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Summary record of the 2743rd meeting

Topic:

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The report of the Study Group on the Fragmentation of International Law, as a whole, as amended, was adopted.

The meeting rose at 1 p.m.

2743rd MEETING

Thursday, 8 August 2002, at 10 a.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Addo, Mr. Al-Baharna, Mr. Al-Marri, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Koskenniemi, Mr. Mansfield, Mr. Momtaz, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Sepúlveda, Mr. Simma, Mr. Tomka, Ms. Xue.

International liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from transboundary harm arising out of hazardous activities) (A/CN.4/L.627)¹

[Agenda item 6]

REPORT OF THE WORKING GROUP

1. The CHAIR informed the members of the Commission that Mr. Sreenivasa Rao had agreed to continue as Special Rapporteur for the second part of the topic of international liability for injurious consequences arising out of acts not prohibited by international law, which was international liability for failure to prevent loss from transboundary harm arising out of hazardous activities.

2. Mr. Sreenivasa RAO (Chair of the Working Group on International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law), introducing the report of the Working Group (A/CN.4/L.627), said that in its report the Working Group was proposing

some guidelines for the Commission's work on the second part of the topic of international liability for injurious consequences arising out of acts not prohibited by international law.

3. Some basic ideas were set out in the introduction. First, it had been considered useful to indicate what the relationship of the current endeavour would be to the draft articles on State responsibility for internationally wrongful acts adopted by the Commission at its fifty-third session.² In the Working Group's opinion, the State's failure to perform the duties of prevention assigned to it under the draft articles on prevention of transboundary harm arising out of hazardous activities adopted by the Commission at its fifty-third session³ would entail its responsibility. Furthermore, since harm could occur, even though preventive measures had been taken, it seemed that the core issue consisted in allocating the loss among the different actors involved in the activities that had caused the harm. Even though States should generally be free to authorize desired activities within their own territory, they should ensure that, if harm occurred, some form of relief was available to the victims. Without that assurance, States that could be harmed and the international community might insist that the activities in question should be prohibited.

4. The Working Group had recommended that the scope of the topic should be limited to the activities covered in the part on prevention. In that connection, the question arose of the threshold that would trigger the application of allocation of loss. For some members of the Working Group, the threshold agreed for the articles on prevention ("significant harm") could also be useful for the second part of the topic. However, as was reflected in the footnote corresponding to paragraph 7 of the report, some members of the Working Group had considered that a higher threshold was necessary in order to exclude a multiplicity of small and trivial claims and focus the regime on large-scale harm, which could result in substantial claims for restitution and compensation. It had been felt advisable to seek comments from States on that important point. It had also been decided that the study would deal with losses to persons, property (including elements of State patrimony and the national heritage), and the environment within the national jurisdiction.

5. The next part of the report dealt with the roles of the operator and the State in assuming the loss. The Working Group had agreed that, in principle, the innocent victim should not be left to bear the loss alone; that any regime on allocation of loss must ensure that there were effective incentives for all involved in a hazardous activity to follow best practice in prevention and response; and that such a regime should, in addition to the States concerned, also cover the different elements involved, such as the private sector, insurance companies and funds pooled by the industrial sector.

6. The Working Group had considered that the operator, who had direct control of the activities, should bear the primary liability in any loss allocation regime, since it was

¹ Reproduced in *Yearbook ... 2002*, vol. II (Part Two), chap. VII, sect. C.

² See 2712th meeting, footnote 13.

³ See 2724th meeting, footnote 2.

his responsibility to prepare the work programme, carry out the necessary risk studies, envisage risk-management mechanisms and request State authorization. The State had to notify and inform the interested parties, monitor the situation and, if necessary, authorize the planned activities. Other considerations came into play, particularly with regard to the insurance regime, the establishment by the State of provisions for emergencies or unforeseen situations and mechanisms to cover the costs of restitution and compensation, if harm should occur. In that respect, it had been recalled that the operator might have to internalize any costs that it might eventually have to assume if harm occurred.

7. Nevertheless, in the case of major harm, the operator might not be able to bear the entire loss. Some members of the Working Group had considered that the balance of the loss could be allocated to the State, which would then assume a residual liability. In any case, the State played a crucial role in assessing the risks of a hazardous activity, monitoring the activity in question to ensure that it was carried out in accordance with the prescribed standards and, more importantly, ensuring that effective remedies were available to potential victims. It was not always easy to distinguish between the role of the operator and that of the State when accidents occurred that resulted in large-scale harm.

