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Alexandre S. Timoshenko

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The Problem of Preventing Damage to the Environment in National and International Law: Impact Assessment and International Consultations

Alexandre S. Timoshenko*

Prevention of ecological damage is a fundamental problem in balancing environmental protection and efficient utilization of natural resources. Avoiding harm to the natural environment, as opposed to replacing and restoring natural equilibrium, is not only desirable from the point of view of ecological requirements, but is vastly more advantageous from the standpoint of long-term economic and social interests. This conclusion has been reached by representatives of a variety of scholarly disciplines: natural scientists, mathematicians, economists, and jurists. Building creatively on the ideas of V.I. Vernadskiy,[1] representatives of Soviet science are developing and justifying such fundamental concepts as "ecological safety" and "ecological imperative." One key element of these concepts is the evaluation of the consequences of any action involving intervention in the natural environment.[2]

Soviet legal experts concerned with problems of legal protection of the environment attach great importance to the development of measures to prevent ecological harm.[3] Some of

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* Doctor of Law; Institute of State and Law Academy of Sciences of the USSR, Moscow.

1. V. Vernadskiy, Khimicheskiye Stroyeniye Biosfery Zemnli I Eye Okruzheniye, [Chemical Structure of the Earth's Biosphere and its Environment] (1965).

2. *See, e.g.*, N. Moiseyev, *The Ecological Imperative*, 12 Kommunist 117 (1986); Rakitskiy, *Economic Effectiveness and Social Justice*, Pravda, Jan. 9, 1987.

3. *See also* O. Kolbasov, Ekologiya: Politika - Pravo [Ecology: Policy - Law] (1976); V. Petrov, Ekologiya I Pravo [Ecology and Law] (1981); Y. Shemshuchenko, V. Muntayan, & B. Rozovski, Yuridecheskays Otvetssvennot' v Oblasti Oxraany Okruzhayushchey Sredy [Legal Responsibility in the Area of Environmental Protection] (1978).

the scientific concepts and proposals they have developed are used by legislators to improve existing ecological expert examination and monitoring services. The remainder of these ideas are awaiting implementation in a radical transformation of state control over environmental protection.

The critical ecological situation in the world, particularly the predicted increase in international environmental effects and industrial catastrophes, directs the attention of the global community toward measures to prevent situations likely to damage the environment across boundaries of national jurisdiction. Prevention is more desirable than compensation for damage, not only economically, but socially and ecologically as well. The concluding act of the European Conference on Safety and Cooperation points out "that damage to the environment is best avoided by preventive measures and that the ecological balance must be preserved in the exploitation and management of natural resources."[4] A special section is devoted to preventive measures in the Nairobi Declaration of 1982, which says in particular: "Prevention of damage to the environment is preferable to onerous and costly measures to undo harm that has already been done."[5]

Soviet researchers in the area of international law note the development of special preventive principles in international law which cite the need for exchange of information, timely notification, and consultation on activity capable of causing substantial harm to the environment of other nations or international territories in common use. At the same time, they argue cogently for the proposition that international environmental protection must be based on the fundamental principle that measures which avoid damage to the environment are more ecologically desirable and thus preferable to those that repair such damage.[6]

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4. Mezhudunarodonoye Pravo v Dokumentakh [International Law in Documents] 587-90 (1982).

5. *Taking a Stand: From Stockholm 1972 to Nairobi 1982, Declarations of the World Environment*, 9 Envtl. Pol'y & L. 45, 46-50 (1982).

6. *See, e.g.*, A. Timoshenko, Formirovaniye I Razvitiye Mezhdunarodnogo Prava Okruzhaeyushchey Sredy [Formation and Development of International Law on the Environment] 69-72 (1986).

In recent decades, transboundary impacts on the environment have been the subject of increasingly extensive international cooperation and regulation by international law. For such regulation to be possible, international impacts must be recognized and their parameters identified. To achieve this, procedures for evaluating effects on the environment are utilized. These procedures are given different names in the various countries in which they are used, such as ecological expert examination, declaration of impact, and environmental impact statement. Assessments of environmental impact are already institutionalized in many developed countries. In countries such as the USSR, USA, West Germany, France, Great Britain, and Japan this procedure is mandated by special legislation, directed at the needs of national economic planning and nature protection measures, allocation of the forces of production, and implementation of large-scale projects that alter the natural environment.

