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Summary record of the 1975th meeting

Topic:
International liability for injurious consequences arising out of acts not prohibited by international law

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1975th MEETING

Wednesday, 25 June 1986, at 10 a.m.

Chairman: Mr. Doudou THIAM

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Koroma, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

International liability for injurious consequences arising out of acts not prohibited by international law (continued) (A/CN.4/384,¹ A/CN.4/394,² A/CN.4/402,³ A/CN.4/L.398, sect. H.1, ILC(XXXVIII)/Conf. Room Doc.5⁴)

[Agenda item 7]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. Mr. ROUKOUNAS, referring to the various aspects of the schematic outline, said that it would be necessary to define and draw up a list of the activities which might give rise to injurious consequences for the environment. Such activities might, for example, include the peaceful uses of nuclear energy, the exploration and utilization of outer space, the carriage of oil, the exploration and exploitation of marine natural resources, the exploitation of shared natural resources, the utilization of international watercourses and the production and stockpiling of some types of weapons. In view of the wide variety of activities which might pollute and damage the environment, the Commission should be careful not to make the list too selective: some activities might later be eliminated if it turned out that they were already regulated.

2. The spatial context would also have to be defined. The schematic outline stated that activities "within the territory or control of a State" were within the scope of the topic. The concepts of "territory" and "control" would, however, be difficult to apply in the case of activities which gave rise to pollution in outer space and which were not yet governed by any international régime, since no State had ratified the 1985 Vienna Convention for the Protection of the Ozone Layer. Outer space as a medium for the transmission of the radio frequency spectrum was nevertheless part of the natural environment. It was a limited natural resource which

might become saturated, but, according to the administrative regulations of ITU, it was not exhaustible.

3. It would also have to be determined what consequences were to be regarded as injurious. Contrary to what was provided for in the draft articles on State responsibility for wrongful acts, injury was, in the present case, a *sine qua non* for liability. The various types of activity in question would, however, necessarily give rise to various kinds of injurious consequences. A number of questions would have to be answered: at what level of seriousness were the consequences of an activity to be regarded as injurious? What did "appreciable harm" mean? Could appreciable harm be the result of an accumulation of acts which would, by themselves, not be hazardous?

4. There would have to be a definition also of "loss or injury". The 1972 Convention on International Liability for Damage Caused by Space Objects⁵ and the 1979 Convention on Long-range Transboundary Air Pollution⁶ did not define injury in the same way. In his view, the Commission had to carry out further research before deciding that "unforeseeable injury" should not come within the scope of the topic.

5. Turning to the régime proposed in the schematic outline, he said that it was difficult to regulate activities that were on the borderline between what was lawful and what was unlawful. Three possible situations might arise in that regard. The first was that, as a result of the development of international law, an activity which had been lawful might simply be not prohibited and then become wrongful. It would gradually move from one legal category to another. Nuclear weapon tests in the atmosphere, for example, had followed that course before being prohibited in 1963. The second situation was that in which lawful activities were governed by special conventions. In the case of oil pollution on the high seas, for example, compensation for injury was governed by treaty rules. Since the activity in question was not unlawful, it continued to be carried out. In some cases, however, an activity which was lawful might be suspended: that was the case, for example, of activities giving rise to transboundary pollution of some magnitude. The third situation was that in which lawful activities were governed by a general convention. According to the schematic outline, which covered that third situation, the activity continued to be lawful as long as the State concerned applied a particular procedure before or perhaps after injury had occurred. A basic rule thus appeared to be embodied in a set of procedural rules. The objective, which was to maintain good relations between the States concerned between the time injury occurred and the time reparation was made, was commendable, but difficult to achieve.

6. In that connection, it should be recalled that the obligations to inform and to co-operate were already provided for in Principles 21 and 22 of the 1972 Stockholm Declaration⁷ and that the international community had been working along those lines for some

¹ Reproduced in *Yearbook ... 1985*, vol. II (Part One)/Add.1.

² Reproduced in *Yearbook ... 1985*, vol. II (Part One).

³ Reproduced in *Yearbook ... 1986*, vol. II (Part One).

⁴ The schematic outline, submitted by the previous Special Rapporteur, R. Q. Quentin-Baxter, at the Commission's thirty-fourth session, is reproduced in *Yearbook ... 1982*, vol. II (Part Two), pp. 83-85, para. 109. The changes made to the outline in R. Q. Quentin-Baxter's fourth report, submitted at the Commission's thirty-fifth session, are indicated in *Yearbook ... 1983*, vol. II (Part Two), pp. 84-85, para. 294.

⁵ See 1972nd meeting, footnote 12.

⁶ E/ECE/1010.

