

Dr. Caroline E. Foster¹

For publication in the Proceedings of the 12th Annual Meeting of the Australian and New Zealand Society of International Law, held in Canberra, 18-20 June 2004

Growing interdependence between States is giving rise to the increasing development of rules to deal with transnational environmental and health risks associated with human activity, including substantive rules, rules for international co-operation and rules for dealing with disputes that may arise between States.

This paper discusses the growing significance of procedural obligations in international environmental law, which fall within the category of rules for international co-operation. The creation of procedural obligations in relation to particular risks and contemporary disputes in the fields of trade and environment, of the law of the sea, and of health, provide examples.

The paper suggests that a subtle constitutional restructuring within international law is taking place as a result of the growing significance of procedural obligations in international environmental law: new forms of legitimation and democratization of decision-making in respect of activities involving risks to human health and the environment are entering international law.

The final section of the paper examines the significance of procedural obligations in the work of the International Law Commission on International Liability for Injurious Consequences arising out of Acts Not Prohibited By International Law, and advances the observation that it does not seem to be viable to develop a set of legal rules relating to a given subject that will consist solely of procedural obligations.

¹ Caroline E. Foster BA LLB(Hons)(Cantuar) LLM PhD (Cantab). This presentation represents work in progress. Feedback welcome, my email address is c.foster@auckland.ac.nz. My thanks to Professor Bruce Harris of the University of Auckland for reading over this paper in draft, to Professor Jim Evans of the University of Auckland for discussing with me some of the points arising in connection with the paper, and to Isaac Hikaka, Chapman Tripp Research Assistant 2003-4, for research on the transportation of radioactive material. Also to Ivana Zovko for her comments at the ANZSIL conference. Any errors of fact or analysis remain my own.

a) Introduction

Growing interdependence between States today is increasingly giving rise to the development of international rules to deal with transnational environmental and health risks associated with human activity. These rules include substantive rules, rules for international co-operation and rules for dealing with disputes that may arise between States.

This paper comments on the growing significance of procedural obligations in international environmental law in the context of the second trend, the development of rules for international cooperation, and examines the adoption of a broad range of procedural obligations in contemporary international environmental law. By a procedural obligation this paper refers to an obligation to fulfill a certain procedure, such as to carry out a risk assessment or an environmental impact assessment, or to notify another party of an activity that may involve risk to human health or the environment. Procedural obligations operate in tandem with substantive obligations: they are an additional and sometimes a primary way to deal with the serious risks that inevitably remain even where substantive obligations are adopted.

Developments in the fields of international law dealing with trade and environment, the law of the sea, and health may be considered. Examples of risks to human health and the environment currently demanding the development of appropriate legal frameworks in these areas include: risks arising in the course of international commerce in genetically modified products;² risks associated with the potential pollution of the oceans in the course of the shipment of radioactive material from one side of the globe to another;³ and the dramatic risks arising in connection with the

² Reference the complaint by the United States, Canada and Argentina in the World Trade Organisation in the case European Communities – Measures Affecting the Approval and Marketing of Biotech Products, in which the composition of the panel was determined on 4 March 2004.

³ In a series of meetings organized by the Pacific Islands Forum Secretariat, discussion has been taking place on the possibility of developing special arrangements with France, Japan and the United Kingdom to ensure that, if there were an accident in the course of the shipment of radioactive material through the Pacific, compensation would be negotiated for economic loss in tourism, fisheries and other affected industries. Press Statement 1401 “Forum on Nuclear Shipment” Pacific Islands Forum Secretariat 23 February 2001 Suva. Please contact me at c.foster@auckland.ac.nz if you would like a copy of a longer piece I am writing on this subject.

potential spread of highly contagious diseases, such as Severe Acute Respiratory Syndrome (SARS) and the strain of avian influenza (bird flu) which “jumped species” and caused a number of deaths in Hong Kong in 1997 and also in 2003.⁴

