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Summary record of the 2088th meeting

Topic:
Other topics

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54. Mr. BENNOUNA supported Mr. Calero Rodrigues's suggested rewording for point (c). Points (a) and (d) could perhaps be combined.

55. Mr. ARANGIO-RUIZ said that the Commission was not obliged to put questions to the General Assembly. It might be better to leave the Assembly to examine the articles submitted to it and state its views on them. Pressing the General Assembly to answer questions could lead to unsatisfactory results.

56. Mr. TOMUSCHAT (Chairman of the Drafting Committee) said that the five points proposed for submission to the General Assembly were academic in character. There was no point on which the Commission needed political guidance from the General Assembly. Asking questions unnecessarily could have the effect of eliciting answers that would restrict the Commission's freedom of choice.

57. Mr. CALERO RODRIGUES again drew attention to paragraph 5 (c) of General Assembly resolution 42/156 of 7 December 1987, in which the Assembly requested the Commission:

To indicate in its annual report, for each topic, those specific issues on which expressions of views by Governments, either in the Sixth Committee or in written form, would be of particular interest for the continuation of its work.

Clearly, the Commission could not disregard those specific instructions. It should indicate the issues on which it wished to have the views of representatives in the Sixth Committee. The Commission would certainly be criticized if it failed to do so.

58. It was worth noting that that subparagraph of resolution 42/156 of 1987 had had its origin in a subparagraph introduced into the corresponding resolution of 1986 (resolution 41/81) at the request of a group of representatives who had believed that it would be helpful to have some general guidance on the issues the Commission wished to be discussed in the Sixth Committee.

59. Clearly, the object was not to obtain answers from the General Assembly by asking questions, but to single out specific issues of major interest to the Commission so that the Sixth Committee could discuss them in depth.

The meeting rose at 6.05 p.m.

2088th MEETING

Tuesday, 26 July 1988, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Present: Prince Ajibola, Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindra-

lambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Draft report of the Commission on the work of its fortieth session (*continued*)

CHAPTER III. *The law of the non-navigational uses of International watercourses* (continued) (A/CN.4/L.425 and Add.1 and Add.1/Corr.1)

D. *Points on which comments are invited (concluded)* (A/CN.4/L.425)

Paragraph 87 (*concluded*)

1. The CHAIRMAN drew attention to the revised texts for paragraph 87 proposed by Mr. Roucounas and by the Special Rapporteur.

2. The text proposed by Mr. Roucounas (2087th meeting, para. 33) read:

"The Commission would welcome the views of Governments, in particular on the following points:

"(a) the degree of elaboration with which the draft articles on international watercourses should deal with the problem of pollution;

"(b) the definition of pollution;

"(c) the concept of 'appreciable harm' as a standard for establishing liability;

"(d) the place of the protection of the environment within the framework of the draft articles;

"(e) the régime of protection and international co-operation in cases of emergency."

3. The text proposed by the Special Rapporteur read:

"The Commission would welcome the views of Governments, either in the Sixth Committee or in written form, in particular on the following points:

"(a) the degree of elaboration with which the draft articles should deal with problems of pollution and environmental protection, discussed in paragraphs 32-34, 67-68 and 73-74 above;

"(b) the concept of 'appreciable harm' in the context of paragraph 2 of draft article 16, discussed in paragraphs 49-57 above."

4. Mr. ROUCOUNAS said that his proposal had been circulated simply as a matter of interest. The Commission had before it only the text proposed by the Special Rapporteur.

5. Mr. McCAFFREY (Special Rapporteur) said that he had sought to reconcile the various points of view expressed at the previous meeting. Some members had thought that too many questions were to be put to States; others had felt that cross-references to particular paragraphs of the report were needed. The text he was now submitting consolidated points (a) and (d) of the text proposed by Mr. Roucounas, which had been endorsed by a number of members.

6. Mr. KOROMA said that it might be better, in the introductory clause of paragraph 87 to speak of the General Assembly, rather than the Sixth Committee. Again, perhaps point (a) was not sufficiently precise.

The General Assembly should be provided with some options to choose from, and a reference could perhaps be made to the 1982 United Nations Convention on the Law of the Sea, for it was difficult to expect the Sixth Committee or the General Assembly to make spontaneous suggestions. It might also be possible for the Chairman, in introducing the Commission's report to the General Assembly, to explain the meaning of the paragraph.

