THE CASE FOR MEXICAN LIABILITY FOR TRANSNATIONAL POLLUTION DAMAGE RESULTING FROM THE IXTOC I OILSPILL

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My testimony relates to the international legal consequences of the Bay of Campeche oilspill. The issue of liability and compensation for oil pollution damage within the United States as well as to natural resources subject to United States jurisdiction raises a number of interesting legal questions.[1] I will, however, concentrate on one particular issue, namely the international legal aspects proper, *i.e.*, those issues which arise if recovery efforts are directed against the state of Mexico on an international plane. My assumption thus is that Mexico—in contrast to, for example, PEMEX—could not be sued in the courts of the United States because the very cause of action against Mexico would run afoul of the Foreign Sovereign Immunities Act.[2]

A fundamental point of departure in settling, as between the United States and Mexico, the question of compensation be that through quiet diplomatic negotiations or by an eventual recourse to third party determination of respective rights and duties, is clarification of the basis and scope of Mexican liability under international law. Incidental to this question is the issue of the applicability of the so-called local remedies rule to claims for compensation for damage due to transnational pollution: could the United States Government espouse the claims of U.S. citizens without the latter having first exhausted

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1. Apart from possible liability by PEMEX, PEMARGO and SEDCO, it is quite conceivable that the United States itself might be found liable for part of the damage on account of a failure to take all cost-effect measures to mitigate the effects of the spill.

2. Foreign Sovereign Immunities Act of 1976, Pub. L. 94-583, 90 Stat. 2891 (codified in scattered sections of § 85, 28 U.S.C. (1976)). Claims brought against Mexico on an international level would have to allege Mexico's failure to discharge its international duties as a territorial sovereign *vis-à-vis* the United States. On the other hand, if the claim of liability is based on a construction of strict liability, Mexico's liability commensurate with its licensing of an abnormally dangerous activity, would again involve a sovereign activity rather than a commercial one. In either case, in a suit in a U.S. court, Mexico would be able to plead successfully immunity from jurisdiction pursuant to 28 U.S.C. § 1603-05. No such problem would, by contrast, be encountered by the victim-plaintiffs against PEMEX, which suit, according to § 1695(a)(2), would clearly not qualify for immunity. For a previous denial of immunity to PEMEX see, *e.g.*, S.T. Tringali Co. v. The Tug PEMEX XV, 274 F. Supp. 227 (S.D. Tex. 1967); United States v. Tug PEMEX XV, 1 A.M.C. 896 (1960).

whatever legal remedies might be available to them in Mexico? Finally, a few words are due on what might be essential elements in the necessary improvement of international legal parameters applicable to offshore drilling operations which pose a significant extra-territorial environmental risk.

The question of Mexican liability is directly related to the question of whether states are originally responsible for damage caused extra-territorially by private activities within their jurisdiction or control. International law nowadays quite clearly lays down a general duty of states to see to it that no such damage to the environment be caused by activities within their jurisdiction or control. Thus, principle 21 of the Stockholm Declaration—one of the final documents of the 1972 U.N. Conference on the Human Environment—states:

> States have in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies and the responsibility to insure that activities within their jurisdiction or control do not cause damage to the environment of other states or to areas beyond the limits of national jurisdiction.[3]

Already at the 1972 Conference a number of national delegations expressed the view that the provision on state responsibility was reflective of the then state of customary international law.[4] The question of the legal significance of the provision was, in any event, clearly settled in the follow-up discussions within the U.N. General Assembly's Second Committee which in turn led to adoption by the General Assembly of Resolution 2996 (XXVII). The single purpose of this resolution was to confirm that principle 21 laid down a basic rule governing the international responsibility of states with regard to the environment.[5]

The history of this notion of original state responsibility is a long one and includes its assertion in the classic *Trail Smelter* case.[6] In this dispute between the United States and Canada over transfrontier air pollution, the court of arbitration in pronouncing as a general principle of international law, held that:

> No state has a right to use or permit the use of its territory in

3. Report of the United Nations Conference on the Human Environment, U.N. Doc. A/CONF. 48/14, at 7 (1972).

4. As to, for example, the Canadian delegation's viewpoint, see U.N. Doc. A/AC. 138/SC.III/SR. 20, at 7 (1972). *See also* U.N. Doc. A/CONF. 48/PC.12, Annex II, at 13 ¶ 60 (1971).