In relation to each of these risks new international procedural legal obligations are being applied, identified and developed, alongside appropriate substantive commitments. For trade in biotech products the WTO Agreement on Sanitary and Phytosanitary Measures requires a risk assessment to be conducted before a decision is taken on raising trade barriers in response to a risk, while the Cartagena Protocol on Biosafety to the Convention on Biodiversity of 2000 establishes a raft of procedural obligations for the safe handling and transfer of living modified organisms. For the shipment of radioactive material work is taking place in the International Atomic Energy Agency (IAEA), not only on the improvement of IAEA standards for the shipment of radioactive material but also on such procedural issues as communication with the public and between Governments.⁵ For contagious diseases, revisions to the International Health Regulations have been proposed by the World Health Organisation, including revisions related to the key issues of surveillance and communication.⁶

⁴ Fidler, David “Global Outbreak of Avian Influenza A (H5N1) and International Law” ASIL Insights January 2004. “In all cases, humans became infected through contact with infected birds, typically poultry, or their excreta. The greater concern was the potential for the H5N1 virus to undergo “antigenic shift”—swapping genetic material with human influenza viruses to produce a highly pathogenic microbe transmissible from person to person. The H5N1 virus’ potential for antigenic shift is significant because it mutates rapidly and acquires genes from viruses infecting other animal species.”

⁵ At the IAEA International Conference on the Safety of Transport of Radioactive Material 7-11 July 2003, Vienna, Austria, some 120 papers were submitted, on the topics of Liability, Communication with the Public and Between Governments, Effectiveness of Radiation Protection in Transport, Packaging and Transport of Radioactive Materials, Packaging and Transport of Non-Standard Radioactive Materials, Assessment of Regulatory Criteria, Effectiveness of the Regulatory Process, Adequacy of Safety Requirements, Identifying Areas for Potential Improvement of the Regulatory Regime, and Emergency Preparedness and Response. Subsequently, at its General Conference in September 2003, the IAEA decided that an Action Plan should be developed based on the outcomes of the July Conference, to carry forward the development of the considerable body of IAEA standards that already exists.

⁶ In January 2004, the World Health Organization (WHO) released an interim draft of proposed revisions to the emergency response provisions set out in the International Health Regulations, *inter alia* extending them beyond the diseases to which they have previously applied: cholera, plague, and yellow fever, and also extending them to cover public health emergencies of international concern associated with the suspected intentional release of pathogens, chemicals or radioactive material. WHO, International Health Regulations: Working Paper for Regional Consultations, Intergovernmental Working Group on the Revision of the International Health Regulations, IGWG/IHR/Working Paper/12/2003, 12 January, 2004. http://www.who.int/csr/ihr/revisionprocess/working_paper/en/. Cited by Fidler, *op cit*.

The purpose of this paper is to draw attention to the subtle but evolutionary change that, as a result, is taking place in the character of international environmental law. The paper suggests that, through the increasing incidence of procedural obligations in international environmental law, new forms of legitimation, and possibly democratization, of decision-making in respect of risks to human health and the environment are entering international law; and a quiet constitutional shift is taking place within this branch of international law.

b) The growing significance of procedural obligations in international environmental law

The examples of procedural obligations referred to above are just a few illustrations of a much broader phenomenon. Today’s international environmental law, and international environmental treaty law in particular, incorporates obligations to assess potential environmental harm in advance of carrying out activities involving risk,⁷ to notify and consult with States who may be affected by such an activity,⁸ and to cooperate and exchange information with them,⁹ as well as to ensure adequate information is provided about such activities and that the public is consulted.¹⁰

The significance of procedural obligations in international environmental law is closely related to issues concerning the legitimacy of international governance and

⁷ Particular reference should be made to the Convention on Environmental Impact Assessment in a Transboundary Context, Espoo, 1991. EIA obligations are however found in a number of international environmental treaties, for example in the Protocol to the Antarctic Treaty on Environmental Protection, Article 8. For a survey, see Ebbesson, Jonas “Innovative Elements and Expected Effectiveness of the 1991 EIA Convention” 19 *Environmental Impact Assessment Review* 1999 47 at 48.