7. Mr. PAWLAK recalled that, at the previous meeting, he had proposed a shorter text for paragraph 87, one that he still preferred, but he could agree to the Special Rapporteur's proposed text. However, point (a) should make it clear that the issue raised related to draft article 16, rather than to the draft as a whole.

8. Mr. YANKOV said that the text proposed by the Special Rapporteur was acceptable, subject to a few changes of form. To meet Mr. Koroma's concern, at least in part, the introductory clause could refer to "the Sixth Committee of the General Assembly", unless it followed the wording of paragraph 5 (c) of General Assembly resolution 42/156. As to point (a), for the purposes of greater accuracy the words "relating to international watercourses" could be added after "environmental protection", even though the paragraphs cited obviously concerned international watercourses.

9. Mr. McCAFFREY (Special Rapporteur) confirmed that the introductory clause was drawn from General Assembly resolution 42/156. In response to Mr. Pawlak, he would point out that, while point (b) related to draft article 16, point (a) covered a wider issue, namely whether the Commission should deal—not only in draft article 16 but also in draft article 17—with pollution and environmental protection in detail.

10. While it was quite evident that only international watercourses were involved, he had no objection to Mr. Yankov's proposal for point (a).

11. Mr. BENNOUNA said that the introductory clause of paragraph 87 should retain the terms used in General Assembly resolution 42/156. The questions posed in points (a) and (b) properly reflected the trends that had emerged during the discussion at the previous meeting. He none the less supported the proposal by Mr. Yankov concerning point (a), but would supplement it by speaking of "the uses of international watercourses".

12. Mr. BEESLEY, referring to the amendments to point (a) proposed by Mr. Yankov and Mr. Bennouna, proposed instead that the words "relating to the law of the non-navigational uses of international watercourses" should be added after "environmental protection". Furthermore, he wondered whether the expression *degré de précision*, in the French text, fully reflected the English expression "degree of elaboration". Was it really a matter of specificity, of detail?

13. It was not the first time that the Commission was inviting the General Assembly to give its views on specific issues; but since it had displayed great selec-

tiveness, the possible consequences of such an approach should not be lost from sight. He had no objection to proceeding in that fashion, and indeed thought that the Commission should act in the same way when it came to other chapters of its report. For example, he had already said in connection with the draft Code of Crimes against the Peace and Security of Mankind that States should be asked whether the Commission was to continue its work on the basis of an international criminal court. Similarly, in connection with the topic of international liability for injurious consequences arising out of acts not prohibited by international law, did States want an instrument elaborated on the basis of the concept of risk? Such a constructive method would make it possible to guide the discussion in the Sixth Committee and make sure that the Committee did not engage in a debate such as the one to which the concept of a "civilized State" had given rise at the present session.

14. Mr. KOROMA said that the formula used in paragraph 79 of chapter II of the draft report (A/CN.4/L.424 and Corr.1) was preferable to the wording of the introductory clause of paragraph 87 as proposed by the Special Rapporteur, which seemed to depart from the usual model. The Commission often took the "Sixth Committee" to be synonymous with the "General Assembly". However, it was to the General Assembly that the Commission submitted its report, and also to the General Assembly that the Sixth Committee submitted its report. Moreover, some Member States might decide to speak on questions of international law in the General Assembly itself. For that reason, it would be better, as was customary, to ask the General Assembly for its views.

15. Mr. CALERO RODRIGUES said that he could agree to the amendment to point (a) proposed by Mr. Yankov or to the formula suggested by Mr. Beesley. As for the introductory clause, the Commission could request "the views of the General Assembly", but it would be better to keep to the wording of General Assembly resolution 42/156.

16. Mr. REUTER said that Mr. Beesley's concern regarding the French text of point (a) was justified. The expression *degré de précision* was not the equivalent of the words "degree of elaboration". Perhaps it would be better, in the French text, to speak of *l'ampleur des développements que le projet d'articles devrait consacrer aux problèmes* . . .

17. Mr. BARBOZA said that the introductory clause should be kept as it was, for Governments could state their views on the Commission's report in the Sixth Committee.

18. The CHAIRMAN said that it was pointless to expatiate on the roles of the Sixth Committee and the General Assembly. The best course, in his opinion, would be to speak of the "General Assembly".

19. If there were no objections, he would take it that the Commission agreed to adopt the text of paragraph 87 proposed by the Special Rapporteur (para. 3 above) with the amendment to point (a) proposed by Mr.