5. International Responsibility of States in Regard to the Environment, G.A. Res. 2996, 27 U.N. GAOR, Supp. (No. 30) 42 U.N. Doc. A/8730 (1973).

6. Trail Smelter Case (United States v. Canada), 3 R. Int'l Arb. Awards 1905 (1938, 1941); 35 AM. J. INT'L L. 684 (1941).

> such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein when the case is of a serious consequence.[7]

In the *Corfu Channel* case the International Court of Justice had an opportunity to reaffirm as a principle of international law of general applicability "every state's obligation not to allow knowingly its territory to be used contrary to the rights of others."[8] State practice reflecting acknowledgement of such a duty has been consistent and widespread.[9] As regards the Mexican Government's position itself, there can be little doubt about Mexico's recognition of the existence in international law of a state's responsibility to prevent activities subject to its jurisdiction or control from causing extraterritorial environmental damage. For example, in the discussions within the General Assembly's Second Committee on princple 21 of the Stockholm Declaration, the Mexican delegate in quoting the minister of foreign affairs of Mexico stated unambiguously that ". . . it was the responsibility of all states to avoid activities within their jurisdiction or control which might cause damage to the environment beyond their national frontiers and to repair any damage caused."[10]

In consequence, one can conclude that the existence of an international legal obligation of the above nature should be beyond controversy as between the United States and Mexico.

Once the applicability to the present case of this customary international legal duty of prevention has been established, the issue of re-

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7. *Id.* at 1965.

8. Corfu Channel Case (United Kingdom v. Albania), [1949] I.C.J. 1, 22.

9. *See, e.g.*, Handl, *Balancing of Interests and International Liability for the Pollution of International Water Courses: Customary Principles of Law Revisited*, 13 CAN. Y.B. INT'L L. 156, 170-77 (1975); Charter of Economic Rights and Duties of States, U.N. Doc. A/RES/3281 (XXXIX) art. 30; Informal Composite Negotiating Text/Revision I, U.N. Doc. A/CONF. 62/WP.10/Rev. 1 arts. 139, 235 (1979). The closest analogy to the Ixtoc I blowout is the Cherry Point oil spill at which occasion the Canadian Government very strongly emphasized *vis-à-vis* the United States:

> We are especially concerned to ensure observance of the principle established in the 1938 Trail Smelter arbitration between Canada and the United States. This has established that one country may not permit the use of its territory in such a manner as to cause injury to the territory of another and shall be responsible to pay compensation for any injury so suffered. Canada accepted this responsibility in the Trail Smelter case and we would expect that the same principle would be implemented in the present situation.

Statement by the Secretary of State for External Affairs in the House of Commons, June 8, 1972, *excerpted in* 11 CAN. Y.B. INT'L L. 314, 334 (1973). There was, however, no need for intervention by the United States as the private polluter settled the claims for compensation. For details of the case, see *id.* at 333; N.Y. TIMES, June 16, 1972, at 36, col. 5; 3 INT'L CAN. 93-94 (1972). For an excellent exposition of the basic proposition, namely, the inherently functional notion of territorial sovereignty, see Island of Palmas Case (Netherlands v. U.S.A.), 2 R. INT'L ARB. AWARDS 829, 838-39 (1932).

10. Statement by Gonzales-Martinez, U.N. Doc. A/C.2/SR. 1470, at 7 (1972).

covery centers largely on the question as to the scope of the international obligation concerned. Does the responsibility provision of principle 21 amount to an international obligation to guarantee the avoidance of extraterritorial environmental damage? In other words, does the occurrence—pure and simple—of such damage represent a violation of international law by the controlling state or is the incidence of the additional element of negligence required before the duty embodied in principle 21 can be said to have been breached? The question in short is whether the provision concerned constitutes a basis for the construction of strict liability or liability for fault in the event of transnational pollution damage.

