legal obligations owed to other States with respect to transboundary harm and with the general obligations with respect to preventing or minimizing the risk of causing transboundary harm. The Secretariat of the AALCC is of the view that this provision manifests a fair balance between the interests and rights of the sovereign State to act freely within its territory on the one hand and the inviolability of the territories of other States from adverse effects of activities undertaken in the territory of another State on the other hand. The stipulation needs to be read as an element of good neighbourly relations.

Draft article 4 entitled " Prevention requires States parties to take all appropriate measures. to prevent or minimize the risk of significant transboundary harm from activities not prohibited by international law and if such harm has occurred to minimize its effects. The provision sets out the specific obligation of States to prevent or minimize significant transboundary harm as a statement of principle. The provisions of this article together with that of draft article 6 (on cooperation) furnish the basic foundation for the provisions on prevention.

Draft article 5 addressed to liability applies both to activities involving risk, as defined in draft article 1 (a), and those which cause harm even though the risk that they would cause harm was not appreciated earlier i.e. draft article 1(b). It stipulates a general principle that liability to make compensation or provide other relief may arise from significant transboundary harm caused by activities to which article 1 applies. The basic principle is qualified, however, by the opening phrase "in accordance with the present articles". The extent to which the draft article may give rise to compensation or other relief would be determined in accordance with the provisions of Chapter III of the draft articles.

Draft article 6 spells out the essential principle of cooperation and provides that States shall cooperate in good faith and 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 the affected States and the States of origin. It would have been observed that this provision envisages cooperation among 3 categories of personae viz. the State

of origin, the affected State or States and international organizations. Such cooperation is contemplated both in the prevention and mitigation of significant transboundary harm.

Draft article 7 on implementation requires States to take the necessary measures of implementation, whether of a legislative, administrative or other character. It has been included to emphasize the continuing character of the provisions which require actions to be taken from time to time to prevent or minimize transboundary harm arising from ictivities to which the articles apply. It has also been included to provide for liability in certain cases where significant transboundary harm should occur. Thus, in relation to Chapter III of the present draft articles this provision should be interpreted 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.

Draft article 8 on the relationship -to other rules of international Law signifies the residual character of these draft articles. The stipulation clarifies that the present articles are without prejudice to the existence or operation of any other rule of international law relating to an act or ommission to which these articles might otherwise be thought to apply.

Draft article 9 entitled 'Prior authorization' sets out the first supervisory function and responsibility of a state in respect of activities involving a risk of causing significant transboundary harm and requires the prior authorizaion of the State within whose territory or jurisdiction or control they are conducted. Such prior authorization is also required to be obtained in the event that a major modification or change in the activity is planned and which may transform an activity into one involving a risk of causing significant transboundary harm.

This formulation is in effect a modified version of the opening sentence on the preventive measures that the Special Rapporteur had proposed in his eighth report. It would have been observed that the stipulation relating to prior authorization, does not provide

or envisage the periodic renewal of the authorization or the possibility or even the obligation to withdraw it in certain cases. Consideration should be given to the issue of expanding the scope of the provision to cover periodic review and renewal of authorization of activities involving risk.

Draft article 10 on Risk Assessment stipulates that a State shall ensure that an assessment is undertaken of the risk of the activity causing significant transboundary harm before taking a decision to authorize an activity which though not prohibited by international law creates a risk of causing transboundary harm. It is further provided that such an assessment should include an evaluation of the possible impact of that activity on persons or property as well as on the environment of other States.

It may be recalled that the Special Rapporteur had last year explained that assessment did not require that there must be certainty that a particular activity would cause significant transboundary harm, but only certainty that a significant risk of such a harm existed. Opinion was divided concerning this provision with some members believing that it was the State itself which should make the assessment, and others arguing that it was the duty of the operator to undertake such assessment. The Commission, however, feels that as these articles are designed to have global application, they cannot be too detailed and that they should contain only what is necessary for clarity.

The subject matter of the draft article on risk assessment and, the requirements of exchange of information and consultation covered by articles 15, 16 and 18 are closely linked and must be read together. All are geared to an objective which is very important for the purposes of an effective prevention regime, namely encouraging the participation of the State presumed to be affected so that it can help to ensure that the activity is carried out more safely in the State of origin and at its own territory to prevent or minimize the transboundary impact.