Beesley, and on the understanding that the French text of point (a) would be brought into line with the English.

It was so agreed.

Paragraph 87, as amended, was adopted.

Section D, as amended, was adopted.

B. Consideration of the topic at the present session (concluded)
(A/CN.4/L.425)

Paragraph 62 (concluded)

20. The CHAIRMAN drew attention to the following text proposed by the Special Rapporteur for insertion after the second sentence: "In that connection, certain members pointed out that the presumed behaviour of a 'civilized State' could not serve as the basis for the obligation of due diligence. That was also the view of the Special Rapporteur and the other members of the Commission."

21. Mr. BENNOUNA suggested that the expression "so-called" should be inserted before the word "civilized".

22. Mr. KOROMA said that he would have preferred to pass over the non-issue of a "civilized State" in silence. If the Commission's report was to speak of it, however, it should say quite clearly that the Commission rejected the concept.

23. Mr. OGISO pointed out that it was the Commission's custom to reflect in its report the views expressed in the course of the actual debate, not the views expressed at the time of the adoption of the draft report. For that reason, he would prefer the second sentence of the proposed text to be deleted. If that suggestion posed any difficulty, the second sentence could be amended to read: "In the opinion of the Special Rapporteur, that was also the view of other members." Actually, the question had not been the subject of debate when the Commission had discussed the topic, apart from the comments made by some members. However, the Sixth Committee might gain the opposite impression from the second sentence in its present form.

24. Prince AJIBOLA said that it would be creating difficulties to add such a provocative formula to the perfectly reasonable text of paragraph 62.

25. Mr. McCAFFREY (Special Rapporteur), supported by Mr. BEESLEY and Mr. CALERO RODRIGUES, suggested that the second sentence of the proposed new text should be replaced by: "Neither the Special Rapporteur nor any member of the Commission disagreed with that view."

26. After an exchange of views in which Mr. BARSEGOV, Mr. ARANGIO-RUIZ, Mr. McCAFFREY (Special Rapporteur) and Mr. TOMUSCHAT took part, Mr. Sreenivasa RAO, supported by Mr. MAHIOU, proposed that the following sentence should be added after the second sentence of paragraph 62: "In that connection, it was pointed out that the presumed behaviour of a so-called 'civilized State' could not serve as the basis for the obligation of due diligence."

It was so agreed.

Paragraph 62, as amended, was adopted.

Section B, as amended, was adopted.

CHAPTER II. International liability for injurious consequences arising out of acts not prohibited by international law (A/CN.4/L.424 and Corr.1)

A. Introduction

Paragraphs 1 to 4

Paragraphs 1 to 4 were adopted.

Paragraph 5

27. Mr. BEESLEY said that, in addition to the three principles enumerated in subparagraph (d), which were taken from paragraph 85 of the Special Rapporteur's fourth report (A/CN.4/413), mention should be made of the three principles set out in paragraph 86 of that report. It had been decided further to the debate that the Special Rapporteur would, for the purpose of his future work, base himself on the principles listed in both those paragraphs.

28. Mr. BARBOZA (Special Rapporteur) pointed out that paragraph 5 under consideration summarized not the discussion at the present session but the discussion at the thirty-ninth session. Nevertheless, account could be taken of Mr. Beesley's comments in connection with paragraphs 58 and 59 of chapter II of the draft report.

It was so agreed.

29. Mr. ROUCOUNAS said that, to avoid any confusion, "in 1987" should be inserted after the words "At the thirty-ninth session", in the first sentence.

It was so agreed.

Paragraph 5, as amended, was adopted.

Section A, as amended, was adopted.

B. Consideration of the topic at the present session

Paragraph 6

Paragraph 6 was adopted.

Paragraph 7

30. Mr. SHI (Rapporteur) said that, in the text of draft article 7 reproduced in paragraph 7, the expression "source States" should be replaced by "States of origin".

Paragraph 7, as amended, was adopted.

Paragraph 8

31. Mr. CALERO RODRIGUES said that the word "spacial", in the fifth sentence, should read "space".

It was so agreed.

Paragraph 8, as amended, was adopted.

Paragraph 9

32. Mr. BARSEGOV proposed that a sentence should be inserted either in paragraph 9 (where it would have been preferable to reflect more faithfully the Special Rapporteur's comment that there were at the present time no real rules of international law on international relations in regard to prevention and reparation) or in paragraph 13 (which reflected the position of members in that regard) along the following lines: "Some members considered that this appraisal of the existing

legal situation was of fundamental importance and that it paved the way for realistic development of international law in the formulation of new rules and new concepts.”

