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Summary record of the 2302nd meeting

Topic:

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

Extract from the Yearbook of the International Law Commission:-

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2302nd MEETING

Tuesday, 1 June 1993, at 10.20 a.m.

Chairman: Mr. Gudmundur ERIKSSON

Present: Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. Kabatsi, Mr. Koroma, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Rosenstock, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Vereshchetin, Mr. Villagrán Kramer, Mr. Yankov.

International liability for injurious consequences arising out of acts not prohibited by international law (continued)* (A/CN.4/446, sect. D, A/CN.4/450,¹ A/CN.4/L.487)

[Agenda item 5]

NINTH REPORT OF THE SPECIAL RAPPORTEUR (continued)*

1. Mr. PELLET welcomed the fact that the Special Rapporteur had, on the whole, convincingly carried out his assigned task of submitting a report on prevention, but regretted that he had not taken that logic to its ultimate conclusion. Prevention was not, of course, the whole of the topic, but it was the topic's most firmly established part. States that conducted or authorized activities likely to cause harm in the territory of other States or in international areas were bound by an obligation of prevention, which consisted in doing everything in their power to prevent such harm from occurring or, if it did occur, to minimize the harmful effects. Such was the positive law, as already reflected in a relatively large body of case-law, starting with the arbitral award in the *Trail Smelter* case.² On the other hand, it did not seem possible to say that States had an obligation of reparation in the event of harm or that the time was ripe to develop the law in that direction. In his ninth report (A/CN.4/450), however, the Special Rapporteur did not entirely take account of that distinction between prevention and reparation; on several occasions, particularly in the Introduction and in draft articles 14 and 20 bis, he came back to the idea of prevention *ex post facto*. Perhaps that idea should not be ruled out altogether, but, in any event articles dealing with prevention *ex post* would have to be separate from those dealing with prevention *ex ante*, which was the only genuine prevention. In that connection, he was surprised by the reaction of the members of the Commission who, following the introduction of the ninth report, had said they regretted that the document dealt only with the prevention of activities involving risk, since prevention of an activity not involving

risk a priori was not warranted and, if harm had already occurred, the problem was one of reparation or mitigation of harm rather than one of prevention.

2. He did not agree with Mr. Bennouna's view that "acts not prohibited by international law" did not mean "lawful acts".³ The principle of national sovereignty entailed a presumption of lawfulness of acts performed by the State on its territory. Accepting Mr. Bennouna's view would also mean transferring the problem from the topic under consideration to the topic of State responsibility.

3. In that connection, he thought it would be useful to recall the two different meanings of the word *responsabilité*. In the sense of "responsibility", it referred to the mechanism that could lead to reparation, but, in the sense of "liability", it meant being liable for a person, a thing or a situation. In the case of activities conducted in the territory of a State, a distinction had therefore to be drawn between, on the one hand, unlawful activities for which States were responsible within the first meaning of the term and which came under the draft articles on State responsibility⁴ and, on the other hand, activities which were not prohibited, and therefore not unlawful a priori, for which States were also "liable" within the second meaning of the term, the first consequence of such liability being the obligation to prevent transboundary harm. The statement made in the Introduction of the ninth report that prevention did not form part of liability was thus very much open to discussion. Quite to the contrary, prevention was at the very heart of liability and it was because the State was liable for activities conducted in its territory that it had the legal obligation to prevent the transboundary harm that might result from them. That principle was so important that it might be worthwhile stating it formally at the beginning of the articles on prevention. Article 8 of the draft⁵ did, of course, set forth an obligation of prevention, but without linking that obligation to *responsabilité* in the sense of "liability".

4. It was generally regrettable that, in his ninth report, the Special Rapporteur, had simply reproduced the technical draft articles he had submitted in 1992 without providing an overall picture of the obligation of prevention, although he quite rightly recalled that several provisions contained in his earlier reports under the headings "General Provisions" and "Principles" were also relevant to issues of prevention.⁶ If the Special Rapporteur had extracted the necessary elements from those provisions, he could have submitted a homogeneous whole on prevention that could have formed the first part of the draft articles, possibly to be followed by further parts on reparation and on the settlement of disputes. His own conclusion was thus that most of the draft articles submitted by the Special Rapporteur should be referred to the Drafting Committee, although he hoped that the Drafting Committee would consider those draft articles and the elements of earlier draft texts referred to it with a

³ See *Yearbook...* 1992, vol. I, 2271st meeting, para. 18.