8. Finally, the Working Group considered that procedures for processing and settling claims of restitution and compensation warranted more thorough discussion. Such procedures included inter-State and intra-State mechanisms for the consolidation of claims, the nature of available remedies, access to the relevant forums, and the quantification and settlement of claims.

9. Ms. ESCARAMEIA said that she fully endorsed the report and would like to make five remarks. First, she welcomed the fact that liability had been recognized as distinct from State responsibility for internationally wrongful acts; second, now that the Commission had examined the question of international liability from the point of view of prevention, she agreed with the decision to look at what happened when harm occurred despite prevention measures; third, she was satisfied that the Working Group had recognized the existence of several actors when harm occurred and that the role of the State had been duly acknowledged, even though there were differences of opinion among the members of the Working Group; fourth, she appreciated the fact that the report raised several important questions without anticipating the result of the Commission's discussions; and, fifth, she considered that the report was interesting because it suggested several avenues of reflection to guide the Commission in its future work on the topic.

10. She had some questions about the mechanisms by which victims could obtain compensation if harm should occur. Normally, the subject of international law was the State; what mechanisms would allow individuals to file an international claim in the State of origin and in the other affected States? The Commission would be breaking new ground by replying to that type of question. Also, she was not convinced that the environment should be included

among the innocent victims, as that would personalize it unduly.

11. Finally, she thought that a questionnaire should be sent to States requesting information on their practice and on their position, particularly with regard to the victims' participation in the procedure, the role of the operator and the State in sharing the loss, and the importance of the global commons.

12. Mr. PELLET said that, in order to be dealt with properly, the topic that the Commission was proposing to study would require technical, economic and financial expertise that the Commission did not have. Even if, in theory, it had the right to call on outside experts for their advice, that might cause practical problems. The topic also did not lend itself either to codification or to the progressive development of the law. By its very nature, the topic required negotiations among States, and the members of the Commission were neither States nor representatives of States. Whether for setting up the necessary insurance schemes for operators, establishing compensation funds or developing funding or cost-sharing mechanisms, it was hard to see how a group of experts that represented only themselves could take on such tasks. Thus, if the Commission insisted on dealing with a topic that went far beyond its competence, it would be wise, in his view, if it confined itself to suggesting ideas and options that might be used on a case-by-case basis.

13. The members of the Working Group had not been wrong to point out in paragraph 4 of the report that specific regimes would be of particular importance in dealing with the topic. They had also noted in paragraph 14 that any residual State liability could arise only in exceptional circumstances. Only in very specific cases, such as damage caused by space objects, had States accepted primary liability. In point of fact, that liability had been accepted under a convention that had been negotiated on the basis of the particular characteristics of the activities involved and it was hard to see how the members of the Commission could decide to generalize a solution of that kind or even, as suggested in paragraph 11, make a determination on the development of insurance schemes or the allocation by States of funds to meet emergencies and contingencies. The dilemma was the following: If the Commission decided to go ahead and take a position on such thorny issues as that of the potential liability of the State or the "polluter pays" principle, it might be moving onto dangerous ground where it would get bogged down at every session. If, on the other hand, it decided not to take a position, it was in danger of turning in circles and getting nowhere.

14. Consequently, if the Commission decided to adopt the report of the Working Group as part of the report of the Commission—something on which he reserved his position—a number of elements should be clarified or improved. In the English text, there appeared to be a lack of consistency between the subtitle, where the word "liability" was used, and paragraph 2, where the word "responsibility" was to be found. It was a simple matter of common sense that, if there was a duty of prevention, failure to respect that duty did indeed entail "responsibil-

ity” in the sense of responsibility for an internationally wrongful act. It would therefore be better, in his opinion, to choose a more neutral title, such as “Consequences of the occurrence of transboundary harm arising out of hazardous activities”.