33. Mr. MAHIU proposed that, in the second sentence of the French text, either the word *indemnisation* or the word *compensation* should be used, in order to bring the text into line with the English, and that the full stop after *compensation* should be replaced by a semi-colon.

It was so agreed.

34. Mr. BEESLEY said that, in his opinion, the sentence proposed by Mr. Barsegov would be more suitably placed in paragraph 13 than in paragraph 9.

35. Mr. BARBOZA (Special Rapporteur) said that he had no objection to Mr. Barsegov's proposal, but shared Mr. Beesley's point of view. Actually, the entire topic involved the progressive development of international law and, at the present time, there was no rule of international law that imposed reparation.

36. The CHAIRMAN asked Mr. Barsegov, the Rapporteur and the Special Rapporteur to consult and decide on the place for insertion of the sentence in question, and pointed out that paragraph 9 reflected the views of the Special Rapporteur and paragraph 13 the position of members of the Commission.

Paragraph 9, as amended in the French text, was adopted.

Paragraph 10

37. Mr. BENNOUNA said that paragraph 10 was scarcely intelligible in French, more particularly because of the tenses used, and proposed that the end of the fourth sentence, starting with the words “since the breach”, should be deleted.

38. The CHAIRMAN pointed out that paragraph 10 reflected the position of the Special Rapporteur. Hence its form did not commit either the Commission or any of its members.

39. Mr. McCaffrey said that he, too, had some comments regarding the form of paragraph 10, but would submit them to the Secretariat in order to gain time. As to the tense, the preterite was entirely appropriate in the English text.

40. Mr. BARSEGOV, referring to the penultimate sentence, asked what was meant by the “operative level” of an obligation.

41. Mr. BARBOZA (Special Rapporteur) explained that, in speaking of the “operative level” of a rule prohibiting the causing of harm by pollution, he meant the existence of a rule along those lines that was sufficiently general for it to be applied in the matter. He, together with several other members, had considered that the *sic utere tuo* principle was preferable.

42. With reference to Mr. Bennouna's comments, the use of the past tense in the Spanish text was correct. Secondly, he did not consider it advisable to delete the last part of the fourth sentence, for it explained what

went before. On the latter point, however, the decision lay with the Rapporteur and the Commission.

43. The CHAIRMAN, speaking as a member of the Commission, said he was not certain that the actual prohibition on causing pollution existed “at an operative level”. What did exist at that level was the recognition, or more or less general acceptance, of the *sic utere tuo* principle.

Paragraph 10 was adopted.

Paragraph 11

44. The CHAIRMAN said that the words *que no que no existiera*, in the second sentence of the Spanish text, should be replaced by *a que no existiera*.

It was so agreed.

Paragraph 11, as amended in the Spanish text, was adopted.

Paragraph 12

Paragraph 12 was adopted.

Paragraph 13

45. Mr. BARBOZA (Special Rapporteur) said that, in his view, the sentence proposed earlier by Mr. Barsegov (see para. 32 above) should be incorporated in paragraph 13.

46. Mr. CALERO RODRIGUES said that he had no objection, but would like to know where the sentence came from. Moreover, the last sentence of the present text should be recast so as to avoid the repetition of the words “paved the way”. In addition, the words “For a few members”, in the first sentence, should be replaced by “For some members”, so as to bring the English text into line with the other languages.

47. Mr. BEESLEY said that he, too, had no objection to the sentence proposed by Mr. Barsegov, but wondered whether it was suitable in the part of chapter II on “General considerations”, which also stated the position adopted by the Special Rapporteur in his fourth report (A/CN.4/413). It was a question of method more than principle: it would be wise, for the sake of balance, to separate general considerations from the examination of more concrete issues.

48. In addition, what was the subject of the “consensus” mentioned in the last sentence of paragraph 13? He reserved the right to propose some changes to the paragraph once the full wording was known.

49. Mr. ARANGIO-RUIZ said that, if there was a consensus on the concept of “appreciable harm”, he was not part of it, for the term “appreciable” was not in his vocabulary.

50. Mr. KOROMA said that he could agree to the text proposed by Mr. Barsegov, subject to the deletion of the words “realistic” and “and new concepts” and subject to the place at which it would be inserted in paragraph 13.

51. Mr. TOMUSCHAT said he did not think that a text proposed by one member and reflecting his views could be altered by another member.