The requirement of environmental impact assessment plays an important role, and is compatible with Principle of the Rio Declaration on Environment and Development which likewise provides for impact assessment of activities that are likely to have a significant adverse impact on the environments. The draft article leaves open the question of who should

conduct the assessment and leaves it to the States. Neither does the draft article specify what should be the content of the risk assessment. In sum the specific of the authority (governmental, non-governmental or operator) who shall evaluate the risk assessment and accept responsibility therefor - as well as what ought to be the content of. assessment is left to the domestic law of the State in which such assessment is conducted.

Draft article 11 on "Pre-existing Activities" provides that where a State having assumed its obligations under these articles, ascertains that an activity with a risk of causing a transboundry harm is being conducted in its territory or otherwise under its jurisdiction or control without the required prior authorization it shall direct those responsible for carrying out the activity that they obtain the necessary authorization. Pending authorization the State may permit the continuation of the activity in question at its own risk.

It was pointed out during the discussions in the Commission that draft article 11, extended the scope of international liability to pre existing activities, which may have continued for several years. without ever causing harm. This pre supposed that they had not involved any significant risk at the outset. To subject pre existing activities to the requirements envisaged might create differences in the relationship between the State and the operators, since the new demands of the State with respect to prevention could be regarded as a departure from the initial undertaking or as a modification.

Draft Article 12 (formerly 20 bis) on "Non-transference of Risk" stipulates that in taking measures to prevent, control or reduce the transboundary effects of dangerous activities States shall ensure that risk is not simply transferred directly or indirectly, from one area to another or that one risk is not transformed from one type into another. It reiterates a general principle of non-transference of risk and is inspired, *inter alia* by the provisions of Article 195 of the Convention on the Law of the Sea, 1982 and Principle 14 of the. Rio Declaration on Environment and Development, 1992. It may be recalled that during the debate at the forty fifth session whilst some

members of the Commission had deemed this provision logical to be included in the draft articles, others had taken the view that the proposed article only complicated the proposed provisions.

Draft article 13 addressed to "Notification and Information" provides that should the risk assessment of an activity, undertaken in accordance with draft article 12, reveal the possibility of significant transboundary harm, the State of origin should inform the State or 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. Paragraph 2 further stipulates that where it subsequently comes to the knowledge of the State of origin that there are other States which are likely to be affected, it should notify them accordingly. The ninth report of the Special Rapporteur had, in this regard, referred to three recent legal instruments on the environment which contain similar provisions viz. the Convention on Environmental Impact Assessment in a Transboundary Context; the Convention on the Transboundary Effects of Industrial Accidents and Principle 19 of the Rio Declaration on Environment and Development.

Draft article 14 addresses itself to facilitating preventive measures, and provides for timely Exchange of Information between the States concerned, relevant to preventing or minimizing the risk causing significant transboundary harm and deals with steps to be taken after an activity has beet undertaken. It is aimed at preventing or minimizing the risk of causing harm.

Draft article 15 on Information to the Public 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. It requires that States provide their own publ ic with information, whenever possible, relating to the risk and harm that may result from an activity subject to authorization and to ascertain their views thereon. The twofold requirements of this provision are (i) that States provide information to their public regarding the activity and the risk and the harm it involves; and (ii) that States ascertain the view of the public.

The purpose of providing information to the public is to ascertain their views. Without the latter i.e. the ascertainment of the views of the public the purpose of the provision would be defeated. As to the content of the information to be furnished to the public it is understood that such information includes basic information about the activity and the nature and scope of the risk and harm it may entail.

The Special Rapporteur had, it will be recalled, explained the need for an article on "National Security and Industrial Secrets" to ensure the legitimate concerns of a State in protecting its national security as well as industrial secrets which may be of considerable economic value. This interest of the State of origin, in the view of the Special Rapporteur, would have to be brought into balance with the interest of the potentially affected State through the principle of "good faith". The Draft 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 attempted to maintain a reasonable balance between the interests of the States involved by requiring the State of origin that refuses to provide information on the basis of national security and industrial secrets, to cooperate with the potentially affected State in good faith and on the basis of the principle of good-neighbourliness to find a satisfactory solution.