USSR nature protection legislation, as well as legislation on capital construction and public health, stipulates measures and requirements necessary for the prevention of ecological harm caused by economic activity, and for the evaluation of environmental policy as formulated in the USSR Constitution. The mechanism for evaluating the impact of economic activity on the environment is referred to as an "ecological expert examination." By ecological expert examination, we mean a check by specially authorized organizations of plans and activities involved in economic development, to assure conformance with governing ecological protection of the natural environment and public health.[7] This includes examining plans for the construction and siting of industrial and economic facilities, the operation of enterprises and other facilities, manufacturing processes, products and substances produced or utilized in production, inventions, discoveries, efficiency suggestions, and imported equipment. The procedures for performing an ecological expert examination include, enumeration of what should be examined, the agencies empowered to

7. V. Petrov, *supra* note 3, at 133-6.

conduct such examinations, and the responsibilities of the economic organizations during examinations. These procedures are regulated by the following fundamental enforceable enactments: 1) Fundamental Principles of Public Health Legislation, 2) Law on Protection of the Atmosphere, and 3) Central Committee of the Communist Party of the Soviet Union (CC CPSU) and USSR Council of Ministers decrees "On Improving Expert Examinations of Designs and Estimates for Construction (Reconstruction) of Enterprises, Buildings, and Facilities" of May 4, 1973,[8] and "On Measures to Further Improve Matters Relating to Designs and Estimates" of March 30, 1981.[9] As the basic legal principles developed, various specific regulations and departmental acts were passed, such as "Regulations on the Procedures for Performing Expert Examinations of Designs and Estimates for Construction (Reconstruction) of Enterprises, Buildings, and Facilities," ratified by decree of the USSR Gosstroy and Goskomitet on Science and Technology on October 31, 1973.[10]

Many years of experience in nature protection and the Soviet doctrine on environmental law led to the development of principles for evaluating environmental impacts, which are intended to ensure both the effective protection of the environment and ecologically desirable use of natural resources in the USSR. These principles include: the priority of the citizens' right to a favorable environment, harmonious coordination of ecological and economic interests, implementation of projects that are desirable from both a territorial/sector and an ecological point of view, conformance of the environmentally relevant aspects of the project to the legal requirements for protecting the environment, and consistency and strict objectivity in evaluation of a project's environmental impact.

Today there is justification for arguing that the ecological expert examination is an institution in the USSR. An ecological expert examination is the combination of: the legal stan-

8. W. Butler, Collected Decrees of the USSR 56 (1978).

9. W. Butler, Collected Decrees of the USSR 84 (1981).

10. Byulleten Normativnykh Aktov Ministerstv I Vedomstv SSSR [Bulletin of the Enforceable Enactments of USSR Ministries and Departments] 7 (1974).

dards defining what will be subject to ecological expert examinations, the specific features distinguishing this examination from an ordinary verification that environmental measures and rules are being observed, the stages of the ecological expert examination itself, and its characteristics at the national, republic and local levels. In spite of the practical results of the present system for performing expert examinations, a number of shortcomings remain and significant improvements are required. The most important shortcoming is the system's diffusion among various departments; at the national level alone, more than ten ministries and state committees are empowered to perform such examinations. In addition, ecological expert examinations are conducted by departments which themselves engage in various forms of resource utilization. Assignment of the ecological monitoring function to the very agencies that are utilizing environmental resources frequently decreases objectivity through the conflict of departmental interests with universal state interests. Ecological imperatives belong primarily to the category of long-term universal state interests.

The need to create harmony among various categories of interests, while giving first priority to ecological imperatives, has convinced Soviet scientists that a central, all-union, agency should be established; one which exercises the power to monitor and oversee the functions of departments in the area of environmental protection and efficient use of resources. The scientists have proposed that the conducting of ecological expert examinations be made one of the major functions of this agency. More than ten years ago it was argued convincingly that "preliminary prophylactic monitoring of economic and technical activity must occupy a fundamental place" in the activity of a central environmental agency.[11] Subsequent research has shown that to further reinforce and improve the ecological expert examination service and to increase its efficiency, we must solve a whole set of administrative and legal problems related to the passage of a statute defining the way the examinations must be performed. We must

11. O. Kolbasov, *supra* note 3, at 220.

also resolve the problems inherent in the establishment of a single centralized agency for managing such examinations.[12]

The newest ideas being discussed today, against a background of economic restructuring of high level party, state, and legislative organs, involve giving responsibility for ecological examinations to a single specialized national environmental agency similar to a USSR State Committee. Plans also call for public discussion of the most important economic, scientific, technological, and ecological problems. The issue of the establishment of a single centralized environmental agency is currently in the developmental stage. The difficulty here lies in the fact that this agency must become an organic part of the new system of state control over the national economy. Moreover, nowhere in the world is there an analogue to the proposed agency with respect to the extent and complexity of its proposed environmental powers.

