that they were fully permissible under international law. The articles on prevention would also apply to cases where there was no agreement or clear legal prescription that the activity involved was prohibited.

697. It was suggested that the draft articles could be revised in order to incorporate new developments in international environmental law, with a special emphasis on the precautionary principle and on issues relating to impact studies and, possibly, on the prevention of disputes.

698. In relation to the preamble proposed by the Special Rapporteur, the point was made that it would be very important to include references to positive international law, since there was a series of conventions that contained provisions with a direct bearing on the draft articles. Another observation made to the preamble was that it came down too heavily on the side of freedom of action. Mention might also be made of the obligation under general international law to look after the territory of one's neighbour: *sic utere tuo ut alienum non laedas*.

699. The view was expressed that the principle in the fifth preambular paragraph merited being placed in an article in view of its importance.

700. There were divergent views as to the deletion of the phrase “activities not prohibited by international law”. In this connection, a proposal was made to refer, in ar-

³⁵³ With the exception of the removal of paragraph 3.

³⁵⁴ See footnote 351 above.

ticle 1, to obligations to prevent significant risks irrespective of whether the activities in question were or were not prohibited by international law. If an obligation was imposed because a significant risk was involved, why should it matter whether the activity was prohibited, and for reasons which might be totally unrelated to the risk? An activity might be prohibited under international law but not necessarily in relation to the State which might suffer the harm. Why should an obligation undertaken towards third States have an influence on the application of the draft articles? Why should it be important that a treaty existed between the State of origin and a third State when it came to procedures designed to prevent significant harm being caused to another State?

701. It was noted that by deleting the words “activities not prohibited by international law”, there might be a need to review the entire text. One such example was article 6, wherein a new fourth paragraph might be inserted to indicate that illegal activities, prohibited by international law, could not be authorized.

702. In relation to the application of the duty of prevention to prohibited activities, it was stated that a distinction had to be drawn between activities prohibited under international environmental law and those prohibited by entirely different rules of international law such as those on disarmament.

703. For his part, the Special Rapporteur felt that the deletion of the phrase “activities not prohibited by international law” would not make it imperative to review the provisions of the draft articles. If an activity was illegal, the draft articles ceased to apply; it became a matter of State responsibility.

704. Those members who favoured retention of the phrase “activities not prohibited by international law” indicated that by deleting said phrase, the Commission would broaden the scope of the draft articles and would thus require the approval by States in the Sixth Committee. Furthermore, the effect of the recommendation in paragraph 33 of the third report of the Special Rapporteur might be to weaken the notion of prohibition. It was questioned whether States engaging in prohibited activities would notify other countries concerned, even if they were aware that their activities could cause harm. Additional arguments for retaining the phrase included: the need for a link between the rules governing the duty of prevention and those governing the matter of international liability as a whole; the use of the phrase released a potential victim from any necessity to prove that the loss arose out of wrongful or unlawful conduct; maintaining the legal distinction between the topics of State responsibility and international liability.

705. The view was also expressed that the proposed deletion would be tantamount to legitimizing prohibited activities, which would not be acceptable.

706. For his part, the Special Rapporteur recalled that, in considering various drafts over the years, the Commission had concentrated not on the nature of various activities but on the content of prevention. Some members maintained that by retaining the phrase “activities not prohibited by international law” there was a danger of distracting the reader from the content of prevention by dis-

cussing which activities were prohibited and which were not. In order to avoid such a needless debate, he had made the recommendation contained in paragraph 33 of his third report, with which he had attempted to reassure those who were concerned about retaining the phrase “activities not prohibited by international law”. Such activities would, however, still have to be subject to the provisions of articles 10, 11 and 12. If, on the other hand, an activity was clearly prohibited by international law, it was not for the draft articles to deal with the consequences.

707. With regard to article 3, the view was expressed that the definition of the obligation of prevention should be dealt with in a separate article.

708. As regards articles 6 and 11, the redrafting was advocated so as to provide that authorization was required for any kind of activity falling within the scope of those draft articles. The question was not whether an act was prohibited but whether it would involve a breach of an obligation by the State of origin to the State where the harmful consequences of an activity would be felt.

709. In relation to the question of harm caused to areas beyond national jurisdiction or to the global commons, the view was expressed that, although it would be difficult to cover that question at the present stage, the Commission could show that it was aware of the issue by making a reference to it in the preamble or in a “without prejudice” provision.

710. The point was made that at the core of the draft articles was the triggering for the State of origin of a duty of notification and consultation. Under article 9, the obligation to notify arose only when the State of origin had made an assessment that significant risk was involved. Although under article 7, the State of origin had an obligation to make such an assessment in the case of possible transboundary harm, it might be inclined not to carry out the assessment very thoroughly—partly because, if a risk of significant harm was detected, then further obligations would arise. The draft thus gave an incentive to the State of origin not to do precisely what was intended, namely, to give advance notice when there was a risk of significant harm.