⁴ For a historical account of the draft articles on State responsibility, see *Yearbook...* 1991, vol. II (Part Two), paras. 302-307.

⁵ For the texts of the draft articles, see *Yearbook...* 1990, vol. II (Part One), pp. 105-109, document A/CN.4/428 and Add. 1, annex.

⁶ Document ILC/(XLV)/None No.4, of 21 May 1993.

* Resumed from the 2300th meeting.

¹ Reproduced in *Yearbook...* 1993, vol. II (Part One).

² United Nations, *Reports of International Arbitral Awards*, vol. III (Sales No. 1949.V.2), pp. 1905 et seq.

view to preparing a full and consistent set of draft articles on prevention.

5. Articles 11 to 14 were an improvement over article I of the annex, which derived from the former article 16⁷ dealing in a single provision with the separate problems of authorization, conditions for authorization and assessment. There was still the question of the order in which those problems should be tackled, since the authorization to conduct activities involving risk could be given only after the assessment of the risks, if possible in cooperation with the other States concerned. It would therefore not be desirable for the article on authorization to come first.

6. With regard to article 12, he proposed that the words "order an assessment to be undertaken" should be replaced by the words "undertake an assessment", since the prevention of major risks was part of the prerogatives and responsibilities of the State.

7. It was at that stage, in other words, when assessing transboundary effects and before the authorization was given, that it would be logical for the State having liability to enter into consultation with the other States concerned ("concerned" rather than "affected", since the activities in question involved risk), as provided for in article 15 in the form of the obligation to notify and inform. In connection with that article, he continued to be sceptical about the possibility of imposing any obligation at all on "an international organization with competence in that area" and even about whether such organizations should be referred to, except where, like the International Seabed Authority, IMO or ICAO, they dealt with areas outside the jurisdiction of States. He also had some reservations about article 15, subparagraph (d), because it was up to each State to decide who should be informed and how.

8. In his view, article 18 on prior consultation was unbalanced. On that point, the Special Rapporteur had implicitly been working on the basis of a presumption of wrongfulness, whereas the State of origin was liable for an activity not prohibited by law and its decisions therefore had to be presumed to be lawful. Requiring "mutually acceptable solutions" was thus going much too far. The State of origin naturally had to listen to what the other States had to say, but it alone had to take the final decision, possibly taking account of the "factors involved in a balance of interests" referred to in article 20. Only the principle of taking account of the interests of other States and of the international community should be included in the draft and a non-exhaustive list of those factors should be included in the commentary.

9. In his view, the problem of presumption was fundamental because the State hypothetically had the right to conduct or authorize the activities in question, but, since there was also hypothetically a risk of transboundary harm, that right had to be exercised with circumspection and caution and the vigilance of the State had to be exercised both before the authorization was granted and afterwards, when the operator began and continued his activities. He was therefore inclined, although he realized that what was involved was the progressive development of the law, to make provision for States not to

encourage, as provided in article 14 (Performance of activities), but to require the use of insurance.

10. Having consulted, informed in good faith, assessed and imposed the necessary preventive measures, including insurance, the State should be able to authorize the activity without the potentially affected States being able to prevent it from doing so, contrary to what article 18 implicitly provided. The point was not to find mutually acceptable solutions, but to authorize the conduct of a lawful activity with a "lesser risk". It would be logical, however, that States which had not been consulted should be given the right to express their point of view in the spirit of what was provided in article 19 (Rights of the State presumed to be affected), but subject to two reservations. First, that was not a right of the State "presumed to be affected", but of the State "likely to be affected". Secondly, the text proposed by the Special Rapporteur should be redrafted in such a way as to distinguish between risk, which, in the context, it was legitimate to take into consideration, and harm, which was not within the scope of prevention. In his view, there was no need to go any further, in particular as far as the settlement of disputes was concerned. All obligations of prevention linked to "liability" were, in fact, firm obligations which the State had to fulfil, account being taken of the circumstances, existing technology and the means available to it; if it did not fulfil those obligations, it would be responsible, but within the framework of the topic of State responsibility.