In international law, the institution of environmental impact assessment is a basic principle. This principle is reflected in international documents that vary in the degree to which they are legally binding. The following have the force of treaty: the 1985 Agreement of the Association of South-East Asian Nations on Conservation of Nature and Natural Resources (Articles 14, 19, and 20);[13] the 1982 United Nations Convention on Maritime Law (Article 206);[14] the 1978 Kuwait Regional Convention (Article 11);[15] the 1982 Abidjan Regional Convention (Article 13);[16] the 1981 Regional Convention on Protection of Coastal Regions of the Southeastern Pacific

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12. Y. Shemshuchenko, V. Muntayan, & B. Rozovski, *supra* note 3, at 79-87.

13. *Agreement on the Conservation of Nature and Natural Resources*, 15 Envtl. Pol'y & L. 64 (1985).

14. United Nations Convention on the Law of the Seas (done at Montego Bay, Dec. 10, 1982), U.N. Doc. A/CONF.62/122 of October 7, 1982, *reprinted in* 21 I.L.M. 1261 (1982). [The reprinting in International Legal Materials also incorporates the two English corrections contained in U.N. Doc. A/CONF.62/122/Corr.3 of Nov. 23,1982 and A/CONF.62/122/Corr.8 of Nov. 26,1982.].

15. Kuwait Regional Convention for the Co-operation on the Protection of Marine Environment from Pollution, *reprinted in* 17 I.L.M. 511, 516 (1978).

16. Convention for Co-operation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region, *reprinted in* 20 I.L.M. 746, 750 (1981).

Ocean (Article 8); the 1982 Convention on Protecting the Environment of the Red Sea and Gulf of Alden (Article 11); and the 1983 Convention on Protection and Utilizing the Aquatic Environment of the Caspian Region (Article 12).[17]

The principle of national or international impact assessment also occupies an important place in international recommendations. For example, this principle can be found in the following: the conclusions of a group of United Nations Environmental Protection (UNEP) experts on environmental protection in shelf mining;[18] the resolution of the United Nations (UN) General Assembly on International Environmental Protection Charter No. 37 of October 28, 1982; the resolution of the 1984 session of the Council of Ministers of the member nations of the Economic Commission on Africa devoted to the environment and development in Africa; the 1974 Declaration of the member nations of the Organization of Economic Cooperation and Development; and the 1985 Directive of the European Economic Community on the assessment of the environmental impact of certain government and private projects. The member nations of the Council on Economic Cooperation, collaborating within the framework of a Common Comprehensive Program in the area of environmental protection and improvement, also devote considerable attention to various aspects of environmental impact assessment. The importance of impact assessment is also emphasized in the program of scientific cooperation on administrative and legal questions relevant to environmental protection.

The fact that both impact assessment and transboundary impact assessment have been incorporated in international law only in the form of a general principle can be explained by the characteristics inherent in impact assessments. The impossibility of establishing a single procedure for implementing this principle is a consequence of the real differences in the nature of national and regional legal and governmental systems, the subjects of the assessments, the sources of the im-

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17. Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, *reprinted in* 22 I.L.M. 227 (1983).

18. U.N. Doc. UNEP GC.3/5 Add 5, Annex 3 (1981).

pacts, and the particulars of individual ecosystems. For this reason, the most acceptable form of international collaboration in accordance with the principle of impact and transboundary impact assessment is the convening of international consultations to consider activities of one nation that may have significant deleterious environmental impacts in other national jurisdictions. This, however, does not preclude exchanges of national expertise, development of legal models, or the technical aspects of transboundary impact assessments.

The institution of international consultation is broad and encompasses transboundary impact assessment as a basic element and essential prerequisite. In a narrow sense, international consultations on transboundary impacts involve negotiations between states on two levels. The first consideration is on whose territory or under whose control a proposed project, which may have substantial adverse environmental effects beyond its territory or control, is located. The second is whose legitimate rights and interests will be encroached upon by this action. In a broader sense, the institution of international consultations is a multi-step process, including an exchange of information, preliminary notification, and impact assessment. The negotiations themselves are the final stage in the process of international consultation.[19]

It is assumed that international consultations will be conducted on a basis of equality and mutual respect for the sovereign laws and legitimate interests of the participants, and in a spirit of good will and neighborliness. Participants in a consultation are given access to all the necessary information. Conferences are held well in advance of the planned action. With the consent of all parties interested in the consultation, a third state or qualified international organization may be asked to participate in the negotiations as a mediator.