⁷ See 1972nd meeting, footnote 8.

time. At the current stage, however, it was still not known how those principles and the many relevant conventions were being applied in practice. He was thinking primarily of international organizations, which had an important role to play in that regard and which should be considered as having autonomous rights and obligations, as the 1982 United Nations Convention on the Law of the Sea clearly showed.

7. A procedural régime to promote co-operation between States would, of course, be entirely welcome, but there should be no implication that it would operate automatically. According to the schematic outline, a hazardous activity continued to be lawful under a régime consisting of four parts, namely information, co-operation, injury and reparation. Prior information might, however, be difficult to provide or to obtain, since some States did not, for example, deem it appropriate to indicate whether their warships were nuclear-powered or not, and in some cases co-operation might break down, although the source State would still take the necessary measures unilaterally. There would then be a direct shift from injury to reparation. Consideration might therefore be given to the possibility of including in the schematic outline much more specific rules which would give States some freedom of choice.

8. It must be borne in mind that considerable importance had been attached to the theoretical basis for the topic. Reference had thus been made to strict liability or liability for risk, to international solidarity and to sovereign equality among States. As a justification for reparation, mention had also been made of territorial integrity or the protection of the sovereignty of the affected State. In his second report (A/CN.4/402), the Special Rapporteur appeared to have a slight preference for strict liability—and he himself shared that preference.

9. Since an international fund for the protection of States against transboundary injury caused by lawful activities was not likely to be established for quite some time, efforts should perhaps be made now to formulate not only a set of procedural rules, but also a general rule of conduct which would make the hazardous activities in question lawful while specifying their international limits. The problem was a global one which might as easily arise on the border between Canada and the United States of America as in Stockholm or in the Corfu Channel, and to which no solution had yet been found.

10. The unity of the topic, as dealt with by the Special Rapporteur (*ibid.*, paras. 6-10), should be a reminder of the oneness of the human race in its efforts to cope with the advantages and disadvantages of modern-day science and technology, or with what Paul Valéry had described as “the time when the finished world begins”.

11. Mr. BALANDA said that the topic under consideration was an interesting, but difficult one because it involved prospective law: no general rule had yet been formulated to govern activities which would promote the development of States, but which involved risks.

12. With regard to the scope of the topic, the Special Rapporteur, who had not yet defined the concept of

“situations”, was proposing that for the time being reference should be made only to activities which might cause “appreciable” or “tangible” physical transboundary harm (A/CN.4/402, para. 11). The problem was, however, that it was not easy to determine the degree of seriousness beyond which harm had to be repaired.

13. Some members had suggested that account should be taken only of ultra-hazardous activities; but, since practically no rules of customary law were applicable and treaty practice was not very abundant, a wide variety of activities would not be covered by any legal rules if that course were followed.

14. There was also the problem whether the provisions that would be formulated would apply only to activities conducted by States or whether they would also apply to activities carried out by other entities within the jurisdiction of States. What the Special Rapporteur said in that regard (*ibid.*) was not very clear. The reference to the exclusive jurisdiction of the State as a territorial or controlling authority appeared to imply that the State was responsible for all activities carried out in its territory. That was, however, precisely the interpretation which the previous Special Rapporteur had wanted to avoid and, in all his reports, he had therefore used the term “acting State”, which would apparently be applicable only if account were taken of activities conducted by the State itself and not of all the activities which could be carried out in its territory. That point would therefore have to be clarified.

15. The Special Rapporteur had successfully demonstrated the conceptual unity of the topic, which encompassed both prevention and reparation, with injury as the unifying criterion as far as substance was concerned (*ibid.*, paras. 6-10).

16. With regard to the obligation of prevention, the source State did, of course, have to be required to do everything possible to prevent the activities it undertook from giving rise to injurious consequences. But it first had to know what risks the activity in question might involve; it could very well undertake an activity without knowing that it might give rise to certain injurious consequences. There was thus an important element of unpredictability, which would, in the event of harm, entail the responsibility of the source State. Consequently, a rule relating to the obligation of prevention would have to make it clear that prevention depended on the state of the art with regard to the activity in question. The State could not reasonably be held responsible if, despite limited scientific and technological resources and know-how, it had done everything possible to identify the injurious consequences of an activity and if it had not been able to prevent harm from occurring.

17. Although the obligation to provide information and the obligation to co-operate were incumbent only on the source State, the obligation to negotiate was incumbent not only on the source State, but also on all States that might be aware of the impact of the activity carried out by the source State. Since States were sovereign, some might refuse to co-operate and negotiate. It would therefore be necessary to find a way of solving that problem.