11. To sum up, while appreciating the efforts made by the Special Rapporteur to focus his report on prevention, he considered that the structure of the draft articles should be seriously reviewed. The draft should first enunciate some principles, starting with the obligation of prevention linked to liability as a result of the risks involved in the activities envisaged. That would mean putting together article 3, paragraph 1, articles 6 and 8 and including the provisions of article 2, subparagraphs (a) and (b), already referred to the Drafting Committee,⁸ in that part of the draft. It might also be necessary to include an article in the general part on risks to areas not under the national jurisdiction of States ("global commons").

12. The principles would be followed by modalities, classified under six separate headings: (a) notification, information and the limits thereto; (b) assessment, taking account of the views of other potentially affected States—and, possibly, international organizations—and of the balance of interests; (c) authorization, which would be made contingent on insurance effectively covering risks; (d) the maintenance of the obligation of vigilance after the start of activities and the question of activities already in progress at the time of the adoption of the future convention; (e) the possible grouping of all provisions relating to the cessation and limitation of harm, which could be described as prevention *ex post*; and (f) the explicit statement of another basic general principle, namely, that, if the State in whose territory the activity involving risk took place did not fulfil its obligations of prevention, its liability for failure to do so would be incurred. That principle would spell out what was

⁷ See footnote 5 above.

⁸ See 2300th meeting, footnote 18.

already stated rather esoterically in article 5, which had been referred to the Drafting Committee.⁹

13. Subject to a basic difference of opinion on the presumption of lawfulness, he agreed with the request made by the Special Rapporteur in the Introduction of his report that the full set of articles 1 to 20 bis should be considered by the Drafting Committee at the current session, but only from the viewpoint of the prevention of risk.

14. Mr. PAMBOU-TCHIVOUNDA said that the ninth report of the Special Rapporteur was a turning-point in the Commission's work from the point of view of both substance and method. As to substance, the priority given to prevention should make it possible to define the framework of a system for engaging the liability of States and thus break the grip of presumption, which was based on the fact that the activities involving risk took place in their territory. As to method, the Special Rapporteur had acted pragmatically in rearranging the place of the concept of prevention in the draft. Abandoning the idea of treating the subject in an annex, he had decided to make prevention a general principle of law, which he had then developed by indicating several of the conditions for its application. The ninth report thus mapped out the contours of a coherent legal regime which the Drafting Committee might be requested to consider, its task being not only to revise, but to reformulate the proposed draft articles in order to improve on some of their structural and material shortcomings.

15. With regard to the structural weaknesses, he said that articles 10 to 20 bis did not reflect the disparities of development and industrialization between the States subject to the principle of prevention. The developing countries, where all industrial activity, even rudimentary, was by definition an activity involving risk, had neither the industrial infrastructure nor the legislative or administrative apparatus to respond in the same way as the developed countries to the need to implement the primary rules being proposed. As conceived in the proposed draft articles, the principle of prevention did not take account of the situation of those countries with regard to access to industrial technology; and the resulting undifferentiated implementation of primary rules might give rise to a new type of condition being posed for the transfer of technology that might well make the developing countries increasingly hesitant about acceding to the system advocated within the framework of the United Nations. The Commission must bear those facts in mind by including special provisions for the developing countries while not compromising the universality of the proposed system. The Special Rapporteur was not indifferent to those concerns, as he had shown in his report, and he proposed to include the text he had envisaged on that subject in that part of the articles dealing with the "principles which guide the application of all the specific rules". In his own view, one or more modulating criteria should be defined at the stage of the general principles; such criteria would prove their full usefulness during the drafting of specific rules. That was a shortcoming in the very conception of the subject which there was still time to remedy.

⁹ Ibid.

16. The other structural problem in the ninth report had to do with the order of the draft articles. The provisions on "Preventive measures" (arts. 11 to 14), "Notification and information" (arts. 15 and 16) and "Consultations on a regime" (art. 18) all pursued the same goal: to explain the principle of prevention. On the other hand, the provision entitled "National security and industrial secrets" (art. 17) set a limit on the scope of the general principle of prevention. As the Special Rapporteur had stressed with reference to the participation of the affected State, however, impact assessment, notification, information and consultation were closely linked. The unexpected insertion of an exception in the middle of the rule was thus out of place. Simply rearranging the provisions would restore the unity of the principle, not for the sake of pure form, but to make the discussion more coherent.