The principle of international consultations is consistent with the newest concepts in foreign policy. Concepts such as

19. It should be noted that notification, exchange of information, and impact assessment may be performed independently and not involve international consultations. This may take place in instances where transboundary impacts are not pronounced or are not significant.

an integrated interdependent world community, a new way of thinking required by the epoch of global problems, and an all-encompassing system of international security, of which ecological security is an inalienable part. International consultations on transboundary impacts also serve to reinforce international cooperation among nations with different social and political systems. Improvement of international consultations is an additional stimulus to develop national mechanisms to avert ecological damage, to coordinate the ecological legislation of interested nations, and to expand scientific and technological exchanges.

The principle of international consultations on potential damage to the environment extends beyond the limits of a single national jurisdiction and is an international obligation. In its general form, the principle has already been incorporated in international acts with varying degrees of legal force, such as treaties on water use in international organizations.[20] However, the practical application of this principle requires the development of specific regulations, and defining the occasion, object, and procedure for the consultations. It is significant that the experts of a UN European Economic Community Working Group, specially formed to develop a procedure for assessing environmental impacts, concluded that it is essential to improve international consultations on transboundary impacts.

To assure progressive development of international environmental law, the utilization of international consultation on transboundary impacts must become one of the major activities of international organizations. There are two reasons for this. First, international consultations may serve as the most workable means for preventing transboundary damage to the environment, since impact assessment, exchange of information, and even notification concerning a proposed action, can solve this problem. Secondly, the procedures of international consultations, in contrast with impact assessment, can be completely and successfully regulated by international law

20. *See* World Commission on Environment and Development, WCED Doc. WCED/86/23/Add 1, Annex, at 61-3.

virtually without impinging on national regulations.

Today, we are ready to have international groups of experts begin drafting either a convention or a guiding principle that interested states can adopt as a standard regulating international consultations on transboundary impacts. Regardless of its form and legal force, such a document must contain the following basic elements:

1. Occasion

The occasion for international consultations is evidence that activity on the territory, or within the boundaries of a national jurisdiction, or within the control of one state will have an adverse impact on the environment of another state or on the environment of an international area of common use, and thus, will encroach on the sovereign rights or legitimate interests of the second state. An essential condition is the significance of the potentially adverse impact or encroachment of rights and interests. The impact must be substantial or significant with respect to the exact legal definition of the given effect.

2. Subject

The subject of international consultation is a set of impacts on the environment including their type, nature, duration, interaction with existing effects, and potential damage. To some extent this is linked to the character and scale of the activity that would result in the transboundary impact. The relevant information must be provided by the state that is the source of the potential impact. The information must be timely, adequate, and must be used in accordance with the principles of good will and good conscience. Considerations of national security may make some limitation of the information exchanged unavoidable. These limitations must not diminish the efficacy of the consultations, increase their duration, hinder their implementation, or otherwise interfere with them.

3. Procedure

The procedure must ensure that all interested parties participate fully, that the consultation be obligatory, and that an optimal milestone be observed. Consultations will be conducted at the request of one or several interested states. Consultations must not be used as a mechanism for causing harm or violating the sovereign rights and legitimate interests of other states. The procedure must establish a method for exchanging the information needed for the consultation. It is essential to make a provision for the possibility of a third party or qualified international organization participating in the consultation, or for the use of another conciliatory procedure. When necessary, provisions may be made for conducting additional investigations, establishing monitoring, or conducting an international expert examination.

4. Permanent Structures (applies only to the draft convention)

In order to give consultations permanent status, provisions may be made for annual consultative meetings of the participants, exchanges of annual reports on proposed large scale projects involving transformation of the natural environment (including reconstruction of manufacturing facilities), or creation either of an international expert council or secretariat.

5. Scientific and Technological Cooperation

The effectiveness of international consultations is a direct function of the uniformity and comparability of results assessing potential transboundary impacts. To attain such comparability it is essential that there be cooperation in exchanging technology relevant to impact assessment, in coordinating methodologies, standards, calibration of instruments, and other forms of scientific and technological cooperation.

6. Responsibility

The guilty state will be internationally accountable for

unjustified refusal to conduct an international consultation on potential transboundary impacts or for intentional interference with their performance.