18. According to the schematic outline, failure to fulfil the obligation to provide information, to cooperate and to negotiate did not in itself give rise to any right of action; in other words, it did not give rise to an obligation of reparation if harm occurred. The existence of an obligation of reparation depended on shared expectations or negotiation. However, in regard to grounds for exoneration, the Special Rapporteur stated:

These exceptions, which mitigate the application of strict liability, might not be appropriate if the source State behaved in a way that was incompatible with its obligations to provide information and to negotiate ... (*Ibid.*, para. 61.)

The Special Rapporteur thus seemed to be of the opinion that, by ruling out the possibility for the source State to claim exceptions, failure to fulfil the obligation to provide information and to negotiate did entail the responsibility of that State. That was an apparent contradiction.

19. In his own view, the source State had to fulfil the obligation to provide information before the activity began, not after. The previous Special Rapporteur had set a limit on the right to information by providing that the State could refrain from communicating certain types of information in order not to reveal trade secrets. The present Special Rapporteur would have to explain whether he thought that there should be limits on the right to information or whether it should, rather, be absolute.

20. As to the content of the obligation to provide information, it might, for example, be asked whether a State which was about to build a factory to undertake an activity that might give rise to transboundary harm had to supply the blueprints for that factory or whether it merely had to provide general indications concerning the injurious consequences to which the activity in question might give rise.

21. In his report (*ibid.*, para. 17), the Special Rapporteur referred to the possibility of introducing the concept of due diligence, probably in order to establish a kind of balance. If account was not taken of the source State's diligence in trying to prevent harm, that State might be held liable for any harm done to a neighbouring State. The Special Rapporteur should include further details on that point in his future reports.

22. With regard to the obligation of reparation, he could not fully agree with the views expressed by the Special Rapporteur (*ibid.*, paras. 46 *et seq.*). Although the limitation of the automatic application of strict liability might be acceptable in some cases, the obligation of reparation should not, in view of the nature of the topic, depend on a disturbance of the balance of interests which "shared expectations" or negotiation had tended to establish between the States concerned. To regard the obligation of reparation as a treaty obligation would be to deprive the topic of its autonomy, or in other words to preclude liability for risk. Since the activities in question always involved risk, the obligation of reparation could not be conditional. It had to be autonomous. The Special Rapporteur rightly stated that the obligation of reparation was based on the principle of sovereignty. If a sovereign State with exclusive jurisdiction over its territory caused harm to another

State, it had to make reparation, whether or not there had been a breach of some agreement concerning negotiation or a failure to meet "shared expectations".

23. Reparation was not the same as compensation. The purpose of reparation was to re-establish a pre-existing situation to the extent possible. Compensation came into play when harm could not be physically repaired. It could be asked how, in the present context, reparation would operate, particularly when harm continued to take place. Would reparation be made over a period of time or would compensation be made once and for all? In view of the particular features of reparation and compensation, the Commission should try to establish a different régime for each.

24. If grounds for exoneration were allowed, even though, as things now stood, the obligation of reparation would arise only in the event of failure to meet "shared expectations", it was to be feared that reparation would become impossible. The affected State would not be able to obtain either reparation or compensation. The Special Rapporteur would therefore have to give further thought to that question in order to avoid any imbalance. It would be quite abnormal if the source State, which would benefit from carrying out an activity that caused harm, were not bound to make reparation to the affected State, which would not derive any benefit from that activity.

25. In the case of the carriage of oil by sea, for example, it would be entirely logical to allow such grounds for exoneration as *force majeure* and fortuitous event, because the harm that might be caused in such a case, namely pollution, was necessarily accidental. That was not true, however, when, as in the present case, risk was inherent in the activity in question. In any event, if grounds for exoneration were to be allowed, the Commission would have to be very cautious and take account of the legitimate interests of the affected State.

26. A number of clarifications would have to be provided with regard to harm. It would, for example, have to be determined whether what had been caused was direct or indirect harm and whether the source State had an obligation to make reparation for all the consequences of the activity it had carried out.

27. Further consideration should also be given to the question of the establishment of an international compensation fund, which would be the only means of reconciling the interests of the source State and the affected State, by taking account of the harm suffered by the latter and enabling it to obtain suitable reparation.

28. The distribution of costs would have to be studied very carefully. It was important not to prejudice the legitimate interests of the affected State; but, if that State had an obligation to share costs, although it derived no advantage from the activity which caused it injurious consequences, it would suffer further harm.

29. Mr. FRANCIS congratulated the Special Rapporteur on his excellent second report (A/CN.4/402), on which he had some preliminary comments to make.

30. First, the level of care required in connection with the present topic fell short of the familiar concept of the

“duty of care”. Secondly, the purpose of the topic was not to establish secondary rules, but rather to lay down rules which would, from the legal point of view, constitute guidelines or recommendations for the source State and the affected State. In that connection, he agreed that the Special Rapporteur should follow the example of his predecessor and use the term “source State”.