15. Turning to the body of the text, he said he regretted that in paragraph 4 the consequences of the fact that specific regimes existed had not been fully taken into account. If the report of the Working Group was to be reproduced in the Commission’s report, it might be useful in paragraph 7 (a) to recall, for the benefit of readers, how hazardous activities had been defined in the draft articles on prevention of transboundary harm arising out of hazardous activities. Paragraph 11 brought out very well the fact that the topic did not lend itself to codification. While there was good reason to set up insurance schemes and oblige operators to contribute to funding mechanisms, such measures were not by any means within the Commission’s competence. In that connection, it was not clear what was meant at the end of paragraph 13: Was the liability of the operator limited, or was it strict or absolute? The penultimate sentence of paragraph 14 was a statement of the obvious, namely, that any residual State liability could arise only in exceptional circumstances. That statement seemed, however, to be contradicted by the preceding sentence, which said that, in the view of some members, when private liability proved insufficient, the remainder of the loss should be allocated to the State. In his view, the State’s liability could come into play only following negotiations, and even then the inter-State or intra-State mechanisms for the consolidation of claims mentioned in paragraph 16 were not within the Commission’s competence.

16. In conclusion, he said that the proposed topic was the subject of negotiations between sovereign States and not something that lent itself to the codification or progressive development of international law. The Commission had proved incapable of dealing with it over a period of 28 years, and nothing indicated that it would do better in future.

17. The CHAIR said that, whatever doubts one might have about the topic, the Commission’s hands were to some extent tied, since the Sixth Committee had called on it to push forward with its consideration of the question and had even adopted a decision to that effect.⁴

18. Mr. MANSFIELD reminded Mr. Pellet that the topic was already on the Commission’s programme of work; the members of the Working Group had worked very hard to draft a constructive report, which was, in his view, a good starting point for advancing the discussion in the Sixth Committee. His comment would be primarily from a practical perspective: there was general agreement that “prevention” was the most critical aspect and that an ounce of prevention was worth a pound of cure. No matter how good the prevention might be, however, it was not possible to eliminate the risk of damage entirely, and that was precisely the reason why the Commission was involved in the work it was doing.

19. In that connection, one aspect must not be lost from sight: safe operations were of the utmost concern to operators themselves, since accidents posed a direct threat to the profitability of their enterprises by entailing expenditure on repairs, increases in insurance costs and loss of confidence among customers, *inter alia*. Operators were thus the first to seek to manage risk and would normally expect to participate in loss-sharing mechanisms. If loss occurred, however, despite the best prevention measures, there was a general understanding that the victims should not be left to bear the loss unsupported and that the operators should bear the primary responsibility. It was accordingly inadvisable for operators to realize from the outset that, if they did anything wrong, the State would pick up the pieces. That knowledge would remove part of the incentive for them to manage the risk. As was pointed out in paragraph 14 of the report of the Working Group, residual State liability should arise only in exceptional circumstances, in cases when private liability proved insufficient for achieving an equitable allocation of loss. As Mr. Pellet had pointed out, that was a very complex matter.

20. No matter how difficult the task, however, he was convinced that the Commission could do constructive work and define a number of general principles, even though it was not for the Commission to develop insurance schemes. That was why he fully supported the report of the Working Group, which pointed to ways of moving forward on the topic.

21. Mr. PELLET, replying to the Chair, said he was aware that the General Assembly had adopted a decision urging the Commission to take up the topic. He believed, however, that the Commission had the responsibility to begin by taking a critical look at its own capacities and considering whether the issue really fell within its mandate.

22. Mr. SIMMA said that he too had been rather sceptical about the feasibility of the Commission’s taking up the topic, but that he had become more optimistic after the presentation of the Working Group’s report. He wished, however, to hear the opinion of the Chair of the Working Group and Mr. Mansfield as to whether outside, non-legal experts should be called on at some stage for advice on economic or technical questions. The Chair of the Working Group had not indicated in the report what his intentions were for the next two sessions.

23. Mr. MANSFIELD said that it was probably a bit early to make any decision on that point. It might well be that, if the Commission broached the kind of questions to which Mr. Pellet had referred, it would need to call on outside expertise, whether for authoritative advice or for guidance on areas to avoid.

24. Mr. Sreenivasa RAO (Chair of the Working Group on International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law) noted that technical complexities had never prevented the Commission from studying such topics as watercourses or State responsibility, for which it had had to grapple with the problems of quantification, interest and damage. Even if in some areas the Commission needed to call on outside expertise, such assistance should not be impossible

⁴ General Assembly resolution 56/82, para. 3.

to obtain. When the Commission had been working on the question of watercourses, the World Bank had given it extremely valuable technical assistance.