52. The CHAIRMAN asked Mr. Barsegov, the Rapporteur and the Special Rapporteur to consult and decide on the exact text and the place at which it would be inserted in paragraph 13.

53. Mr. BARSEGOV said he agreed to that method. He would add that he was ready to agree to an alternative and, if necessary, to place the sentence he was proposing at the end of paragraph 13, so as not to upset the present structure.

54. Mr. SHI (Rapporteur) said he thought that the matter should be settled by Mr. Barsegov and the Special Rapporteur; he would accept any formula they agreed on.

55. Mr. GRAEFRATH proposed that paragraph 13 should be retained in its present form, with the amendment to the English text proposed by Mr. Calero Rodrigues and the additional sentence proposed by Mr. Barsegov, in which the words "Some members" should be replaced by "Other members".

56. Mr. BEESLEY said that he would like the last sentence of paragraph 13 to be amended so as to make it clear that it was the members in question who took the view that many States would be unable to accept that the rules and principles drafted by the Commission on the topic already formed part of the existing law.

57. The CHAIRMAN suggested that paragraph 13 should be provisionally adopted, with the amendments by Mr. Calero Rodrigues to the first sentence (para. 46 above) and by Mr. Beesley to the last sentence (para. 56 above), on the understanding that the Commission could revert to the paragraph later, if necessary.

It was so agreed.

Paragraph 13, as amended, was adopted.

Paragraph 14

58. Mr. REUTER said that, in its present form, paragraph 14 seemed to rule out the fact that the origin of transboundary harm could lie in a wrongful act, for example in a violation of territorial integrity. Such a possibility should be pointed out from time to time in the report, though not necessarily in paragraph 14.

59. Prince AJIBOLA said that some corrections should be made to the English text, purely in matters of form. The words "allow any flexibility", in the first sentence, should be replaced by "allow for any flexibility", and the nouns and adjectives in the two expressions at the end of the last sentence should be transposed so as to read "compensable harm" and "negligible harm".

60. Mr. BEESLEY said that the expression "under the new approach", in the second sentence, implied that there had been a change of view and that an earlier approach which would not have been fruitful had been abandoned. The adjective "new" did not seem felicitous.

61. The CHAIRMAN, speaking as a member of the Commission, said that the phrase *Aunque esta premisa era correcta*, at the beginning of the last sentence of the Spanish text, was too abrupt. The statement should be given more nuance, for instance by using the equivalent

of the phrase "Although they considered this approach to be correct".

62. Mr. KOROMA said that the second sentence, stating that "there would not be liability for every transboundary harm", was too peremptory, since it could be contended that, when harm occurred, somebody was always liable. The idea to be expressed was, rather, that the victim did not always demand reparation.

63. Mr. BARBOZA (Special Rapporteur) said that he agreed to Prince Ajibola's corrections to the English text. Mr. Beesley's point could be met simply by saying: "Thus, under such an approach".

64. As to Mr. Koroma's observations, the report simply recorded the opinions expressed by members of the Commission, and some had indeed considered that "there would not be liability for every transboundary harm".

65. Lastly, regarding the point raised by the Chairman, the subjunctive could be used in the Spanish text by saying *Aunque esta premisa fuera correcta*.

The amendments by Prince Ajibola and the Special Rapporteur were adopted.

Paragraph 14, as amended, was adopted.

Paragraph 15

66. Mr. YANKOV said that the word "Many", at the beginning of the paragraph, should be replaced by "Many members", which was more precise.

It was so agreed.

67. Prince AJIBOLA proposed that, at the end of the fifth sentence, the word "completely" should be deleted and the word "correct" should be replaced by "exhaustive".

It was so agreed.

68. Mr. BENNOUNA said that paragraph 15 was not logical. It confused two ideas, namely a "list of dangerous activities" and a "list of toxic and dangerous materials". The two things should be separated, for example by placing the third sentence, beginning "It was stated that many instruments . . .", in a later part of the paragraph.

69. Mr. KOROMA said that he shared that view.

70. Mr. BARBOZA (Special Rapporteur) said that Mr. Graefrath had suggested two other changes to him: to replace the phrase "did not, however, justify not drawing up a list", in the second sentence, by "did not, however, exclude drawing up a list"; and to insert, after the third sentence, a new sentence reading: "Such lists, it was remarked, could also be useful to determine necessary preventive measures."

It was so agreed.