31. In the context of the present topic, the Commission was engaged in establishing primary rules to govern the question of reparation and the obligation to negotiate. The previous Special Rapporteur had emphasized that those primary rules came into play in the event of transboundary harm being caused by an activity which was not prohibited by international law. The schematic outline had been based on those assumptions.

32. In his report, the present Special Rapporteur specified that: “At the present stage, we will work only on the outline itself and not on the amendments proposed in the first five draft articles submitted subsequently” (*ibid.*, para. 13). The articles in question were, of course, articles 1 to 5 submitted by the previous Special Rapporteur in his fifth report.⁸ The present Special Rapporteur also pointed out that the schematic outline did not give any indication of the qualitative nature of the risk involved:

... No indication is given of the kind of risk that is meant. Nothing is said about whether the risk lies in the existence of a very slight probability of catastrophic injury ... or whether we are to consider only the activities that Jenks termed “ultra-hazardous” ... (*Ibid.*)

33. He himself would prefer the Commission to deal with the five draft articles already submitted on the basis of the schematic outline, provided, of course, that a flexible approach was adopted. With regard to the scope of the topic and the qualitative nature of the risk involved, it was essential to bear in mind the distinction between the present topic and that of State responsibility. State responsibility dealt with internationally wrongful acts, whereas the present topic was concerned with acts not prohibited by international law. At the current stage, the Commission should not be concerned with the question of the qualitative nature of risk, but should concentrate on the broad objectives of the topic.

34. As to the general adequacy of the schematic outline, he drew attention to a comment made by the previous Special Rapporteur in his third report:

Of course, it should be made very clear that a schematic outline is not a substitute for the proof of any of the propositions it may briefly indicate. Every element in the schema must later be tested by reference to received principles of international law and emerging State practice, or acceptability to States in the light of their experience and perceived needs. If in any case that test is not satisfied, the schematic outline must be revised. ...⁹

The element of flexibility had thus been left wide open by the previous Special Rapporteur.

35. The scope of the topic should be seen in the context of its object, namely acts not prohibited by international law. Such acts could be performed either by State

agents or by other persons. At the present stage, the Commission should not try to determine the level of risk to be taken into consideration. Many examples could be given to show how wide a range of situations there was to be covered. The essential point was that the present topic concerned all transboundary harm resulting from activities not prohibited by international law.

36. The recent accident at Chernobyl, in connection with which he wished to join in Sir Ian Sinclair’s expression of sympathy (1974th meeting) to Mr. Ushakov, was relevant to the scope of the topic. One of the conclusions to be drawn from that accident was that the Commission would have to be very careful in delimiting the scope of the topic from the spatial point of view.

37. With regard to the question of the role of international organizations, he noted that the Special Rapporteur clearly indicated that the practice of the member States of such organizations would affect the scope of the topic (A/CN.4/402, para. 11 (c)). Since the Special Rapporteur would have to examine that practice, it would be premature at the current stage to reach any conclusions on that point.

38. He recalled that the previous Special Rapporteur had, in his third report, indicated that:

... The best course was to suspend judgment about the unresolved questions of scope until the content of the topic had been more fully explored. ...¹⁰

In his own view, any attempt to revise the schematic outline would therefore be premature at the current stage.

39. Lastly, he drew attention to the comments made by the present Special Rapporteur on the terms “responsibility” and “liability” (*ibid.*, para. 5), on the concept of the duty of care (*ibid.*, para. 6) and on the question of negotiation (*ibid.*, para. 41 (c)). In essence, the Special Rapporteur wanted negotiation to be a binding element in the schematic outline and, accordingly, had suggested that the first sentence of section 2, paragraph 8, and of section 3, paragraph 4, of the outline should be deleted. The cumulative effect of those comments would be a premature revision of the schematic outline. At the same time, the present topic would be shifted in the direction of State responsibility, or in other words in a direction opposite to its very nature. All was, however, not lost. Both the previous and the present Special Rapporteurs had admitted that the schematic outline might have to be revised. His own suggestion was that the outline should be retained as it stood, on the understanding that it would be revised in the light of future developments. The Commission should proceed on that basis to consider the five draft articles submitted by the previous Special Rapporteur.

40. Mr. TOMUSCHAT said that, in addition to its intellectual merits, the Special Rapporteur’s excellent second report (A/CN.4/402) had the advantage of drawing up a detailed balance sheet of all the work done on the topic thus far. The Special Rapporteur had thus given the Commission a solid foundation for its future work. He himself wholeheartedly agreed with that approach,

⁸ See 1972nd meeting, footnote 6.