⁸ *Ib id*, Article 3; see also the Convention on the Transboundary Movement of Hazardous Wastes and their Disposal, Basel, 1989, Article 6; the Convention on Biological Diversity, Article 14 (d); the Cartagena Protocol on Biosafety to the Convention on Biodiversity, Montreal, 2000, Article 8 ; as well as a number of other international environmental treaties.

⁹ Most environmental treaties contain provisions on information exchange. These include, for example, the Protocol to the Antarctic Treaty on Environmental Protection, Article 6(2); the Convention on the Transboundary Movement of Hazardous Wastes and their Disposal, Basel, 1989, Article 13; the Convention on Biological Diversity, Article 17; and the provisions relating to the establishment of a Biosafety Clearing House under the Cartagena Protocol on Biosafety to the Convention on Biodiversity, Montreal, 2000.

¹⁰ For an overview, see Ebbesson, Jonas “The Notion of Public Participation in International Environmental Law” 8 *Yearbook of International Environmental Law* 1997 51. As discussed by Ebbesson, the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Aarhus, 1998, is of particular significance.

decision-making. Professor Tom Franck has written eloquently on the contribution made to the legitimation of international decisions through compliance with basic tenets of procedural fairness,¹¹ which are epitomized in certain of the procedural obligations now encapsulated in international environmental treaties. Daniel Bodansky has written about the achievement of legitimacy in international environmental law through the application of expertise, public participation and democracy.¹²

A word should be said here on the consonance of legitimation and democratization – terms often used loosely in a synonymous sense. To what extent are notions of democracy relied upon in saying that the creation of and compliance with procedural obligations in international environmental law makes decision-making in international environmental law more legitimate? Some might say this legitimation does rely on certain democratic notions, analogizing the idea of “one person, one vote” with the idea of “one State, one vote”. Thus it might be said that procedural obligations increase legitimacy within international environmental law because they help level political inequalities between sovereign States involved in a decision about an activity involving risk of environmental harm by ensuring that all potentially affected States are guaranteed the opportunity to have input into, and thereby greater influence over, decisions about the conduct of these activities. A procedural obligation may, even subtly, realign power and authority in a way that partially transcends power imbalances between States. Procedural obligations may also render international environmental decision-making considerably more transparent, and so more consistent with understandings of how successful democracies function.

Arguments based on these notions are open to question, though, as Bodansky notes. An international law built on the sovereign equality of States possessing populations of vastly differing proportions is not likely to be a democratic law in any numerical sense.¹³ Resolving the question of why we consider procedural obligations to make international environmental decision-making more legitimate in a democratic sense is

¹¹ Franck, Thomas M. *Fairness in International Law and Institutions* 1995 Clarendon Press 7, 25.

¹² Bodansky, Daniel “The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?” 93 *American Journal of International Law* 1999 596 at 600 and 611-623.

¹³ *Ib id* 613-314.

not so simple. A better explanation of the contribution of democracy to the increased legitimacy of international environmental decision-making engendered by procedural obligations might be found in an appreciation that States represent recognized, sovereign, established, functioning structures of government and administration. If a State with a numerically greater population recognizes the sovereignty of another State with a smaller population, that might arguably provide some democratic basis for their international dealings, assuming the government of the first State is democratically accountable to its oversized populus. There is not scope in this paper to explore the significance of recognition in this context, though I refer to the work of Sir Hersch Lauterpacht on the fundamental role of recognition as a starting point for further investigations.¹⁴

In any event it is clear that procedural obligations, to varying degrees, move the locus of international decision-making authority in relation to environmental risks, so that those States that may be affected at some future point in time by a risk, if it eventuates, become entitled, to a certain extent, to participate in decision-making at the time when the activity involving the risk is being embarked upon. This is not an insignificant development in a legal “system” where the subjects of the law are sovereign equals. By consistently shifting the locus of decision-making authority within the relationships between subjects of international law, compliance with international environmental procedural obligations involves a process of constitutional change within international law that has perhaps gone relatively unrecognized to date.