17. As to the material weaknesses of the ninth report, there was, first of all, the serious distortion of the regime that would be brought about by the dual privilege provision based on reasons of national security and industrial secrets. The exception contained in article 17 was not without value, but, apart from the fact that it heightened inequality between States, it might well defeat the purpose and scope of the obligation to cooperate in good faith. In particular, it might suppress any inclination to exercise the right of initiative that article 19 recognized for the State likely to be affected by giving the State of origin a discretionary power not only for the information to be transmitted, but even for the decision whether or not to transmit it. That extravagant monopoly must be corrected to ensure the balance of interests at play, as well as a certain realism, given the existence of remote sensing devices whose use was likely to make the exception clause illusory.

18. The other material problem to which he drew the Commission's attention related to the autonomy of the regime that the Commission was in the process of devising. Defining the primary rules that derived from the obligation of prevention for activities involving risk was to some extent tantamount to subjecting those activities to international law, through the intermediary of States. Non-compliance with the obligation of prevention would then constitute an internationally wrongful act within the meaning of the ordinary law of international responsibility and the affected State would merely be exercising its right under settled case-law to ensure that international law and, in particular, general international law was being respected to its advantage. But how was a distinction then to be made between the ordinary law of international responsibility for an internationally wrongful act and the special law of international liability for activities involving risk allegedly not prohibited by international law? The Commission would have to answer that question some day.

19. Mr. BENNOUNA recalled that the Commission had decided to draft a set of articles not on liability in the strict sense of the term, but on prevention and on ways of repairing harm, with priority being given to prevention. It was with that in mind that the Commission had requested the Special Rapporteur to submit, at the current stage, draft articles in respect of activities having a risk of causing transboundary harm. In his view, that decision raised two questions. The first was that of the

definition of prevention and, on that point, he agreed to a large extent with Mr. Pellet. The second related to the difference between activities involving risk and activities with harmful effects: although the Special Rapporteur had drawn subtle distinctions between the two, the difference was perhaps not as clear as it might seem.

20. It had been decided that the Commission would come back to the title at the end of its work on the topic and it would in fact be better to focus at present on the basic problem of obligations and liability incurred for State activities with transboundary effects. It was time to sever the umbilical cord connecting the topic under consideration and that of State responsibility.

21. The topic hinged on legal obligations arising out of the conduct of an activity that had transboundary effects and that automatically brought into play the rights of the operators involved and the limits of those rights. It was necessary to determine the legal source of those obligations, which might not be a particular source, but might derive from various forms of lawmaking, such as treaties, custom and principles. If that was not possible, the activity and the conduct of the State had to be defined by reference to the international public order because it was that which conferred the status of subject of law and governed peaceful relations between States. The Commission might therefore attempt to fill the legal vacuum, a kind of "natural state of things" in which the relation of power is in no way mediated by the law. Article 6 (Freedom of action and the limits thereto)¹⁰ established that link with the international public order, a consequence of the principle of the sovereign equality of States, which was violated if one State caused another State to incur a risk.

22. The Commission thus had to formulate residual rules applicable to the consequences of the activity of the State which arose independently of its will and, indeed, of any expression of *opinio juris*. In that sense, it was the activity that gave rise to the obligations whose purpose was to preserve the sovereign equality of States. Those obligations must be established before the accomplished fact: that was the role of prevention, which was indispensable if the law was to perform its function of protecting and safeguarding its subjects. In sum, the Commission must, in its role of codifying international law, produce a legal framework into which activities involving risk could be fitted and which would give States and the courts the necessary points of reference. Governments must know that, when they acted within their borders, they were also assuming international obligations and responsibilities.

23. The draft articles should therefore be as general as possible so as not to distort the obligation of prevention through legalistic or excessive procedures, which would not reflect the true situation. States did not expect a detailed and binding procedure, but the statement of general obligations on which they could draw in deciding on their relations in that regard.