25. Mr. KATEKA said that he did not share the pessimism expressed by Mr. Pellet. The Commission was not trying to reinvent the wheel. Important groundwork had been done on the question by various agencies, including UNEP, not to mention the contributions of previous special rapporteurs. When people wanted to abandon a subject, they often advanced the argument that the Commission lacked technical competence or expertise, but, as the Chair of the Working Group had very rightly said, that had not prevented it from considering subjects on which its expertise might be in some doubt.

26. It was, of course, well known that special regimes for the environment—covering areas such as oil pollution, nuclear accidents and space objects—already existed. There even existed a number of agreements and conventions on the topic, but it was interesting to note that many of them had not yet entered into force. He wondered whether the reason might not be that they were too ambitious and did not adequately address some of the realities of insurance and compensation. It was to be hoped that the Commission would examine some of those issues carefully so as to stimulate the interest of Member States. The topic might also give it the opportunity to resume consideration of other environmental problems that it had been forced to abandon in the past, following unfavourable feasibility studies.

27. With regard to the report, the subtitle was particularly well chosen, since it brought out the link between the prevention and the liability aspects of the topic, which the General Assembly had endorsed. As for the scope of the study, one of the subjects that should have appeared in the list contained in paragraph 7 (c) was the “global commons”. It would also be helpful to speak of environmental damage rather than loss, since damage was associated with the possibility of compensation. Environmental damage was, however, often irreparable. In many cases, financial compensation could not provide reparation, and it was sometimes better to allow natural processes to do their job than to embark on a cleaning-up exercise. It was to be hoped that the Special Rapporteur would explore the question of defining environmental damage, despite the doubts that had been expressed about the Commission’s lack of expertise. With regard to the role of the operator and the State, he shared the view that the operator should be primarily liable in any regime of attribution of losses, while the State had a residual responsibility. It was a step in the right direction.

28. Finally, he said that, while the experts fought over their competence, the degradation of the environment continued. He hoped that, with the World Summit for Sustainable Development to take place shortly in Johannesburg, the Commission would help to establish a framework to ensure that the environment would be saved.

29. Mr. GAJA congratulated the Chair and the members of the Working Group on the suggestions they had made in the report. The subtitle of the study proposed by the Working Group, however, posed a problem. When the Com-

mission had drafted the articles on prevention of transboundary harm arising out of hazardous activities, it had assumed that activities that could produce transboundary harm were lawful *per se*, but that did not exclude a State’s obligation of prevention in the territory in which the activities took place. In draft article 1, such activities were described as not being prohibited by international law, irrespective of the obligation to prevent harm. The injurious consequences arising out of such non-prohibited activities could thus be due both to activities taking place when the obligation of prevention had been fully complied with and to activities which were lawful *per se* but constituted infringements of that duty of prevention. In the latter case, an internationally wrongful act had occurred, since there had been a failure to comply with the duty of prevention. On the other hand, activities which were not prohibited by law and were carried out in compliance with the duty of prevention, but which nonetheless resulted in harm, were activities for which the term “failure to prevent loss” did not seem appropriate: it gave the impression of non-compliance with a duty. He therefore suggested wording even more neutral than that suggested by Mr. Pellet, along the following lines: “International liability in case of loss from transboundary harm arising out of hazardous activities”.

30. In the report, the Working Group did not address the question of the nature of the end product of the Commission’s work. The Commission might be heading for a framework convention establishing substantive rules concerning liability, whether that of private operators or that of States. Such a regime would be viable only if all the States concerned were bound by the convention. Should that not be the case, an operator could face additional claims for the same loss in a State not party to the convention. He would not be protected by the ceiling hinted at in paragraph 13. Moreover, a State would naturally be unwilling to contribute to making good a loss for the benefit of another State, if it was not assured that the other State was similarly liable in a reciprocal situation. A precise definition of the scope of application of such a convention and the adoption of rules of jurisdiction would be major factors in persuading States to accept being bound by such an instrument.

31. Unlike the draft articles on the prevention of transboundary harm arising out of hazardous activities adopted by the Commission at its fifty-third session, the rules envisaged in the Working Group’s report could not be converted into rules of general international law. They would apply only if States were bound by a convention embodying them. The novelty of the exercise therefore lay not only in the substantive elements contained in the rules on liability, but also in the attempt to write a draft treaty regime that could function only if a large number of States agreed to be bound by it. If the Commission was in a position to undertake the task, it should provide some clarification as to the end product envisaged, in order not to give the impression that it was adopting general rules of the same kind as those adopted at the previous session. It could only sketch out a draft regime, on the basis of which States would negotiate with a view to drafting either a general treaty or several specific treaties relating to areas not yet covered for the kind of harm currently under consideration by the Commission.