⁹ *Yearbook ... 1982*, vol. II (Part One), p. 52, document A/CN.4/360, para. 4.

¹⁰ *Ibid.*, p. 61, para. 48.

which recognized the Commission as a collective working unit.

41. As to the question of the legal basis for the topic under general international law, he fully agreed with the Special Rapporteur's conclusions (*ibid.*, paras. 52-54). Basically, liability for acts not specifically prohibited by international law could be traced back to the principle of sovereign equality or equal sovereignty. Interference in the internal affairs of another State was prohibited. The use of force in international relations was also prohibited by Article 2 of the Charter of the United Nations. National sovereignty must, however, be protected against other impairments as well. Quite obviously, physical transboundary effects constituted a third category of acts against which States had to be safeguarded. For sovereignty to retain its meaning, self-determination had to be guaranteed in the economic and social fields.

42. As he saw it, there was no doubt about the legal existence of a rule which could already be relied upon at the present stage: that rule was *sic utere tuo ut alienum non laedas*. Since that ground rule was only a broad principle, whose meaning within the context of the present topic was controversial, there was a definite need to codify in detail the rights and duties of territorial interdependence.

43. He concurred with the Special Rapporteur's approach of not separating the question of prevention from that of reparation of damage and of dealing with them together. Three basic reasons could be given in support of that approach. The first was the interest of the community of nations, and indeed of mankind as a whole, to be preserved from harm to the greatest possible extent. From that point of view, reparation *ex post facto* was always the second best solution. The second reason was that, in many instances, it would not be possible to identify the State which had caused the damage. The third reason was that, in the event of a major disaster, the damage could be so great that the duty to pay compensation would prove rather theoretical. Clearly, therefore, emphasis had to be placed on prevention. A good example was provided by the Chernobyl incident, in connection with which he wished to express his sympathy to the Soviet people. The Soviet Union would obviously have serious difficulties in meeting all the claims that might be made.

44. It was precisely in such circumstances that the role of international organizations became important. Internationally accepted standards could never be enacted by one State alone. They were conceivable only as the outcome of a co-operative effort, which nowadays could be made only within the framework of an international organization.

45. Consequently, he partly disagreed with the schematic outline, and in particular with section 2, where the relationship between a potential source State and a potentially affected State was regarded primarily as a bilateral one. In his view, if a State followed the guidelines adopted by an international organization, it could not be deemed to have an obligation further to discuss safety standards with its neighbours.

46. The role which international organizations were called upon to play might not be easy to define because of the wide range of functions and activities involved. The fact was, however, that many international organizations had been entrusted, *inter alia*, with the task of setting standards of conduct intended precisely to prevent physical transboundary harm.

47. As to the scope of the topic, he agreed with the Special Rapporteur on the need to focus on physical transboundary harm (*ibid.*, para. 11). That concept was, however, a rather broad one. Reading the previous Special Rapporteur's fifth report, it was almost frightening to see what could be included under the heading of "physical transboundary harm". Even diseases had been mentioned by the previous Special Rapporteur, who had apparently been of the opinion that, since individuals were under the control of the territorial State, the spread of an epidemic might be regarded as physical transboundary harm.

48. In his own view, the Commission should concentrate primarily on damage caused by way of the air. The main question that arose was whether States would assume responsibility for damage caused to other States by carrying out military activities. In that connection, a careful analysis of the legal position would be appropriate.

49. Other speakers had referred to the choice between establishing a general rule and identifying areas of hazardous activities. He himself agreed with the Special Rapporteur that both methods should be applied concurrently, because they supplemented one another. Indeed, different categories should even be established. It was clear that the ordinary régime of State responsibility applied wherever standards established by an international treaty had been violated. Violations of resolutions of international organizations were, however, a different category; he had in mind resolutions without binding effect which identified substances that should not be released into the environment. Such resolutions served to underline the high-risk nature of certain activities, and, if damage occurred, full compensation was called for. The same would apply to activities which the laws of all countries regarded as high-risk activities. In his view, a nuclear power plant clearly came within that category.

50. The general rule then applied to all other activities which did not qualify as high-risk activities. The operation of a chemical plant was thus not usually regarded as an ultra-hazardous activity. In that field, any rule on reparation would require some flexibility.

51. Although he, like other Continental lawyers, was not familiar with the concept of shared expectations, he believed that in the present context it was entirely appropriate. Since every human activity in an industrial society had some kind of negative effect on the environment, the task at hand was to set limits of mutual tolerance. If all States engaged in the same deleterious activities, none could claim damages from the others for the harmful effects. The best example in that regard was air pollution caused by road traffic. So long as all the States concerned took no remedial steps, even serious damage to forests could have no legal consequences. If,

however, one State or a few States required the use of air pollution abatement devices, the negative expectation of continuing to pollute the air would be destroyed.