24. Turning to the proposed articles, article 14 (Performance of activities), which was at the heart of the obligation of prevention, was acceptable on the whole. He agreed with Mr. Pellet's comments on the concept of

prevention and pointed out that the text envisaged two types of prevention: prevention before damage occurred and prevention *ex post facto*, which the Special Rapporteur justified in the report by stating that it was that broad concept of prevention "with which most agreements on civil liability deal". What was involved, however, was not civil liability or a particular convention, but general obligations of prevention before harm occurred. The problem of prevention *ex post facto* related to liability in the strict sense, with the cessation of the activity, compensation for harm caused, and so forth; and that was another question which came under the second part of the topic, namely, corrective measures. As he was in favour of a restrictive concept of prevention, he urged the Drafting Committee and the Special Rapporteur to confine themselves to that concept and proposed that article 14 should be amended to read: "The State shall, through legislative, administrative or other measures, allow on its territory only the activities of operators who take all necessary measures, including the use of the best available technology, to minimize the risk of transboundary harm. It shall make the conduct of such activities subject to the use of insurance commensurate with the risk incurred".

25. Article 12 (Transboundary impact assessment) was unnecessary as it was for the State to decide how it should proceed. Clearly, a State would undertake an assessment, and even investigations, and would require a particular type of material before issuing or refusing its authorization, whether for pre-existing or new activities.

26. Article 15 (Notification and information) was not satisfactory. The State of origin did not have to notify the other States of the conclusions of its assessment; instead, it should inform them of the content of its legislation and the measures it had taken to ensure that the activities were consistent with that legislation. He also agreed with Mr. Pellet about the role of international organizations and about informing the public.

27. He agreed with article 16 (Exchange of information), and also with article 17 (National security and industrial secrets), which seemed to him to be standard, contrary to what Mr. Pambou-Tchivounda thought. He shared some of the views expressed by Mr. Pellet on article 18 (Prior consultation) and did not see why such consultation should take place before the activity was carried out. The activity of a State should not be subject to the intervention of another State. Consultation should take place following the exchange of information and did not necessarily have to result in mutually acceptable solutions, in which connection he referred to the commentary to article 18. Further, he too considered that the title of article 19 (Rights of the State presumed to be affected) was incorrect. He even wondered whether the article was necessary. The consultation provided for under article 18 was sufficient as it could be requested by either State. Lastly, with regard to article 20 bis (Non-transference of risk or harm), he found it hard to see how States could transfer risk or harm. The article only complicated the situation.

28. In short, he agreed that the Commission should move ahead with its work, but considered that it should confine itself to obligations that were as general as possible and that could serve as a framework of reference, while allowing States the most room to manoeuvre.

¹⁰ Ibid.

29. Mr. TOMUSCHAT said he regretted that the Special Rapporteur's ninth report, the logic of which was flawless, had not provided an opportunity to review the work already done and to examine in particular the developments that had taken place since 1985 with regard to prevention. He agreed with Mr. Pellet on the need for an introductory article in the draft which would state clearly the principle of prevention and with Mr. Bennouna's observation that that principle derived essentially from the principle of equality of States. However, the issue which seemed extremely important to him since a new orientation had been given to the topic at the forty-fourth session was the scope *ratione materiae* of the draft articles. They were, of course, concerned with prevention, but the classes of activity which would fall under the future instrument should also be clearly defined. Article 11 proposed by the Special Rapporteur simply referred in that connection to article 1 (Scope of the present articles), which, even in conjunction with article 2 (Use of terms), hardly filled that lacuna. Article 1 spoke of activities involving risk, while article 2 explained that it concerned risk of appreciable transboundary harm. But all kinds of activities could cause transboundary harm and the Special Rapporteur should have identified the different categories of such activities instead of proposing rules which could apply only to specific groups of activities, for instance, the building of nuclear power plants. Such provisions could not possibly be framed in the abstract without first giving thought to the whole range of human activities to which they could apply. In any industrialized society, there were normal activities, whether regular or not, which involved risk and would perhaps require specific rules, different from the rules applicable to major industrial complexes. If there was one general lesson to be learned from environmental law, it was certainly that preventive efforts must always be adapted to the specificities of the danger to be combated.

