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

Proposal by the Special Rapporteur

1. At its 2531st meeting, on 15 May 1998, the Commission decided to convene a Working Group to assist the Special Rapporteur in his review of draft articles 3 to 22 adopted by the Working Group in 1996,<sup>1</sup> taking into account the Commission's decision 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".<sup>2</sup> The purpose of such review, inter alia, was to ascertain whether the draft articles require any adjustment, addition or amendment in the light of the scope of the topic and the various principles and procedures that the duty of prevention entails.

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<sup>1</sup>Official Records of the General Assembly, Fifty-first session, Supplement No. 10 (A/51/10), annex I.

<sup>2</sup>Ibid., Fifty-second session, Supplement No. 10 (A/52/10), para. 168.

2. As a result of the discussion in the Working Group, the Special Rapporteur submits to the Commission the following proposal:

[Article 3]

[Freedom of action and the limits thereto]

[deleted]

Article 3[4]\*

Prevention

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

Article 5

Liability

[deleted]

Article 4[6]

Cooperation

States concerned shall cooperate in good faith and as necessary seek the assistance of any international organization in preventing, and minimizing the risk of, significant transboundary harm.

Article 5[7]

Implementation

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

Article 6[8]

Relationship to other rules of international law

Obligations arising from the present articles are without prejudice to any other obligations incurred by States under relevant treaties or principles of international law. 3/

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\* The number within square brackets indicates the number of the corresponding article proposed by the Working Group in 1996.

3/ Consideration of this article should be suspended until a decision is taken on the form of the draft articles.

Article 7[9]

Prior authorization

1. The prior authorization of a State is required for activities within the scope of the present articles carried out in its territory or otherwise under its jurisdiction or control. Such authorization shall also be required in case a major change is planned which may transform an activity into one falling within the scope of the present articles.
2. The requirement of prior authorization established by a State under paragraph 1 shall be made applicable in respect of all pre-existing activities within the scope of the present articles.<sup>4</sup>

Article 8[10]

Impact assessment

1. Any decision in respect of the authorization of an activity within the scope of the present articles shall be based on an evaluation of the possible adverse impact of that activity on persons, property as well as on the environment of other States.
2. States shall, by such means as are appropriate, provide the public likely to be affected by an activity within the scope of the present articles with relevant information relating to that activity, the risk involved and the harm which might result and ascertain their views.<sup>5</sup>

Article 11<sup>6</sup>

Pre-existing activities

Article 12

Non-transference of risk

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<sup>4</sup> Paragraph 2 reflects the content of deleted article 11 (Pre-existing activities).

<sup>5</sup> Paragraph 2 reflects the content of deleted article 15 (Information to the public).

<sup>6</sup> The content of article 11 is reflected in article 7[9], paragraph 2.

Article 9[13]

Notification and information

1. If the assessment referred to in article 8[10] 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 thereof and shall transmit to them the available technical and other relevant information on which the assessment is based.
2. The response from the States likely to be affected shall be provided within a reasonable time.

Article 10[17]

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 regarding measures to be adopted in order to prevent, and minimize the risk of, causing significant transboundary harm.
2. States shall seek solutions based on an equitable balance of interests in the light of article 11[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 in case it decides to authorize the activity to be pursued at its own risk, without prejudice to the rights of any State likely to be affected.

Article 11[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 10[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 such harm and minimizing the risk thereof 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 such harm and minimizing the risk thereof 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.

#### Article 12[18]

##### Procedures in the absence of notification

1. If a State has reasonable grounds to believe that an activity planned or carried out in the 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[13]. 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[13], it shall so inform the other State, 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[17].

3. During the course of the consultations, the State of origin shall, if so requested by the other State, arrange to suspend the activity in question for a period of six months unless otherwise agreed.

Article 13[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, and minimizing the risk of causing, significant transboundary harm.

Article 15<sup>7</sup>

Information to the public

Article 14[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 15[20]

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 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 21

Nature and extent of compensation or other relief

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<sup>7</sup> The content of article 15 is reflected in article 8[10], paragraph 2.

Article 22

Factors for negotiations

[deleted]

Article 16

Settlement of disputes

Any difference or dispute concerning the interpretation or application of the present articles shall be settled expeditiously by mutual agreement through such peaceful means of settlement chosen by the parties, inter alia, submission of the dispute to arbitration or judicial settlement. Failing an agreement in this regard within a period of six months, the parties concerned shall, at the request of any of them, have recourse to the appointment of an independent and impartial fact-finding commission. The report of the commission shall be recommendatory in nature and shall be considered by the parties in good faith.

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