The view that procedural obligations are non-justiciable will need to be carefully scrutinized.¹⁵ The procedural character of provisional measures that have been granted by international tribunals operating under the United Nations Convention on

¹⁴ Lauterpacht, Sir Hersch Recognition in International Law Cambridge University Press 1947.

¹⁵ Okowa attributes such a view to the ILC Working Group on International Liability for the Injurious Consequences of Acts not Prohibited by International Law (Forty-Eight Session of the ILC, 1996, Doc, A/CN.4/2.5333 p.83) noting that reservations have been expressed about this view. Okowa, Phoebe N. “Procedural Obligations in International Environmental Agreements” 67 *British Yearbook of International Law* 1996 275 334. Okowa examines the status of procedural obligations in international environmental law, including the extent to which they might be considered rules of customary international law.

the Law of the Sea in the *MOX Plant* cases¹⁶ and the *Malaysia/Singapore* case¹⁷ may also merit further examination.

These studies do not fall within the focus of this paper. However, I will now briefly consider one area of international environmental law where the phenomenon of the growing significance of procedural obligations in international environmental law takes on an extra twist - an area in which it is envisaged that States would commit to complying with certain contingent procedural obligations in the future when they decide to undertake an activity involving risk in the present. I will focus here on the International Law Commission’s draft Articles on International Liability for Injurious Consequences arising out of Activities not Prohibited by International Law.

- c) The International Law Commission’s draft Articles on International Liability for Injurious Consequences arising out of Activities not Prohibited by International Law

A major portion of the ILC’s work on International International Liability for Injurious Consequences arising out of Activities not Prohibited by International Law was carried out by New Zealander Professor R. Quentin Quentin-Baxter, who was the ILC Special Rapporteur on this topic in the early 1980s. Concentrated work on the topic is presently taking place again.¹⁸

¹⁶ *The MOX Plant Case (Ireland v United Kingdom) Request for Provisional Measures*. On 3 December 2001 the International Tribunal for the Law of the Sea prescribed a provisional measure requiring Ireland and the United Kingdom to cooperate and to enter into consultations to exchange information with regard to possible consequences for the Irish Sea arising out of the commissioning of the MOX plant, to monitor risks or the effects of the operation of the MOX plant for the Irish Sea and to devise, as appropriate, measures to prevent pollution of the marine environment which might result from the operation of the MOX plant. Para 89. Affirmed on 24 June 2003 by the Arbitral Tribunal Constituted Pursuant to Article 287, and Article 1 of Annex VII, of the United Nations Convention on the Law of the Sea for the Dispute Concerning the MOX Plant, International Movements of Radioactive Materials, and the Protection of the Marine Environment of the Irish Sea. Order No 3.

¹⁷ *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore), Provisional Measures*. On 8 October 2003 the International Tribunal for the Law of the Sea prescribed provisional measures ordering Malaysia and Singapore to cooperate in order, *inter alia*, to enter into consultations for certain specific purposes, to exchange information on, and assess risks or effects of Singapore’s land reclamation works; additionally the Tribunal directed Singapore not to conduct its land reclamation in ways that might cause irreparable prejudice to the rights of Malaysia or serious harm to the marine environment. Para 106.