711. As regards article 10 and the obligations incumbent on the State concerned once the risk of significant harm had been assessed, the point was made that it could be suggested that States consider the possibility of establishing a joint monitoring body to be entrusted with activities such as ensuring that the level of risk did not substantially increase and that contingency plans were properly prepared.

712. In relation to article 16, the view was expressed that the phrase “where appropriate” could be deleted since it afforded States an escape clause that was both dangerous and useless.

713. As regards article 19, paragraph 2, it was pointed out that the provision contained omissions which could be overcome by drawing inspiration from article 33 of the Convention on the Law of the Non-Navigational Uses of International Watercourses.

714. As regards the final form to be given to the draft articles, the Commission concurred with the Special Rapporteur that a framework convention would be appropriate.

3. SPECIAL RAPPORTEUR'S CONCLUDING REMARKS

715. As regards the proposal to revise the draft articles in order to incorporate the new developments in the field of international environmental law, the Special Rapporteur recalled that the draft articles as adopted on first reading had proved acceptable to most States and therefore he recommended that the Commission retain the scope of the articles within manageable proportions, for otherwise there was a risk that work on the topic would be protracted even more.

716. Concerning the suggestion that the issue of the precautionary principle be addressed in the draft articles, the Special Rapporteur pointed out that, in his view, the precautionary principle was already included in the principles of prevention and prior authorization, and in the environmental impact assessment, and could not be divorced therefrom.

717. The Special Rapporteur noted that the division of opinion within the Commission over whether to remove or retain the reference in article 1 to "activities not prohibited by international law" was roughly equal. Whether it was retained or not, the real purpose of the article was risk management and to encourage States of origin and States likely to be affected to come together and consult among themselves. Emphasizing the obligation to consult at the earliest possible stage was the main value of the draft.

718. Concerning the question as to whether direct reference should be made within the terms of article 3 to the concept of due diligence, the Special Rapporteur was of the opinion that "all appropriate measures" and "due diligence" were synonymous and that the former was more flexible and less likely to create confusion than inserting a reference to the latter.

719. As for the settlement of disputes, he indicated that since article 19 had generally met with the approval of Governments, he proposed its retention without any changes.

720. The Special Rapporteur felt that a number of other suggestions made by the members of the Commission could be dealt with in the context of the Drafting Committee and he therefore recommended that the draft articles be referred to the Committee.

721. At its 2643rd meeting, on 20 July 2000, the Commission agreed to refer the draft preamble and revised draft articles 1 to 19, as proposed by the Special Rapporteur, to the Drafting Committee, the text of which is reproduced below.³⁵⁵

³⁵⁵ See the annex to the third report. Changes to the text adopted on first reading have been indicated in bold or strikeout.

PREVENTION OF SIGNIFICANT TRANSBOUNDARY HARM

The General Assembly,

Bearing in mind Article 13, paragraph 1 (a), of the Charter of the United Nations,

Recalling its resolution 1803 (XVII) of 14 December 1962, containing the Declaration on Permanent Sovereignty over Natural Resources,

Recalling also its resolution 41/128 of 4 December 1986, containing the Declaration on the Right to Development,

Recalling further the Rio Declaration on Environment and Development of 13 June 1992,³⁵⁶

Bearing in mind that the freedom of States to carry on or permit activities in their territory or otherwise under their jurisdiction or control is not unlimited,

Recognizing the importance of promoting international cooperation,

Expressing its deep appreciation to the International Law Commission for its valuable work on the topic of the prevention of significant transboundary harm,

Adopts the Convention on the Prevention of Significant Transboundary Harm, annexed to the present resolution;

Invites States and regional economic integration organizations to become parties to the Convention.

CONVENTION ON THE PREVENTION OF SIGNIFICANT TRANSBOUNDARY HARM

Article 1. Activities to which the present draft articles apply

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

Article 2. Use of terms

For the purposes of the present articles:

(a) "Risk of causing significant transboundary harm" means such a risk ranging from a high probability of causing significant harm to a low probability of causing disastrous harm ~~encompasses a low probability of causing disastrous harm and a high probability of causing other significant harm;~~

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

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

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

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

(f) "**States concerned**" means the State of origin and the States likely to be affected.

Article 3. Prevention

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

³⁵⁶ Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992 (United Nations publication, Sales No. E.93.I.8 and corrigenda), vol. I: *Resolutions adopted by the Conference*, resolution 1, annex I.

Article 4. Cooperation

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

Article 5. Implementation

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

Article 6 [7].³⁵⁷ Authorization

1. The prior authorization of a State of origin shall be required for:

(a) All activities within the scope of the present draft articles carried out in the territory or otherwise under the jurisdiction or control of a State;

(b) Any major change in an activity referred to in subparagraph (a);

(c) A plan to change an activity which may transform it into one falling within the scope of the present draft articles.