52. That and other examples showed that, in the present context, the yardstick could never be an absolute one. It was through their own practices that States determined the content of what was required under the general principle of due diligence. Some legal concepts therefore had to be framed on the subject, and they had to allow the necessary flexibility. He agreed with the Special Rapporteur that the concept of shared expectations could play that role.

53. Mr. RAZAFINDRALAMBO congratulated the Special Rapporteur on his second report (A/CN.4/402), which reflected the same grasp and mastery of the topic as those of the previous Special Rapporteur, whose fourth report had, moreover, been welcomed by the Sixth Committee of the General Assembly. The schematic outline which the previous Special Rapporteur had submitted could therefore be regarded as having clearly defined the scope and elements of the topic under consideration. The present Special Rapporteur had rightly decided to focus on the schematic outline, which he regarded as the basic raw material for the topic, but some elements of which had given rise to objections in the Commission and in the Sixth Committee, where the discussions had made it clear that some additions and deletions would be necessary. Accordingly, he himself would draw the Special Rapporteur's attention to various aspects of his report, on which he would request some clarifications and make some suggestions.

54. He would not refer to the question of the unity of the topic, according to which prevention and reparation were one and the same thing viewed from different angles, but he would spend some time on the question of the scope of the topic.

55. As the Special Rapporteur stated:

The schematic outline ... deals primarily with the duty of the source State to avoid, minimize or repair any "appreciable" or "tangible" physical transboundary loss or injury, when it is possible to foresee a risk of such loss or injury associated with a specific dangerous activity. ... (*Ibid.*, para. 11.)

It would be interesting to assess that proposition not in abstract and general terms, but in the light of specific cases, for example by taking the viewpoint of the developing countries, something that would be all the more to the point in that, in his preliminary report (A/CN.4/394, para. 17), the Special Rapporteur had said that he would give careful attention to the interests of the developing countries.

56. Those countries did deserve particular attention because it was difficult to place them on the same footing as the highly industrialized countries and because it could not be denied that, in the developing countries, activities that might cause appreciable physical transboundary harm were usually carried out by corporations controlled either in whole or in part by foreign interests. The activities of such corporations had led to a number of very serious accidents, such as the disaster at the Union Carbide plant at Bhopal in India. Even when hazardous activities were carried out by na-

tional corporations in developing countries, those corporations used technologies guaranteed by industrialized countries. That was the case of nuclear plants practically everywhere in the third world. However, the schematic outline apparently did not contain any provisions relating to the liability of countries with exported high-risk technologies, at least in terms of guarantees of reparation.

57. With regard to the nature of harm, the Special Rapporteur appeared to be using the term "transboundary" in the strict sense, in other words in the sense of "neighbouring" or "bordering", and thus to be dealing only with the situation of neighbouring countries and of countries in the same continent. That meant that account was not being taken of the interests of countries in other continents and, in particular, of the countries of the South, which ran the greatest risk of becoming affected States, with the aggravating factor that they had no means of challenging a source of injury located in a country in the North. That was a matter of even greater concern because the industrialized countries continued to have dependent territories in the South where they could freely carry out hazardous activities, such as nuclear tests and the stockpiling of nuclear weapons. Risks might also be created by freedom of navigation in countries of the South and by the overflight of those countries' territory by aircraft carrying dangerous substances. That brought to mind the problem of the large numbers of potentially affected States to which Mr. Ushakov (1973rd meeting) had referred. As for the affected State, not enough emphasis had been placed on the fact that harm could be suffered by the international community as a whole, since the common heritage of mankind might, for example, be affected. That question should be studied in detail by the Special Rapporteur.

58. Referring to the source State's obligations to provide information and to negotiate, he fully agreed with the principles laid down by the Special Rapporteur, although he had some comments to make concerning their application. The Special Rapporteur had explained that the obligation to inform would lead not only to the establishment of a régime, but also to reparation. Perhaps reference should be made to an obligation "having regard to" the establishment of a régime. He agreed with the idea that the obligation to inform was one of the obligations of prevention and that there was thus a close link between that obligation and the obligation to negotiate, for the aim was to negotiate a régime of prevention, limitation and, where necessary, reparation. Was that an incomplete obligation, or so-called "soft law" or, rather, a well-established obligation under which negotiation would be compulsory? In the latter case, the obligation would involve penalties.