30. He wished to raise the question of the usefulness of general rules. In order to prevent the danger from materializing, the international community needed hard rules that went beyond the 1972 Stockholm Declaration¹¹ and the Rio Declaration on Environment and Development.¹² In addition, the areas in which there was still a regulatory deficit should be identified. Admittedly, the Special Rapporteur referred to the Convention on Environmental Impact Assessment in a Transboundary Context and to the Convention on the Transboundary Effects of Industrial Accidents, but he had not discussed the impact of those two instruments on the topic—an impact that was perhaps considerable. Perhaps, too, he should have explained how he conceived the relationship between the rules he proposed and the often fairly detailed provisions of the United Nations Convention on the Law of the Sea. Before proceeding to any drafting exercise, it was necessary to have that additional information in order to define the exact scope of the rules on prevention. The topic under consideration was important and the international community was looking to the Commission for tangible

results. Unfortunately, the Commission was not yet in a position to produce such results.

31. Mr. CALERO RODRIGUES said that the Commission had not really made the Special Rapporteur's task any easier by inviting him, at its preceding session, to submit once again draft articles on the preventive measures to be taken in the case of activities which involved a risk of causing transboundary harm,¹³ as compared—and he did not altogether understand the comparison—to activities that actually caused transboundary harm, without, however, having taken any decision on certain basic issues. For example, the Special Rapporteur made reference in article 11, to "the activities referred to in article 1", but article 1 had still not been finalized.

32. None the less, he would abide by the Commission's decision and would confine himself to responding to the issues raised by the Special Rapporteur and to making certain remarks on the report. The first and extremely important question was whether there should be articles on the settlement of disputes and whether those articles should apply to disputes in general or only to disputes arising out of the consultations contemplated. The Special Rapporteur presented convincing arguments in favour of specific procedures dealing with disputes relating to the original assessment of risk, more particularly in the form of inquiry commissions. For his own part, he agreed on the need for articles on the settlement of disputes which might arise regarding the nature of the risk and the conduct of the activity.

33. Another question was whether a list of factors involved in a balance of interests should be drawn up, as proposed in article 20. The Special Rapporteur was in favour of such a list. He himself was ready to accept the idea if the majority of the Commission was in favour of it, but on condition that the provisions in question appeared in an annex. He saw even less merit in having such a list in the body of the draft, since as was apparent from the opening clause of article 20, it would not be exhaustive. In the circumstances, he wondered why factors should be quoted by way of example if States were not obliged to take account of them.

34. Like the Special Rapporteur, he considered that the "polluter pays" principle should be included not in the articles on prevention of risk, but in the general principles. He also agreed with the Special Rapporteur's approach with regard to article 20 bis (Non-transference of risk or harm). In that connection, he drew attention to a mistake in the article: the words "between areas or environmental media" were not a proper translation of the original Spanish words *de un lugar o medio ambiente a otro*.

35. He further agreed that there was no point in including provisions in the draft articles on such matters as emergency preparedness, contingency plans and early warning systems for accidents, since the proposed instrument was of a general nature.

36. He had no particular comment to make, for the time being, on the draft articles themselves, the text of which could no doubt be improved in the Drafting Com-

¹¹ Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972 (United Nations publication, Sales No. E.73.II.A.14 and corrigendum), part one, chap. I.

¹² A/CONF.151/26/Rev.1 (Vol.I) (United Nations publication, Sales No. E.93.I.8 and corrigendum), pp. 3-8.

¹³ See Yearbook... 1992, vol. II (Part Two), p. 51, para. 349.

mittee. In article 12 (Transboundary impact assessment), however, it should be made clear whether the assessment would be the responsibility of the operator or the State. With respect to article 13 (Pre-existing activities), he considered that the State should make the possibility of authorizing the continuance of the activity subject to the conclusion of an agreement with the other States concerned or at least to the conclusion of consultations with them, since the liability of the operator did not affect the risk and the other States might have something to say about the risk itself. Lastly, he noted that article 15 (Notification and information) referred to "the assessment referred to in the preceding article", but article 14 (Performance of activities) made no mention of assessment. As had already been pointed out, however, the information communicated to other States should relate not only to assessment, but also to the decision taken, or on the point of being taken, by the State in which the activity was carried out. Article 15 should therefore be redrafted to specify the purpose of the notification and information.