A review of the debates within the Preparatory Committee charged with the task of drafting the text of the Stockholm Declaration clearly reveals strong opposition by several Committee members to the idea that principle 21 could be interpreted as imposing absolute or strict liability on the controlling state. Instead it was maintained that negligence was a prerequisite before the controlling state's responsibility might be successfully invoked.[11] No further concrete discussions on the basis of liability took place at the Conference itself. On the other hand, principle 22 of the Stockholm Declaration commits states to "cooperate to develop further the international law regarding liability and compensation. . . ."[12] On the basis of this evidence it is obvious that principle 21 cannot be viewed as incorporating, as a general proposition, the notion of absolute or strict liability for extraterritorial environmental damage.[13] A reading of the scope of the international legal obligation of states under principle 21 as necessitating, in general, the additional element of negligence is, indeed, more appropriate. Such an interpretation would be in line with the *Corfu Channel* case which arose over the damage sustained by a British convoy which while navigating through the *Channel* (part of Albania's territorial sea) struck a mine field. The International Court of Justice did not proceed on the assumption that Albania was strictly liable but instead inquired into whether the Albanian authorities might not have known of the existence of mines in Albanian waters and thus willfully or negligently contributed to the damage by failing to warn the approaching vessels.[14]

A persuasive piece of evidence for a narrow interpretation of the

11. *See Report of the Intergovernmental Working Group on the Declaration on the Human Environment*, U.N. Doc. A/CONF. 48/P.C. 12, Annex II, at 15, para. 65 (1971).

12. *Supra* note 3.

13. For a detailed analysis, see de Arechaga, *International Law in the Past Third of a Century*, 159 RECUEIL DES COURS 9, 272 (1978); Handl, *supra* note 9, at 158-62.

14. *See* note 8 *supra*, at 17-23. As to the impossibility of clear inferences with regard to the basis of liability from the Trail Smelter case, see Handl, *supra* note 9, at 167-78.

duty of prevention comes also from the International Law Commission which recently adopted draft article 23 on the law of state responsibility. Despite its unfortunately tortuous wording the article clearly conveys the idea that a state's international obligation phrased as a duty to prevent the occurrence of certain events such as extraterritorial environmental damage, may be deemed to have been violated not upon the mere realization of the event concerned but upon coincidence of prohibited event and negligence imputable to the state.[15]

In applying these findings to the present case, the question arises to what extent negligence on the part of the Mexican authorities might have been involved in both the initial occurrence of the blowout and the eventual scope of its environmental and economic impact in and on the United States. To put it differently, what might be in issue is not only the adequacy of such inherently governmental measures as the Mexican procedure for the licensing of offshore drilling activities, Mexican regulations and standards for the operation of oil rigs, and state supervision and control of compliance with these standards, but also Mexican efforts to control and mitigate the effects of the blowout. Determination of Mexican negligence is, of course, dependent on a factual finding on which to speculate would be inappropriate in this exposition. Suffice it, therefore, to say that initial indications are such that an impartial inquiry into the cause of the accident might well conclude in a vein similar to the Norwegian Royal Commission which upon investigation of the 1977 Ekofisk blowout established as the underlying cause of the accident "inadequacy of organizational and administrative systems to assure a safe drilling operation."[16] Given the evident causal connection between blowout and oil pollution effects on and along the Texas coast, a finding of negligence would thus establish Mexico's violation of an international legal obligation *vis-à-vis* the United States. Any breach of an engagement involves, however—as a principle of international law and even a general conception of law—the obligation to make reparation.[17]

In the alternative, Mexican liability, it is submitted here, could be based on the nature of offshore drilling operations as abnormally dan-

15. "When the result required of a State by an international obligation is the prevention, by means of its own choice, of the occurrence of a given event, there is a breach of that obligation only, if by the conduct adopted, the State does not achieve that result." Draft Articles on State Responsibility, [1978] 1 Y.B. INT'L COMM'N 206, U.N. Doc. A/CN.4/L.271, art. 23, para. 1. For a clarification of its meaning, see, *e.g.*, discussion by Prof. Ago (special rapporteur) of comments made by members of the Commission to draft Article 23, at the I.L.C.'s 1477th meeting. *Id.*, 9-11, paras. 4-16.