¹⁸ During the time the topic has been on the agenda of the ILC it has bifurcated. In 1999 the Commission decided to complete a second reading of the draft articles that had been prepared on the prevention of injurious consequences arising out of acts not prohibited by international law and temporarily to defer work on international liability for these consequences. Report of the International Law Commission on the Work of its Fifty-First Session A/54/10 1999 Chapter IX paras 598-608. In

The ILC’s proposed liability scheme is different to other arrangements on liability. It is a general scheme, intended to operate alongside and to complement schemes targeted to establishing arrangements for liability in relation to a particular pre-identified source of potential harm, such as, for example, the International Maritime Organisation (IMO) Conventions for the compensation of damage caused by oil pollution from ships.¹⁹ The ILC liability scheme does not condition the requirement to pay compensation for harm on a prior breach of international legal obligations, such as breach of States’ obligations to ensure due diligence is exercised in relation to the conduct of hazardous activities. The scheme is rather based directly on a principle that the victim of harm should not be left to bear the entire loss. Finally, the ILC liability scheme is a residual scheme: although the expectation is that operators will compensate victims for harm they cause, the scheme would additionally impose requirements directly on States to compensate for harm where existing legal mechanisms are insufficient to ensure that operators do so.

In the ILC residual liability scheme as it was envisaged when the ILC’s draft articles were circulated in 1996 the occurrence of harm would trigger a procedural obligation

2001 the Commission adopted draft articles on the prevention of injurious consequences, under the title Prevention of Transboundary Harm from Hazardous Activities. Report of the International Law Commission on the Work of its Fifty-Third Session A/56/10. Work has since continued on the liability aspect of the topic, with the presentation in 2003 of his First Report on the Legal Regime for Allocation of Loss in Case of Transboundary Harm Arising Out Of Hazardous Activities by Mr Pemmaraju Sreenivasa Rao, Special Rapporteur. A/CN.4/531 21 March 2003. A Second Report was submitted by the Special Rapporteur on 15 March 2004 for discussion at the 2004 session of the ILC. UN Doc Z/CN.4/540.

New Zealander and International Law Commission Member Mr. William Mansfield, and Professor Alan Boyle of the University of Edinburgh have contributed to work on the topic, and both have been thanked by the Special Rapporteur for their input.

¹⁹ Specifically, the International Convention on Civil Liability for Oil Pollution Damage 1969, as amended by the subsequent Protocols, the International Convention on the Establishment of an International Fund for the Compensation of Oil Pollution Damage 1971, and Protocols thereto, as well as the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996, and the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001. For further examples see the Basel Protocol on Liability and Compensation for Damage resulting from Transboundary Movement of Hazardous Wastes and their Disposal 1999; and those conventions dealing with liability in connection with the transport of nuclear material, in particular the Paris Convention on Third Party Liability in the Field of Nuclear Energy, 1960, and the Brussels Supplementary Agreement, 1963, the Vienna Convention on Civil Liability for Nuclear Damage, 1963, and its 1997 Protocol. These and other agreements governing liability in relation to specific activities are surveyed in the First Report on the Legal Regime for Allocation of Loss in Case of Transboundary Harm Arising Out Of Hazardous Activities of Mr Pemmaraju Sreenivasa Rao, Special Rapporteur, referred to above, pages 20-39. **Second Report**

to negotiate an appropriate level of compensation in accordance with the equitable principles specified in the draft articles.²⁰ Draft Article 5 stated that:

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

Yet the draft articles did not articulate or identify the basis of such liability, inferring that liability might consist solely of the procedural obligation to negotiate an appropriate level of compensation. Draft Article 21, the key provision, provided that:

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

Draft Article 22 set out equitable factors to be taken into account in the negotiations, for example the extent to which the affected State shares in the benefit of the activity that has caused the harm.²¹

It would appear that the procedural character of the residual ILC liability scheme as envisaged in 1996 might have qualified it as an example *par excellence* of the growing number of procedural obligations in international environmental law. Certainly the ILC liability scheme would seem to have the potential to make a significant contribution to the legitimation of decisions by powerful States to undertake activities carrying a risk of harm to human health or the environment borne by less powerful States. However, in developing the scheme, a number of issues continue to test the resolve of the Commission and of the international community. The majority of those issues are not discussed in this paper, including for example the

²⁰ For the text of the draft articles see the Report of the Working Group on International Liability for Injurious Consequences arising out of Activities not Prohibited by International Law Report of the International Law Commission on the Work of its Forty-Eighth Session, Volume II, Part Two A/CN.4/SER.A/1996/Add.1 (Part 2) Annex I. Articles 5 and 20-22 dealt with liability and compensation.