37. Mr. VERESHCHETIN said that the task entrusted to the Special Rapporteur was a difficult and complex one, for the topic was closely related to international environmental law. He shared the view expressed by the representative of Austria during the consideration of that topic by the Sixth Committee at the forty-seventh session of the General Assembly that the preparation of separate instruments applicable to different situations would be preferable to having a single legal regime for the protection of the environment.¹⁴ That idea had been taken up by Mr. Tomuschat, who had stressed the need to define more clearly the scope of the articles on prevention. An example of constructive efforts in terms of specific activities in the field of environmental protection was to be found in the Principles Relevant to the Use of Nuclear Power Sources in Outer Space,¹⁵ which related to the risks of a single activity. Specific rules along those lines could be applied in other areas as well.

38. The time would come when a clear response would have to be given to the question whether or not international law prohibited activities capable of causing significant transboundary harm. If the answer was yes, then the subject of the ninth report would have to be dealt with in the general framework of State responsibility. In view of the complexity of the topic, the attempt made by the Commission and the Special Rapporteur to approach it from a number of angles should be welcomed. Although he agreed with those who considered that the problem of prevention was not directly linked to the question of liability, he conceded that the set of articles proposed by the Special Rapporteur was of great interest and believed that, if the Commission was now focusing its efforts on the rules relating to prevention, that did not mean it would not take up other aspects of the topic under consideration.

39. The Special Rapporteur had chosen to base the new articles on prevention on those already submitted to the Commission. That was a logical and comprehensible method of work, but one that involved a number of ma-

terial difficulties, since the earlier articles dealt both with activities involving risk and with activities that had actually caused transboundary harm and the texts had not yet been adopted by the Drafting Committee. It would be preferable for the new articles to be independent from the earlier ones and numbered differently, so as to avoid any kind of confusion.

40. With regard to articles 11 to 14, which would replace article I of the annex, the Special Rapporteur referred to unilateral measures of prevention and he wondered whether that meant that the measures outlined in the following articles would be bilateral or multilateral. It was open to question whether notification and information on activities envisaged by a State without taking account of the views of another State, as well as consultations, could be considered measures for the prevention of possible harm. The obligation to provide information could be unnecessary in some cases and indispensable in others. The launching of satellites, for example, was an activity involving risk that could cause transboundary harm, but the communication of technical information on that activity was indispensable only if the satellite had a nuclear power source on board, which would increase the risk of harm. That accounted for the need for an instrument dealing specifically with such situations, such as the Principles Relevant to the Use of Nuclear Power Sources in Outer Space. It was therefore open to doubt whether articles 15 and 16 were well founded because it was difficult to draft principles that would be valid for all types of activity involving risk, all the more so as the term "risk prevention" was highly debatable. An "activity involving risk" presupposed that it was impossible to avert completely that risk and that it could only be minimized.

41. He thanked the Special Rapporteur for the efforts he had made to carry out his task. Many complex questions remained unanswered, however, and he doubted that, at the present stage, the Drafting Committee could achieve real results.

42. Mr. GÜNEY said that, in his ninth report and in conformity with the decision adopted by the Commission at its forty-fourth session,¹⁶ the Special Rapporteur had focused his attention on the elaboration of draft articles covering activities involving risk, leaving aside questions relating to liability. It was true that the codification and progressive development of the law on the subject involved the definition of the obligations to be imposed to prevent or minimize the risk of transboundary harm, as well as liability for harm that had actually been done. In view of the nature and complexity of the topic, however, it would be better to deal only with the first aspect of the problem.

43. It should also be recalled that, in accordance with the Rio Declaration on Environment and Development,¹⁷ States must ensure that the activities carried out in their territory or under their control did not jeopardize other States. In his view, the draft articles on prevention were on the whole satisfactory in that regard. They presupposed that it was the basic obligation of States to regulate all dangerous activities under their jurisdiction or

¹⁴ See *Official Records of the General Assembly, Forty-seventh Session, Sixth Committee*, 26th meeting, para. 57.

¹⁵ General Assembly resolution 47/68.

¹⁶ See footnote 13 above.