16. N.Y. TIMES, Oct. 11, 1977, at 1, col. 4.

17. *See* Chorzow Factory Case (Germany v. Poland), [1928] P.C.I.J., ser. A., No. 17, at 29.

gerous activities of international concern. Crucial to this construction is the answer to the question of whether there is a basis in customary international law to impose on such activities liability for damage irrespective of fault. There exist, of course, well known examples of legal régimes featuring strict liability such as the 1971 Convention on Liability for Damage caused by Objects launched into Outer Space and various nuclear liability conventions.[18] The International Law Commission's recent decision to take up codification of the law on international liability for injurious consequences arising out of acts not prohibited by international law is not without significance.[19] It appears to constitute *prima facie* evidence of the existence of a fledgling body of customary international law imposing liability for transnational injury in the absence of fault on the part of the controlling state. A decisive element in the imposition of strict liability is the hazardous nature of the activity concerned. Where the risk of harm is transnational in character, major in degree, and unavoidable despite reasonable care, the controlling state is, as several authors have suggested,[20] originally and strictly liable in the event of extraterritorial damage. In light of past experience such as the Santa Barbara oilspill in 1969, the Ekofisk blowout in 1977, and the oceanographic and climatic characteristics of the Gulf of Mexico there can be little doubt that Mexican offshore drilling operations in the Bay of Campeche meet this test in every single respect.

Recognition of the abnormally dangerous nature of offshore exploration and production of gas and oil emerges clearly from the 1974 Offshore Pollution Liability Agreement (OPOL) entered into by the major oil companies, though not by PEMEX. Under this contract the parties commit themselves to assume strict liability for direct loss for damage and clean-up costs due to a pollution incident involving any offshore facility to which the parties make the contract applicable.[21]

18. Convention on Liability for Damage Caused by Objects Launched into Outer Space, Report of the Legal Sub-Committee on the Work of Its Tenth Session (June 7-July 2, 1971), U.N. Doc. A/AC.105/94 (1971), *reprinted in* 10 INT'L LEGAL MATERIALS 965 (1971). For subsidiary state liability provisions in international conventions regulating nuclear power activities, see Art. XVIII of the Vienna Convention on Civil Liability for Nuclear Damage, Int'l Atom. Energy Agency, U.N. Doc. CN/12/46 (1963), *reprinted in* 2 INT'L LEGAL MATERIALS 727, 742 (1963); Annex II to the O.E.C.D. Convention on Third Party Liability in the Field of Nuclear Activity, 55 AM. J. INT'L L. 1082, 1094 (1961).

19. For references, see Report of the Working Group on International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law, 1 Y.B. INT'L L. COMM'N 284, 287 (1978).

20. *See* Kelson, *State Responsibility and the Abnormally Dangerous Activity*, 13 HARV. INT'L L.J. 197, 198 (1972); Jenks, *Liability for Ultra-Hazardous Activities in International Law*, 117 RECUEIL DES COURS 99, 107 (1966).