32. Mr. KAMTO thanked the Chair and the members of the Working Group for the fact that, in their report, they had defined the focus which should enable the Commission, if all its members got down to work, to hold more in-depth discussions of such a complex and technical topic and, on the basis of existing international legal instruments, to formulate a set of principles of international law, which might, as Mr. Gaja had suggested, lead to a framework convention. In any event, it would be for States to decide on the final form the Commission's work would take.

33. He supported the amendment to the title of the study proposed by Mr. Pellet. It would be better, however, not to refer to hazardous activities but to activities not prohibited by international law, because the purpose was to study the question of unforeseeability, not the question of non-prevention, which was part of the classical regime of State responsibility, as discussed by the Commission at the preceding session, not of the regime of liability. When it was stated that prevention was ineffective or insufficient, that could come under liability, but the problem could also be approached from the viewpoint of the classical regime of responsibility when a State had not taken all of the measures required by an obligation of means. In such a case, responsibility could be said to exist, and the distinction between obligations of means and obligations of result would be relevant. In actual fact, the regime that the Commission intended to draft related to activities not prohibited by international law, whether they were hazardous or not.

34. Paragraph 3 of the report raised the problem of unforeseeability, and it might be asked whether that question should not be dealt with in connection with the principle of precaution, assuming that that principle was at present regarded as a rule of international law. The Commission, which had not discussed the principle of precaution in enough detail at the last session, should now determine how it differed from the principle of prevention. If the principle of precaution existed as a rule of international law, that would have an impact on the way in which the Commission conducted its study.

35. In that connection, the three points indicated in paragraph 7 of the report for consideration as part of the study should be further elaborated on in the light of the comments made by Mr. Kateka on environmental protection. In addition, activities not prohibited by international law should not be considered only from the point of view of prevention but also comprehensively, so as not to fail to meet the expectations of the Sixth Committee.

36. Mr. PELLET, noting that now was not the time to question the principle of precaution, said that at the preceding session the Commission had perhaps missed an opportunity to consider the very real links between that principle and the principle of prevention. Even though the principle of precaution did not appear in the draft articles on prevention, it was mentioned in the commentaries. It might well be a topic that the Commission could study.

37. Perhaps the Chair of the Working Group could explain whether "international liability for failure to prevent

loss from transboundary harm arising out of hazardous activities" was a title or a subtitle, because, if it was a subtitle, Mr. Kamto's proposal was far from obvious, since the title already indicated that the topic was "international liability for injurious consequences arising out of acts not prohibited by international law". The Commission had spent about 15 years trying to define the scope of the topic. It had finally decided that the study should initially be limited to hazardous activities. It would therefore be wiser to study that question in depth before considering activities which did not involve any particular danger.

38. He also wished to know why the English version of the title referred to "loss" rather than to "damage", and why the word "loss" had been translated into French by the word *sinistre* rather than by the word *dommages*.

39. Mr. KAMTO drew the attention of the Commission to paragraph 5 of the report, where the Working Group recognized the fact that States should be free, within reasonable limits, to authorize activities that they wished on their territory, under their jurisdiction or under their control, even if these activities could cause transboundary harm. Such a sentence would be significant if the precautionary principle existed in international law. For this reason he thought there might be reason to examine this principle, whatever form this examination might take.

40. Mr. TOMKA said that the Commission should bring its terminology into line with that used at the preceding session and that, in French, the words *sinistre transfrontière* should be replaced by the words *dommage transfrontière*.

41. Mr. SEPÚLVEDA said that he joined in congratulating the Working Group and its Chair and, like Mr. Mansfield, Mr. Kateka and the Chair of the Working Group, was glad that the Working Group had prepared a positive report and had tried to break new ground rather than simply referring to obstacles and problems.

42. The Spanish title of the topic should be brought into line with the title in English and French. He was not sure whether the Spanish word *empresa* corresponded to the words "operator" and *exploitant* in English and French. It should also be explained what was meant by *patrimonio nacional* (State patrimony) and *patrimonio del Estado* (national heritage).