¹⁷ See footnote 12 above.

control, to evaluate the effects and to adopt the necessary legislative and administrative measures to minimize the risk of transboundary harm. Any further obligation would be incompatible with the sovereign right of a State to carry out legitimate activities in its territory without the agreement of another State as long as the rights of that State were not impinged on by the activities in question. Vigilance on the part of the State of origin must be considered sufficient at that stage. As to the protection of innocent victims, it had to involve compensation for any harm inflicted. To illustrate the scope of the State of origin's obligation, the Special Rapporteur emphasized that it was the people or the environment of that State that was the first to be harmed by a hazardous activity, and that, in the end, it was that State which had a primary interest in requiring prior authorization. In any event, whatever procedures were followed, they must not cause a given activity to be suspended until the State or States that might be affected were satisfied. In such cases, the action to be taken by the State of origin consisted in satisfying the requirements of absolute prevention, without that necessarily involving the suspension of the planned activity or the granting of some kind of right of veto to States that might be affected by the activity. All that was necessary was for the State of origin to carry out an in-depth analysis of the effects of the planned activity so as to prevent, control and reduce the risk of harmful effects.

44. Turning to article II of the annex (Notification and information), he said that the question that arose in connection with the role of international organizations was which of them was to be considered competent. That clarification had to be made in a legal instrument, especially when the interests of many States were at stake. Notification and information were essential when an evaluation brought to light the possibility of significant transboundary harm, but he was not convinced that provision had to be made for official consultations. The State of origin could not reasonably be expected to refrain from undertaking a lawful activity, especially when that activity was deemed indispensable to the country's development and when there was no other solution. Obliging the State of origin to consult all States that might be affected would amount to according them a right of veto, and that would be inadmissible. Stress should therefore be placed not on consultations, but on cooperation based on the principle of good faith and undertaken in a spirit of good neighbourliness. That should be spelled out in the text of article 17 (National security and industrial secrets) by adding the words "and in a spirit of good neighbourliness" after the words "in good faith". Similarly and in the light of the explanations that had been given, he believed that article 18 proposed by the Special Rapporteur (Prior consultation) was out of place in the body of the instrument being drafted.

45. The settlement of disputes (art. VIII of the annex) seemed to him to be closely related to the content and the type of instrument that was to be drafted. It would therefore be premature to discuss that question until the content and final wording of the draft articles had been established. As to article 20 (Factors involved in a balance of interests), it would be preferable to avoid the use of terms, such as the words "shared natural resources", which had been disputed and rejected by many bodies,

including the Commission itself. That article would be better placed in an annex.

46. In conclusion, he suggested that the Special Rapporteur should submit a long-term plan to the Commission specifying future stages in his work and start to prepare the final version of the draft articles on liability or in other words the obligation of the party responsible for the harm to provide compensation for it. Such a legal regime would be based on the liability of the operator rather than on that of the State. The reason was that liability derived from something other than failure to fulfil an obligation and did not entail full compensation for harm, regardless of the circumstances in which the harm had occurred. Transboundary harm resulting from an activity involving risk carried out in the territory or under the control of a State might, however, give rise to the liability of the State of origin.

The meeting rose at 1.05 p.m.

2303rd MEETING

Friday, 4 June 1993, at 10.05 a.m.

Chairman: Mr. Gudmundur EIRIKSSON

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. Kabatsi, Mr. Koroma, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Vereshchetin, Mr. Villagrán Kramer, Mr. Yankov.

International liability for injurious consequences arising out of acts not prohibited by international law (continued) (A/CN.4/446, sect. D, A/CN.4/450,¹ A/CN.4/L.487)

[Agenda item 5]

NINTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. Mr. BARBOZA (Special Rapporteur) said that all statements made so far had been interesting and deserved to be commented on. He proposed to do so in the usual way, but thought at the end of the exercise it would be useful for the continuation of the discussion if he responded to three of the statements at the present stage.

2. First, he agreed with most of the remarks by Mr. Pellet (2302nd meeting) and, in particular, with the criticism of article 18, proposed in the ninth report (A/CN.4/450), to the effect that the phrase "with a view to finding mutually acceptable solutions" appeared to

¹ Reproduced in *Yearbook... 1993*, vol. II (Part One).