21. Offshore Pollution Liability Agreement (OPOL), 13 INT'L LEGAL MATERIALS 1409 (1974).

Similarly, in 1976 an intergovernmental conference adopted a Convention on Civil Liability for Oil Pollution Damage for Offshore Operations which imposes strict liability on the operator of the offshore installation in the event of pollution damage suffered in or by a contracting party.[22] Apart from this regional multilateral agreement, other pertinent instances of state practice evincing acceptance of the principle of strict liability for offshore drilling activities which pose a significant transnational environmental risk, include the United States-Canadian arrangements with regard to compensation for pollution resulting from operations in the Beaufort Sea.[23] Moreover, basic acceptance of the principle of strict liability is reflected in a number of national laws governing offshore production and exploration activities.[24] In short, there exists an impressive body of evidence which clearly indicates strong expectations within the international community that offshore activities to the extent they entail a recognizably significant risk of transnational pollution be subject to a régime of strict liability. Lastly, it must be noted that maritime transportation of oil is now subject to international legal agreements imposing strict liability.[25] Any differentiation between maritime transport and offshore production or exploration with regard to the standard of liability is unjustifiable in view of the disastrous transnational impact potential associated with accidents involving oil rigs which equals if it does not indeed surpass that associated with supertakner accidents.

In conclusion, one can therefore say that while offshore oil drilling is not subject to a strict liability convention of global applicability, a non-fault standard of liability might nevertheless be argued on the basis of an emerging norm of customary international law. In international proceedings before an impartial third party such an argument might well prove to be persuasive.

Presentation by the United States Government of a claim for compensation for pollution damage suffered in the United States or caused to natural resources subject to United States jurisdiction raises one major procedural issue, namely whether such a claim might include dam-

22. Convention on Civil Liability for Oil Pollution Damage from Offshore Operations: Final Text, Dec. 17, 1976 (Cm'd. 6791), *reprinted in* 16 INT'L LEGAL MATERIALS 1450 (1977). The Convention is regional in the sense that only states which have coastlines on the North Sea, the Baltic Sea or that part of the Atlantic Ocean to the north of latitude 36° N. are invited to accede. *Id.*, art. 18, at 1455.

23. For details, see, *e.g.*, House of Commons debates, *excerpted in* 16 CAN. Y.B. INT'L L. 392-94 (1978).

24. This is the case, for example, in the United States, Canada, and Scandinavia.

25. *See* International Convention on Civil Liability for Oil Pollution Damage, November 29, 1969, 1975 Gr. Brit. T.S. No. 106 (Cmd. 6183); I.M.C.O. Doc. Leg. VI/6, Annex I (1969), *reprinted in* 9 INT'L LEGAL MATERIALS 45 (1970).

age sustained by private U.S. citizens. While in general, presentation by a state of an international claim on behalf of its political subdivisions and local governments is unproblematical, espousal of private citizens' claims would normally be subject to the requirements of the exhaustion of local remedies rule. Should, in other words, the private pollution victims be forced to exhaust remedies available to them in Mexico before the U.S. Government can present their claims for damages *vis-à-vis* Mexico?

International jurisprudence clearly indicates that a functional approach to the question of the applicability to the rule is warranted: thus recourse to local remedies will be excused if, for example, no effective remedy is available.[26] On the other hand, it has been argued that in the absence of any voluntary link created by the injured individual between himself and the respondent state the rule did not apply.[27] Although this view does not find explicit support in international case law, it is not incompatible with key decisions of the Permanent Court of International Justice and the International Court of Justice.[28] Whatever the specific policy considerations underlying the rule,[29] it is evident that in the case of accidental transnational pollution, exhaustion of local remedies should not be considered a prerequisite to the espousal by the state of its injured nationals' claims.[30] Forcing pollution victims into multiple litigation in foreign courts hardly constitutes a more efficient and inexpensive way of settling transnational claims than through the international claims procedure proper. Indeed, insis-

26. *See, e.g.*, Panevezys v. Saldutiskis Railway Case, [1939] P.C.I.J., ser. A/B, No. 76, at 18; Finnish Ships Arbitration Case (Finland v. Great Britain), 3 R. INT'L ARB. AWARDS 1484, 1535 (1934).

27. *See* argument by Mr. Rosenne in Aerial Incident of July 27, 1955 Case (Bulgaria v. Bulgaria), I.C.J. Pleadings 455, 531-32 (1959).