71. At the beginning of the eighth sentence, the word "however" should be inserted after the words "In this connection", so as to bring out more clearly the difference between the two ideas expressed in that passage.

72. Mr. Bennouna had proposed that the paragraph should be recast by displacing the third sentence, begin-

ning "It was stated that many instruments . . .". That passage was, in fact, the conclusion of the argument advanced by one member, Mr. Graefrath, who had held that it was possible to establish a list of dangerous activities and had, in the course of the debate, cited numerous international instruments as examples. The paragraph then went on to set out the opposite view, that of the Special Rapporteur, to which many members had subscribed. Changing the order of the sentences would thus affect the logic of the ideas.

73. Mr. GRAEFRATH confirmed what the Special Rapporteur had just said and added that the paragraph might be clearer if it avoided specifying, as did the third sentence, that the instruments were "instruments on the protection of the environment". Indeed, during the debate he had cited a number of instruments on fields other than the environment, such as transport.

74. Mr. BEESLEY said he was concerned to see that, although a great deal of the part of chapter II on "General considerations" had already been dealt with, there had still been no mention of a basic issue on which the debate had focused from the outset, namely whether risk or harm was to be the basis for the draft. That question, which was so important as a guide for further thought on the topic, was mentioned only in paragraph 25, in other words very late on. He therefore formally proposed that paragraph 25 should be placed after paragraph 15.

75. Mr. BARBOZA (Special Rapporteur) explained that the chapter did not necessarily follow the same order as the discussion. In the part on "General considerations", he had sought to include matters which shed light on the topic but still remained pending: creeping pollution, a list of dangerous activities, and so on. It had also seemed preferable to discuss some basic aspects of the debate in connection with the articles which had given rise to them. For that reason, the question whether risk or harm should be the basis for liability was set out in connection with article 1, in other words in paragraph 25 of chapter II.

76. Mr. EIRIKSSON pointed out that the problem raised by Mr. Beesley concerned not only paragraph 25, but paragraphs 21 to 28 as a whole.

77. Mr. BARSEGOV said that, if chapter II of the draft report were changed to such an extent, great attention would have to be paid in order to maintain the balance between the opinion of those who advocated liability based on risk and the opinion of those who advocated liability based on harm.

78. Mr. McCaffrey, supported by Mr. BEESLEY, proposed that the Commission should give further thought to the matter before resolving such an important problem of presentation.

79. Mr. BARBOZA (Special Rapporteur) said that, in view of the extent of the changes envisaged, he would prefer to have proposals set out in writing.

The meeting rose at 1.05 p.m.

2089th MEETING

Tuesday, 26 July 1988, at 3 p.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Present: Prince Ajibola, Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucouas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Draft report of the Commission on the work of its fortieth session (*continued*)

CHAPTER II. *International liability for injurious consequences arising out of acts not prohibited by international law* (*continued*) (A/CN.4/L.424 and Corr.1)

B. *Consideration of the topic at the present session* (*continued*)

New paragraph 12 bis

1. The CHAIRMAN said that there was a proposal to incorporate in section B a new paragraph to explain that some members of the Commission believed that the concept of harm should continue to be the basis of the draft articles, while other members held the opposite view.

2. Mr. BEESLEY suggested that the new paragraph, which would become paragraph 12 *bis*, might read:

"In this connection, the Special Rapporteur had proposed that the scope of the topic be limited to activities involving risk, excluding those situations where appreciable harm occurred despite the fact that the risk of harm had not been considered appreciable or foreseeable. Some members, however, were of the view that, while the concept of risk might play an important role with regard to prevention, it would limit the topic unduly to base the entire régime of liability on appreciability of risk, since there could be activities for which the risk appeared slight, yet from which catastrophic consequences could ensue. These members pointed out that the law was never indifferent to the occurrence of harm when it threatened the rights of other States, citing the *Trail Smelter*, *Corfu Channel* and *Lake Lanoux* cases, Principle 21 of the 1972 Stockholm Declaration, and part XII of the 1982 United Nations Convention on the Law of the Sea."

3. Mr. BARSEGOV said that he had no objection to the Commission recording the views of some of its members in its report, but believed that those of other members should also be included. He therefore suggested the following addition to the text proposed by Mr. Beesley:

"Other members considered that refusal to acknowledge the causal link between appreciable harm and risk demolished the conceptual framework proposed by the Special Rapporteur, was not justified by existing rules of international law and, in many