59. That had not been the solution adopted by the previous Special Rapporteur, who had considered that the obligations to inform and to negotiate should not in themselves give rise to any right of action. Noting that negotiation would be inevitable if the draft did not provide for any dispute-settlement machinery, the present Special Rapporteur had disputed the validity of his predecessor's position. He himself had some doubts about the conclusions which the present Special Rap-

porteur had drawn in that regard. In his view, there had to be independent fact-finding machinery, because otherwise the draft might be incomplete, if not inapplicable, at least as far as North-South relations were concerned, since the industrialized States of the North were source States, while the developing States of the South were potential affected States. The conflict between those two categories of States reminded him of Jean de la Fontaine's fable of the meeting between the iron pot and the clay pot. Fact-finding machinery had to be established either by agreement between the parties or, better still, through compulsory recourse, at the request of one party, to assistance from third States or international organizations, as provided for in section 6, paragraph 16, of the schematic outline, with a view to protecting the interests of the affected State and the source State. Such assistance should be compulsory at the fact-finding stage.

60. Referring to the question of the assessment of harm, he noted that Mr. Ushakov and Mr. Calero Rodrigues (1974th meeting) had convincingly shown how difficult it was to make an assessment of the direct and immediate consequences of an injurious activity that would be satisfactory and equitable for the two parties concerned. Harm might have been caused by many factors, as shown by the problems that experts had encountered in trying to determine why European forests were dying. The proliferation of nuclear plants and nuclear explosions in outer space would, moreover, mean that it would be quite arbitrary to attribute harm exclusively to the activities carried out in one single country.

61. A fact-finding and negotiation procedure based on the provisions of the schematic outline might therefore be ineffective or might not be used, at least in North-South relations. Fact-finding was, however, the cornerstone of the prevention-reparation continuum. He agreed with Mr. Ushakov's proposal that consideration should be given to the possibility of holding global and multilateral negotiations in the interests of the entire international community with a view to establishing international fact-finding and dispute-settlement machinery of an institutional and permanent nature. Judging by section 7, part III, and section 8 of the schematic outline, that idea appeared to have been one of the concerns of the previous Special Rapporteur, who had unfortunately not had time to develop it. He hoped that the present Special Rapporteur would be of the opinion that one of his main tasks was to propose autonomous machinery for the implementation of international responsibility, an intention he appeared to have expressed at the end of his preliminary report (A/CN.4/394, para. 17), when he had stated that he would give careful attention to the degree of progressive development of international law which might be required by the novelty of the topic and the demands of equity. Such machinery, which might form part of a compulsory conciliation and arbitration procedure, would be intended to help States fulfil the obligation to provide information and to negotiate in connection with activities which were not prohibited by international law, but which might have injurious consequences for other States.

62. Chief AKINJIDE, referring to the comments made by Mr. Flitan (1974th meeting) and Mr. Razafindralambo, said that, while the problems raised by the topic could easily be solved in developed countries, the situation was not so simple in developing countries, which could not cause transboundary harm because they did not have the necessary technology. Such harm was caused by the transnational corporations which operated in the developing countries' territory and were, in some cases, not even entirely within those countries' laws. According to the schematic outline and the Special Rapporteur's second report (A/CN.4/402), a number of obligations were incumbent on a State whose activities caused transboundary harm. In the case of the developing countries, that meant that States were given responsibility without power, whereas transnational corporations had power without responsibility. In many cases, the host country did not have a clear understanding of the reasons underlying the transboundary harm. If, for example, the Union Carbide accident in India had occurred not in the heart of the country, but near a border, and had affected a neighbouring State, how could the Indian Government have been expected to assume all the responsibilities and fulfil all the obligations with which it would have been saddled? Another example concerned his own country, which was an oil producer and had experienced a blow-out that had lasted for weeks and caused enormous pollution affecting a neighbouring State. Since even the transnational corporation in question, Texaco, had found it extremely difficult to cope with that situation, his country could hardly have been expected to understand what was occurring. He urged the Special Rapporteur not to assume that the problem related to developed countries alone and to pay more attention in future to the developing countries' situation.

63. Mr. KOROMA said that, until now, the law on the topic under consideration had been classical and historical. He agreed that the rule *sic utere tuo ut alienum non laedas* must be adapted to meet present-day conditions and must not be diluted, for it was more relevant to the international community now than it had been in the past.

64. With regard to the title of the topic, he agreed with Mr. McCaffrey's proposed amendment (1973rd meeting) to the English text. The topic concerned activities which were not considered to be unlawful, but which might give rise to acts causing harm. Changing the English title would make it clearer that it was not the activities that were prohibited, but the acts to which they gave rise.

65. As to the scope of the topic, he noted that the Special Rapporteur had so far confined himself to physical harm. In his own view, the topic should be expanded to include the idea of economic and financial loss brought about by physical damage.