43. With regard to substance, the Commission had to try to find wording designed to share the burden of the loss resulting from harm among the various operators involved in the activity. In that connection, three main questions must be asked: Who had authorized the activity, who had managed it and who had benefited from it? The State played a key role, since appropriate domestic and international systems had to be established to allocate the loss fairly.

44. The question of the residual liability to be attributed to the State in the event of harm also had to be properly studied. Although the operator had to be primarily liable in any loss allocation system, it might, in some cases, not be able to afford to react, and the liability of the State which

had authorized the activity must then be implemented. Finally, it was essential to establish machinery such as that referred to in paragraph 16 of the report of the Working Group, as well as procedures guaranteeing reparation or compensation so that an innocent victim would not have to bear the loss alone.

45. Mr. BROWNLIE, congratulating Mr. Sreenivasa Rao on having agreed to be Special Rapporteur for the topic, said that initially his own position on the question of liability had been similar to that of Mr. Simma and his attitude had been one of scepticism verging on hostility. The early version of the draft articles on the liability topic had, moreover, caused a great deal of misunderstanding, which probably persisted in the Sixth Committee. His views had changed once the work on prevention had been successfully completed, and he had been converted to the idea that the Commission could study several autonomous but nonetheless related topics which would not simply be a *doppelgänger* of State responsibility. One of the reasons he had wanted to be a member of the Working Group was to protect State responsibility from new sources of confusion. It was important to try to appreciate that the prevention topic was about management of risk and that the Commission had now entered the next stage in its work. What separated the prevention topic from State responsibility was that there was a new and separate basis for claims. There was also a separate procedure, and ultimately there might be a multilateral framework agreement and some multilateral mechanism for the weighing up of claims for damage caused.

46. Mr. PAMBOU-TCHIVOUNDA said that the topic was new, but not really new, and that that ambiguity might explain why it had been dealt with unfairly in the report under consideration, as was shown in the paragraphs on the scope of the topic, some aspects of which seemed to have been overlooked, but also by the emphasis which had been placed on the fact that the regime focused on two actors, the operator and the State. That inequality was also apparent in paragraph 16, which raised questions that had not been considered at all in the report, even though they were at the heart of the matter. A system of reparation had to be organized, and, if the term “liability” actually referred to reparation, then reparation must be understood as the implementation of liability. That would help explain why the Chair of the Working Group was trying to establish a connection between the work being done now and the work on prevention, on which 19 articles had been adopted. If that was true, the report of the Working Group called for two general comments. The first was that the exercise related to mechanisms for the implementation of liability for failure to prevent transboundary harm, and he wondered whether such mechanisms should not be seen, within the meaning of the general law of the international liability of the State, from the viewpoint of compensation in the event of a breach of an international obligation of prevention. Article 19 of the draft articles on prevention of transboundary harm arising out of hazardous activities, relating to the settlement of disputes, covered practically every possible case imaginable, and it was perhaps in that type of provision that a solution to the questions that arose might be found. Article 19 should therefore focus on ways of dealing with the technical aspects of the topic. In the report of the Working Group, the section on scope was

incomplete, and that was where the relationship between the draft articles on prevention and the work being done now should be explained. In his preliminary report, perhaps the Special Rapporteur could give a more detailed description of the scope of the topic that focused more on the relationship with prevention.

47. The report of the Working Group also did not contain clear-cut indications on the regime of reparation. That question was dealt with too briefly, since the entire focus was on the operator and the State. A number of problems arose in that regard. In the case of the operator, for example, paragraph 10 of the report referred to basic concepts, such as direct control, without any explanation. Did “renovation” mean *restitutio in integrum* or a return to the *status quo ante*? Those were basic questions that required clarification.

48. As far as the role of the State was concerned, distinctions were made implicitly, as in the case of the distinction between the primary liability of the operator and the residual or secondary liability of the State. Paragraph 14 gave no indication of the consequences of such a distinction. Similarly, the question of the status of the State as an operator was a matter for the internal law of States, and it was to be hoped that in his preliminary report the Special Rapporteur would give the indications on that point, or at least on the main systems governing the role of the State as an operator. The issues referred to in paragraph 16 of the report of the Working Group should also be elaborated on so that the Commission could give the Special Rapporteur guidance for his future work.

49. Mr. CANDIOTI said that in Spanish the subtitle of the topic in parentheses was confusing and that, on the basis of what Mr. Gaja had suggested, it should be amended to read: *Responsabilidad en caso de daño transfronterizo resultante de actividades peligrosas*. It was too early to decide what form the final results of the Commission’s work might take.