Draft article 16 on National Security and industrial secrets purports to introduce an exception to the obligation of States to furnish information in accordance with the provisions of draft articles 13, 14 and 15 . It recognizes the need for striking a balance between the interests of the State of origin and the States that are likely to be affected. Therefore it requires the' State of origin that is withholding information on the grounds of national security or industrial secrecy to cooperate in good faith with other States in providing as much information as can, under the circumstances be furnished.

Draft article 17 provides for Consultations on Preventive Measures between the States concerned, that is the State of origin and the States that are likely to be affected. In the view of the Special Rapporteur, consultations were necessary to complete the process of participation by the affected State and to take into account its views and

concerns about an activity with a potential for significant harm to it. During the debate, it may be recalled ' this article was criticized particularly because of the use of the phrase "mutually acceptable solutions" which it was said might give the impression that the envisaged activity might have harmful consequences. The Secretariat of the AALCC had concurred with that view since while it is desirable that States should be obliged to consult, it is far fetched to require them to reach an agreement.

Draft article 18 on "Rights of the State likely to be affected is designed to deal with situations where for some reason the potentially affected State was not notified of the conduct of an activity with a risk of potential transboundary harm, as provided for in the draft articles. Paragraph 1 provides that any other State which has serious reason to believe that the activity has created a risk of causing it significant harm may require consultations on preventive measures. This may have happened because the State of origin did not perceive the hazardous nature of the activity although the other State was aware of it, or because some effects made themselves felt beyond the frontier, or because the affected State had a greater technological capability than the State of origin allowing it to infer consequences of the activity of which the latter was not aware. In such cases, the potentially affected State may request the State of origin to enter into consultations with it. That request should be accompanied by technical explanation setting forth the reasons for consultations. Where the activity is found to be covered by the provisions of article 1(a), the State requiring consultations may claim an equitable share of the cost of the assessment from the .State of origin. This provision is aimed at protecting the rights and the legitimate interests of States that have reason to believe that they are likely to be adversely affected by an activity and enable them to request consultations. It also imposes a coordinate obligation on the State of origin to accede to that request.

It will be recalled that while introducing his ninth report at the 45th session, the Special Rapporteur had stated that one of the goals of these articles is to provide for a system or a regime in which the parties could balance their interests. In addition to procedures which allow States to negotiate and arrive at such a balance of interests, there are principles of extent to such an exercise. He had then proposed a set of factors involved in an equitable balance of interests. Draft article 19 on

factors involved in an equitable balance of interests provides that in order to achieve an equitable balance of interests the States concerned shall take into account all relevant factors and circumstances.

Subparagraph (a) compares the degree of risk of significant transboundary harm and the availability of means of preventing or minimizing such risk or of repairing the harm;

Subparagraph (b) compares the importance of the activity for the State of origin in relation to the potential harm for the States likely to be affected;

Subparagraph (c) deals with the risk of significant harm to the environment and the availability of means of preventing or minimizing such risk or restoriiig the environment. The Commission emphasized the singular significance of protection of the environment.

Subparagraph (d) introduces factors that must be taken into account and compared. The economic viability of the activity must be compared to the costs of prevention demanded by the States likely to be affected, and to the possibilities of carrying out the activity elsewhere or by other means or replacing it with an alternate activity;

Subparagraph (e) provides that one of elements determining the choice of preventive measures is the willingness of the States likely to be affected to contribute to the costs of prevention.

Subparagraph (f) the standards of protection which the State likely to be affected apply to the same or comparable activities in the standards applied in comparable regional or international practice.

Chapter III on Compensation or other Relief provides 2 procedures through which the injured parties may seek remedies (i) pursuing claims in the courts of the State of Origin or (ii) through negotiations between the State of origin and the affected State or States. The 2 procedures are without prejudice to any other

arrangement on which the parties may have agreed or to the due exercise of the jurisdiction of the courts of the State where the injury occurred. The latter jurisdiction may exist in accordance with the principles of private international law and if it exists it is not affected by these draft articles. Further, where relief is sought through the courts of the State of origin it is governed by the applicable law of that State. Draft article 22 sets out a number of factors which could guide the parties in reaching an amicable settlement in the event that a remedy is sought through negotiations.