²¹ Okowa draws attention to the fact that under the ILC’s scheme the extent to which an offending party has complied with procedural obligations in relation to the prevention and minimisation of the risk of harm is one of the factors to be considered in determining the extent of compensation payable to a State that has suffered injurious consequences. Above, note 15 at 323.

many dimensions of the key question of how liability to compensate is to be allocated as between operators and States. The question of the central significance of procedural obligations in the ILC draft articles can fruitfully be considered in the context of this paper, however, as follows.

Among the key issues outstanding in relation to the ILC scheme is the question of the operability of a compensation scheme that consists essentially of a procedural obligation to negotiate compensation and does not depend on any substantive rule of liability. As noted above, the ILC scheme is intended to be capable of application where there is no prior breach of any international legal obligation in relation to a hazardous activity i.e. where the rules of State responsibility do not pertain. Therefore the scheme is not based on State responsibility for harm. Nor, at the time of writing, is the ILC scheme intended to be based on a concept of strict liability, as known to common lawyers through the rule in *Rylands v Fletcher*,²² according to which a defendant may be held liable for harm despite having exercised all due care to prevent an event occurring. As noted above, Article 5 of the 1996 draft articles did provide for “liability”.²³ However, if such “liability” was based neither on strict liability nor on State responsibility it would appear to have had no substantive content. Although considerable progress has been made in the last two years towards finalising the ILC scheme, Special Rapporteur Pemmaraju Sreenivasa Rao has specifically left open the question of the basis on which liability in the ILC draft Articles might be founded.²⁴

Yet the ILC liability scheme has much in common with strict liability, in that it has been envisaged that it would create a duty to compensate in the absence of the breach of a civil obligation. Under domestic law on strict liability a substantive duty to compensate arises as soon as a harm is caused, and breach of the duty to compensate may be challenged and defended in court. Surely in an international setting it is similarly likely that States will want to seek judicial or arbitral resolution of their

²² [1994] 2 AC 264. Strict liability has generally been rejected in the international setting, because of the emphasis placed by States on their sovereign rights to pursue activities within their own jurisdictions. First Report on the Legal Regime for Allocation of Loss in Case of Transboundary Harm Arising Out Of Hazardous Activities by Mr Pemmaraju Sreenivasa Rao, Special Rapporteur, referred to above, pages 12-13.

²³ The Commentary to Article 5 made it clear that such liability was entirely distinct from State responsibility for breach of international law.

²⁴ See the Special Rapporteur’s first and second reports: UN Doc A/CN.4/531 21 March 2003; UN Doc Z/CN.4/540 15 March 2004.

competing contentions as to whether harm has actually occurred in a given case and how the harm was caused? Can it be expected that a procedural obligation to negotiate compensation will consistently be fulfilled without establishing a basis on which attention may be devoted first to these substantive questions? As a matter of practicality, a move towards commuting the liability scheme of the ILC into a strict liability scheme may be an indispensable aspect of its articulation and finalisation, rendering the scheme workable. The likelihood of litigation over substantive aspects of the duty to compensate can then be acknowledged and the drafting of the scheme reviewed with that in mind. The notion of a scheme that is based essentially, if not exclusively, on a procedural obligation would then become something of a ghost.

Based on this brief case-study on the ILC liability scheme, it would seem that, although the growing significance of procedural obligations in international environmental law may be desirable, the structure of international law will still require procedural obligations to be twinned with substantive rules governing the relations between States and establishing their obligations towards one another.