28. For example, see Finnish Ships Case, *supra* note 26; Ambatielos Case (Greece v. United Kingdom), 12 R. INT'L ARB. AWARDS 82 (1956); *see also* 50 AM. J. INT'L L. 674 (1956).

29. The rationale of the rule was given by the International Law Commission (I.L.C.) as: "to enable the State to avoid the breach of an international obligation by redressing, through subsequent course of conduct adopted on the initiative of the individuals concerned, the consequences of an international course of conduct contrary to the result required." Commentary on Draft Article 22 on State Responsibility (exhaustion of local remedies), Report of I.L.C. on the Work of its Twenty-Seventh Session, 32 U.N. GAOR, Supp. (No. 10) 67, U.N. Doc. A/32/10 (1977). The Commission, though not deciding the issue of whether in the case of injury caused by a state to foreign individuals outside the territory the rule was inapplicable, nevertheless seems to lean toward such a view. *See id.* at 98-100; *see also* Parry, *Some Considerations Upon the Protection of Individuals in International Law*, 90 RECUEIL DES COURS 653, 688 (1956).

30. *See, e.g.*, Observations and Submissions of the Government of the United States of America on the Preliminary Objections of the Government of the People's Republic of Bulgaria, Aerial Incident of 27 July Case, I.C.J. Pleadings 301, 326 (1959); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 208(c) (1965); Meron, *The Incidence of the Rule of Exhaustion of Local Remedies*, 35 BRIT. Y.B. INT'L L. 83, 100-01 (1959).

tence on the application of the local remedies rule in a transnational pollution context would violate basic considerations of equity as many pollution victims might find it simply beyond their means to engage in the costly and complex pursuit abroad of compensation. In any event, where the transnational injury inflicted has elements both of direct (*i.e.*, to the other state itself) and indirect (to the latter's citizens) injury as is here the case, any international judicial or arbitral court would apply the so-called preponderance test: the exhaustion of local remedies rule would thus be inapplicable where the direct injury elements were preponderant—a situation which clearly exists with regard to the present controversy.

In sum, it is difficult to see how the United States Government might be prevented under international law to present claims for damages on behalf of its injured nationals even though the latter did not exhaust all available avenues of redress which the Mexican legal and administrative systems may offer.

The final issue to be only briefly hinted at here concerns the steps by which the present international legal régime could be decisively improved. To begin with, there is urgent need for an internationalization of licensing and operating standards for any offshore activities which pose a recognizably significant risk of transnational pollution. This might be achieved on a bilateral basis and eventually could lead to adoption of a multilateral convention. Another important step is the organization and the putting into effect of a joint contingency plan for which the 1974 U.S.-Canadian plan for oil spills might well serve as a model. Of similar importance appears to be conclusion with Mexico of an agreement on liability for oil spills which clearly defines liability as strict, imposes compulsory insurance on offshore operators, and perhaps features a mutual guarantee fund to which Mexican—as well as U.S.—licensed operators might contribute and whose function it would be to defray those pollution costs for which the insurance coverage might prove inadequate.

In conclusion, one would hope that the issue of liability and compensation will be settled along lines dictated by both international law and economic reasoning despite the sensitive nature of present U.S.-Mexican relations. The costs of Mexican oil production ought to be fully internalized. Such a process would not only strengthen pollution prevention efforts in the long run but ought to be considered a fundamental construct of U.S. energy policy-making. For only if the price of Mexican oil will reflect its true costs, in other words, will include the costs of compensating U.S. pollution victims, will a rational choice among competing energy sources be possible. A nation for which the

social costs and benefits of the various energy options have become critical policy issues deserves a government which expressly reaffirms the principle of the internalization of social costs particularly when Mexican oil and gas are likely to play a significant role in meeting future U.S. energy demands. Lastly, inaction by the U.S. Government in the face of such clear legal stakes, must set a precedent which is likely to make the issue of compensation more difficult to resolve in future cases of transnational oil pollution whose frequency of occurrence is almost certainly going to increase.