50. Ms. XUE said that liability for damage to the environment was a very complex question in both internal law and international law. Since the United Nations Conference on Environment and Development (Rio de Janeiro, 3–14 June 1992), there had been far-reaching changes in environmental law, and it was therefore not surprising that the Sixth Committee should have requested the Commission to study the topic of international liability for transboundary harm after it had completed its work on prevention.

51. The main question was whether strict liability could generally be established for environmental harm. It must be asked whether, when a State carried out hazardous activities which might cause transboundary harm, it could have increased liability, even when it had fulfilled its obligations of prevention. In that connection, the Commission should focus on two aspects of the question: how to develop the “polluter pays” principle in international law, and what the role and responsibility of States would be in that regard. Ultimately, international liability for transboundary harm was a question of compensation for loss and sharing of resources; in economic terms, it might be referred to as “corrective sharing of resources”. That

process had not only legal but also political and economic implications. There were systems for the allocation of liability, for example, in the fields of nuclear power, outer space, shipping and the international carriage of dangerous goods. The mechanisms provided for under such regimes could serve as a basis for the Commission's study, even if many of them were not international but regional and, in particular, European and North American. The Working Group had taken account of those regimes and of the questions which would have to be dealt with later; Mr. Gaja's comments in that regard were very constructive. Whatever form the results of the Commission's work took, the two main questions were whether those results would meet the needs and expectations of States and the international community, and to what extent States would accept them as international rules.

52. The CHAIR pointed out that the Commission had not yet officially appointed Mr. Sreenivasa Rao as Special Rapporteur for the topic of international liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from transboundary harm arising out of hazardous activities) and that it still had to do so. He therefore took it that the Commission did want to appoint Mr. Sreenivasa Rao as Special Rapporteur for that topic.

It was so decided.

The meeting rose at 1 p.m.

2744th MEETING

Friday, 9 August 2002, at 10.05 a.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Addo, Mr. Al-Baharna, Mr. Al-Marri, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Mansfield, Mr. Momtaz, Mr. Niehaus, Mr. Operti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Mr. Simma, Mr. Tomka, Ms. Xue.

from transboundary harm arising out of hazardous activities) (concluded) (A/CN.4/L.627)¹

[Agenda item 6]

REPORT OF THE WORKING GROUP (concluded)

1. The CHAIR invited Mr. Sreenivasa Rao, Chair of the Working Group on International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law and Special Rapporteur, to make a clarification concerning the title of the item.

2. Mr. Sreenivasa RAO (Chair of the Working Group on International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law, Special Rapporteur) said that the bracketed words "(International Liability for Failure to Prevent Loss from Transboundary Harm Arising out of Hazardous Activities)" appearing as part of the title of the report of the Working Group (A/CN.4/L.627) formed a subtitle to the item. As to the wording of the subtitle, the words "for failure to prevent" had given rise to difficulties in the Working Group particularly in the light of the Commission's wish to avoid any linkage of the item with issues of responsibility and prohibition that it had considered in the past under other agenda items. Accordingly, Mr. Gaja had suggested that those words should be replaced by the words "in case of". The new subtitle would thus read "(International Liability in Case of Loss from Transboundary Harm Arising out of Hazardous Activities)".

3. The CHAIR said that, if he heard no objection, he would take it that the proposed subtitle was acceptable to the Commission.

It was so decided.

4. Mr. CHEE said that, given the prominence environmental issues had assumed since the 1992 United Nations Conference on Environment and Development and the continuing evolution of international law in that field, he was strongly in favour of the Commission's proceeding with work on the item under consideration with a view to developing a convention.

5. Mr. AL-BAHARNA said that the subtopic of prevention of transboundary harm from hazardous activities, on which the Commission had completed work at the previous session,² would be incomplete if the question of liability for transboundary harm affecting the territory of another State was not pursued. It had been approved by the General Assembly,³ and there was no reason why the Commission should not attempt to bring it to a satisfactory conclusion in the form of draft articles that could ultimately take the form of a framework convention integrating the two subtopics of prevention and liability. The liability issue was a useful and worthwhile exer-

International liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss

¹ Reproduced in *Yearbook ... 2002*, vol. II (Part Two), chap. VII, sect. C.

² See 2724th meeting, footnote 2.

³ See 2743rd meeting, footnote 4.