Draft article 20 on Nondiscrimination incorporates 2 basic elements viz. (i) non-discrimination on the basis of nationality or residence; and (ii) non-discrimination on the basis of where the harm occurred. Paragraph 1 obligates States to ensure that any person, regardless of nationality or place of residence, who has suffered significant transboundary harm as a result of activities referred to in draft article 1 should, irrespective of where the harm has occurred or might occur, receives the same treatment as that afforded by the State of Origin to its nationals in case of domestic harm. Paragraph 2 of the draft article suggests that the rule is residual in nature and States concerned may agree on the best means of providing relief to persons who have suffered significant transboundary harm".

Draft article 21 provides another procedure through which the nature and extent of compensation or other relief could be determined viz. negotiations between the affected State and the State of Origin. It enumerates the criteria on the basis of which the nature and extent of compensation or other relief should be determined i.e. (i) in the light of a set of factors listed in draft article 22 and. (ii) the principle that anyone who engages in an activity of the nature referred to in paragraph (a) of draft article assumes the risk of adverse consequences as well as the benefit of the activity and, with regard to paragraph (b) of draft article 1 "the victim of harm should not be left to bear the entire loss". The second criteria rests on the basic notion of humanity that individuals who have suffered harm or injury due to the activities of others should be granted relief.

Draft Article 22 lists 10 factors for negotiations for the determination of the nature and extent of compensation or other relief. Subparagraph (a) is the nexus between Chapter II (Prevention) and the issue of liability of and compensation, on the one hand, and the nature and extent of compensation or other relief on the other. It clarifies that the obligations of prevention stipulated in Chapter II in relation to activities involving a risk of significant transboundary harm would certainly affect the extent of liability for compensation and the amount of such compensation or other relief. It is understood that in view of the residual nature of these draft articles the non-fulfillment of the obligations of prevention would not entail State responsibility.

Subparagraph (b) requires that account be taken of the extent to which the State of Origin has exercised due diligence to prevent or minimize the damage.

Subparagraph (c) lists the significant factor of notice - that is to say, 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 and yet took no action.

Subparagraphs (d) and (e) refer 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.

Subparagraph (f) refers to the assistance available either to the State of Origin offered by a third State or an international organization as well as assistance available to the affected state either by a third State or an international organization.

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 negotiations 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.

Subparagraph (h) points to one of the elements in determining the validity of the expectations if 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.

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.

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.

IV. THE LAW AND PRACTICE RELATING TO RESERVATION TO TREATIES

Introduction

At its 48th session the Commission had before it the Second Report of the Special Rapporteur had also prepared Rapporteur, Mr. Alain Pellet[7], In addition to the Second Report, the Special Rapporteur had also prepared a "non-exhaustive bibliography on the question of reservation to treaties". [8] The Report presented an overview of the study of the question of reservation to treaties. It formulated an overview of the study in three sections. The first section entitled "the First Report on Reservation to Treaties and Outcome", summarized 'the conclusions' that he had drawn from the debate both in course ofthe consideration of that report in the Commission during tlie course of its 48th Session as well as the debate on the item in the Sixth Committee at its fiftieth session.

The Special Rapporteur recalled that the General Assembly had in its resolution 50\45, *inter alia* noted the beginning of the work on the topic and invited the Commission to "continue its work along the lines indicated in the reports".[9] The report also pointed out that the General Assembly had also invited "States and international organizations, particularly those which are depositaries, to answer promptly the questionnaire prepared by the Special Rapporteur, on the topic concerning reservation to treaties".

Twelve States viz. Canada, Chile, Denmark, Ecuador, Estonia, Finland, San Marino, Slovenia, Spain, Switzerland, the United Kingdom and the United States of America had sent their replies to the questionnaire prepared by the Special Rapporteur, and sent to States Members of the United Nations or of Special Agencies or parties to the Statute of the

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[7] See A\CN.4\477

[8] See A\CN.4\478.

[9] See General Assembly Resolution 50\45 of 24 January 1996 operative Paragraph 4