2. The requirement of authorization established by a State shall be made applicable in respect of all pre-existing activities within the scope of the present draft articles. **Authorizations already issued by the State for pre-existing activities shall be reviewed in order to comply with the present draft articles.**

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

Article 7 [8]. Environmental impact assessment

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

Article 8 [9]. Information to the public

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

Article 9 [10]. Notification and information

1. If the assessment referred to in article 7 [8] indicates a risk of causing significant transboundary harm, the State of origin shall, ~~pending any decision on the authorization of the activity~~, provide the States likely to be affected with timely notification of the risk and the assessment and shall transmit to them the available technical and all other relevant information on which the assessment is based.

2. The State of origin shall not take any decision on prior authorization of the activity pending the receipt, within a reasonable time and in any case within a period of six months, of the response from the States likely to be affected.

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

Article 10 [11]. Consultations on preventive measures

1. The States concerned shall enter into consultations, at the request of any of them, with a view to achieving acceptable solutions

³⁵⁷ Article 6 has been moved towards the end of the draft articles and the remaining draft articles have been renumbered accordingly. The previous number of the draft articles appears in square brackets.

regarding measures to be adopted in order to prevent, or to minimize the risk of, significant transboundary harm. **The States concerned shall agree, at the commencement of such consultations, on a reasonable time-frame for the duration of the consultations.**

2. The States **concerned** shall seek solutions based on an equitable balance of interests in the light of article 11 [12].

2 bis. **During the course of the consultations, the State of origin shall, if so requested by the other States, arrange to introduce appropriate and feasible measures to minimize the risk and, where appropriate, to suspend the activity in question for a reasonable period of six months unless otherwise agreed.**³⁵⁸

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 in case it decides to authorize the activity to be pursued, without prejudice to the rights of any State likely to be affected.

Article 11 [12]. Factors involved in an equitable balance of interests

In order to achieve an equitable balance of interests as referred to in paragraph 2 of article 10 [11], the States concerned shall take into account all relevant factors and circumstances, including:

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

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

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

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

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

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

Article 12 [13]. Procedures in the absence of notification

1. If a State has reasonable grounds to believe that an activity planned or carried out in the ~~State of origin territory or otherwise under the jurisdiction or control of another State~~ may have a risk of causing significant transboundary harm, the former State may request the latter to apply the provision of article 9 [10]. The request shall be accompanied by a documented explanation setting forth its grounds.

2. In the event that the State of origin nevertheless finds that it is not under an obligation to provide a notification under article 9 [10], it shall so inform the other State within a reasonable time, providing a documented explanation setting forth the reasons for such finding. If this finding does not satisfy the other State, the two States shall, at the request of that other State, promptly enter into consultations in the manner indicated in article 10 [11].

~~3. During the course of the consultations, the State of origin shall, if so requested by the other State, arrange to introduce appropriate and feasible measures to minimize the risk and, where appropriate, to suspend the activity in question for a period of six months unless otherwise agreed.~~³⁵⁹

³⁵⁸ Former article 13, paragraph 3, with the addition of the term "reasonable".

³⁵⁹ This paragraph has been moved to article 10 [11], paragraph 2 bis.

Article 13 [14]. Exchange of information

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

Article 14 [15]. 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 **or concerning intellectual property** 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 15 [16]. Non-discrimination

Unless the States concerned have agreed otherwise for the protection of the interests of persons, natural or juridical, who may be or are exposed to the risk of significant transboundary harm as a result of activities within the scope of the present draft articles, a State shall not discriminate on the basis of nationality or residence or place where the injury might occur, in granting to such persons, in accordance with its legal system, access to judicial or other procedures to seek protection or other appropriate redress.

Article 16. Emergency preparedness

States of origin shall develop contingency plans for responding to emergencies, in cooperation, where appropriate, with other States likely to be affected and competent international organizations.

Article 17. Notification of an emergency

States of origin shall, without delay and by the most expeditious means available, notify ~~other~~ States likely to be affected by an emergency concerning an activity within the scope of the present draft articles.

Article 18 [6]. Relationship to other rules of international law

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

Article 19 [17]. Settlement of disputes

1. Any dispute concerning the interpretation or application of the present draft articles shall be settled expeditiously through peaceful means of settlement chosen by mutual agreement of the parties, including submission of the dispute to mediation, conciliation, arbitration or judicial settlement.

2. Failing an agreement in this regard within a period of six months, the parties concerned shall, at the request of one of them, have recourse to the appointment of an independent and impartial fact-finding commission. The report of the commission shall be considered by the parties in good faith.