66. Turning to the question of liability, he said that the source State had a primary duty not to cause harm or injury, but, if harm was caused, it had a secondary duty to make reparation. A corollary to the primary duty was the right of the affected State to be compensated for the harm suffered. The Special Rapporteur should endeavour to establish the basis for liability

more firmly and convincingly in order to make the topic more acceptable to the international community.

67. Although several multilateral conventions provided for the duty to inform, negotiate and establish conciliation machinery in respect of a number of régimes, he was not certain that that duty existed as such in customary law. However, when a State found that an activity had the potential for causing harm and invited the source State to negotiate or to enter into conciliation, the source State had a duty to do so. In conclusion, he noted that, in the second report (A/CN.4/402, para. 57), the sentence

... Nor does it appear very logical that an affected State which does not provide under its domestic law for compensation for such occurrences should be allowed to claim it when the injury originates in a neighbouring State.

did not appear to follow logically from the two sentences that preceded it. Perhaps the Special Rapporteur could provide further clarifications in that regard.

The meeting rose at 12.50 p.m.

1976th MEETING

Thursday, 26 June 1986, at 10 a.m.

Chairman: Mr. Alexander YANKOV

later: Mr. Julio BARBOZA

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Koroma, Mr. Laclata Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Tomuschat, Mr. Ushakov.

International liability for injurious consequences arising out of acts not prohibited by international law (concluded) (A/CN.4/384,¹ A/CN.4/394,² A/CN.4/402,³ A/CN.4/L.398, sect. H.1, ILC(XXXVIII)/Conf. Room Doc.5⁴)

[Agenda item 7]

¹ Reproduced in *Yearbook ... 1985*, vol. II (Part One)/Add.I.

² Reproduced in *Yearbook ... 1985*, vol. II (Part One).

³ Reproduced in *Yearbook ... 1986*, vol. II (Part One).

⁴ The schematic outline, submitted by the previous Special Rapporteur, R. Q. Quentin-Baxter, at the Commission's thirty-fourth session, is reproduced in *Yearbook ... 1982*, vol. II (Part Two), pp. 83-85, para. 109. The changes made to the outline in R. Q. Quentin-Baxter's fourth report, submitted at the Commission's thirty-fifth session, are indicated in *Yearbook ... 1983*, vol. II (Part Two), pp. 84-85, para. 294.

SECOND REPORT OF THE SPECIAL RAPPORTEUR (concluded)

1. Mr. BARBOZA (Special Rapporteur), summing up the debate, said that he had adopted an overall approach to the topic because there were a number of points on which he wished the Commission to comment before he continued his study. The first was the unity of the topic, which at first sight seemed to have two aspects: that of prevention and that of reparation. He had considered it necessary to find a unifying criterion that was not purely formal. He had also wished to make it quite clear that prevention formed an integral part of the topic, since in the past it had been objected that liability arose only as a consequence of the non-fulfilment of an obligation. That explained the evolution of the meaning of the term "liability".

2. The second point was the need to define the scope of the topic, if only provisionally, while the third was the important issue of obligations. It was necessary to decide whether the Commission would venture into the ill-defined area of law-in-the-making or whether it would introduce real obligations into the schematic outline.

3. His fourth point concerned the operation and basis of what was known as "strict liability" and the extent to which the Commission could accept its mitigation and the obligation to make reparation. He believed that it was not a sufficiently rigorous theoretical argument to base reparation on the obligation of prevention and to recognize that, in the last analysis, reparation was based on strict liability. He had found it necessary to justify that view by pointing out that strict liability could be more or less strict and that the Commission could agree on the acceptable degree of strictness; in other words, it could recognize that the obligation of reparation was based on some form of strict liability and choose the model on which a consensus could be reached.

4. He had not gone into all the questions raised by members of the Commission. For example, Mr. Ogiso (1974th meeting) had observed that information might be withheld for security reasons or to safeguard trade secrets. He himself had not known whether the Commission would accept the obligation to provide information as it had been proposed, and he had therefore left it aside; but that certainly did not mean that he would not revert to it later. Another question had related to indirect injury, which was not yet a matter of concern because it was not known whether the obligation of reparation would rest on the foundations he had indicated. That was why he had not gone into the modalities of compensation for continuing injury, which would be considered at a later stage.

5. With regard to the scope of the topic, that was to say the delimitation of the activities to be studied, it had been suggested that a list of those activities should be drawn up. But it must not be forgotten that the purpose of the study was to establish a general régime and that, consequently, to enumerate the activities would mean using a drafting technique entirely different from that employed hitherto. Moreover, the General Assembly had requested the Commission to study all—and not only some of—the injurious consequences of activities