

Document:-
A/CN.4/SR.2807

Summary record of the 2807th 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:-
2004, vol. I

*Downloaded from the web site of the International Law Commission
(<http://www.un.org/law/ilc/>)*

had been necessary to hold informal consultations. The Commission had therefore taken the view that the point was not self-evident and needed to be included in the article.

90. The CHAIRPERSON said that he took it that, in the light of the Special Rapporteur's explanations, the Commission wished to adopt article 16.

Article 16 was adopted.

PART FOUR (Miscellaneous provisions)

ARTICLE 17 (Actions or procedures other than diplomatic protection)

ARTICLE 18 (Special treaty provisions)

ARTICLE 19 (Ships' crews)

91. Mr. MOMTAZ said that article 19 should immediately follow article 17. Article 17 embodied a general rule and the rule contained in article 19 must be seen as the corollary of the rule stated in article 18. Articles 18 and 19 should therefore be inverted. The provision now contained in article 18 would thus come at the end of the set of articles on *lex specialis*.

92. Mr. GAJA said that the French and English versions of article 17 were different. In his opinion, the French text was a more faithful reflection of the Drafting Committee's intention to stress that the right of States, natural persons or other entities to resort to actions and procedures was governed by international law. The English version gave the impression that it was the actions or procedures which were governed by international law. He therefore proposed that the English version should be brought into line with the French text by placing the words "under international law" immediately after the word "resort".

93. Mr. ECONOMIDES said that he had some difficulty with the grouping together of article 17 (entitled "Actions or procedures other than diplomatic protection") and article 18 (entitled "Special treaty provisions") because all actions or procedures other than diplomatic protection were a matter of special treaty provisions and the two titles were thus confusing. It was, moreover, a well-established legal rule that special treaty provisions took precedence over general provisions. Special treaty provisions should therefore take priority over the very general rules on diplomatic protection. In article 18, however, that priority was given only when the two kinds of provisions were inconsistent. That was contrary to the law. No matter whether it was compatible or incompatible with a general rule, a special rule always took precedence. The Commission was thus introducing an innovation *vis-à-vis* internal law and even *vis-à-vis* the Vienna Convention on the Law of Treaties (hereinafter "the 1969 Vienna Convention"). In his opinion, articles 17 and 18 should be reconsidered and merged into a single article. It was premature to discuss the articles' positioning. He would rather have article 19 come after article 8, for example, but that was a matter for discussion on second reading.

94. Mr. DUGARD (Special Rapporteur) said that he entirely agreed with Mr. Gaja's proposal. The words

"under international law" had been incorrectly placed after the word "procedures" in the English version of article 17.

95. Mr. AL-BAHARNA said that, in the English version of article 17, a comma should be added after the word "entities".

96. The CHAIRPERSON said that he took it that the Commission wished to adopt article 17, the French version being deemed the authentic text.

Article 17 was adopted.

97. The CHAIRPERSON said that, if he heard no objection, he would take it that the Commission wished to adopt article 18, having duly taken account of the comments by Mr. Momtaz and Mr. Economides.

Article 18 was adopted.

98. The CHAIRPERSON said that he took it that, account having been taken of the comments by Mr. Momtaz and Mr. Economides, the Commission wished to adopt article 19.

Article 19 was adopted.

99. The CHAIRPERSON said that, if he heard no objection, he would take it that the Commission wished to adopt the draft articles on diplomatic protection, as proposed by the Drafting Committee.

It was so decided.

The meeting rose at 1.05 p.m.

2807th MEETING

Tuesday, 1 June 2004, at 10.05 a.m.

Chairperson: Mr. Teodor Viorel MELESCANU

Present: Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Candiotti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Ms. Xue, Mr. Yamada.

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) (continued)* (A/CN.4/537. sect. C, A/CN.4/540,¹ A/CN.4/543,² A/CN.4/L.661 and Corr.1, A/CN.4/L.662)

¹ Reproduced in *Yearbook ... 2004*, vol. II (Part One).

² *Ibid.*

[Agenda item 4]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)*

1. Mr. MATHESON said that the Special Rapporteur's second report on the legal regime for the allocation of loss in case of transboundary harm arising out of hazardous activities (A/CN.4/540) was an outstanding effort that created a framework for the Commission's substantive work on the topic. That work would require much time and effort to complete, if only because of the topic's global importance and potential effect on a wide range of human activities. Ultimately, however, the topic concerned an area in which the Commission could do a great deal of good.

2. As the work progressed, the Commission would need to engage in an extensive and detailed discussion of the matters contemplated in the draft principles proposed by the Special Rapporteur in his second report. With regard to the general framework set out in the report, he believed that the Special Rapporteur was absolutely correct in his fundamental judgement that the outcome of the Commission's work must be general and residual in character and must give States the greatest possible flexibility in developing specific regimes for the provision of compensation in particular contexts. It was clear from the reports on the topic to date that there were no fixed models or uniform measures that could possibly fit every situation, and that there was a wide spectrum of devices and concepts on which States could draw in creating a regime that made sense and ensured that justice was done. Rather than creating a single, global solution, the Commission should try to encourage States to act positively and promptly, drawing their attention to a variety of different approaches that might be combined in the process of bilateral or multilateral negotiations to deal with specific problems.

3. One basic question that arose at the outset was the overall legal character and form that the outcome of the Commission's work on the topic should take. It was important to recall that the activities covered by the topic were, by definition, not prohibited by international law, which meant that States did not have international responsibility or a duty to provide compensation for the results of such activities unless they agreed to accept such responsibility. That fact suggested that the Commission had two options: either to draft a treaty instrument that would create legal obligations for States, or to formulate guidelines that would encourage States to take appropriate measures for the provision of compensation and suggest various means of accomplishing that objective. He preferred the second option and agreed with the comments made by Mr. Pellet on the subject.

4. The fact that most States were unlikely to become parties to a treaty that created a global regime of obligations, however general in character, would seriously detract from the overall effectiveness of such a regime. More good could be done with a set of recommendatory guidelines to which States could extend general support and which would encourage them to negotiate binding instruments adapted to their particular circumstances. He therefore favoured the framework of principles proposed by the Special Rapporteur, although he would replace

terms of obligation such as "shall" with recommendatory terms such as "should".

5. He also agreed with the Special Rapporteur that the scope of the draft principles should be limited to that of the draft articles on prevention of transboundary harm from hazardous activities adopted by the Commission in 2001.³ In particular, it was important that the draft principles should cover only activities not prohibited by international law that risked causing significant transboundary harm. Any broader scope would be unlikely to command the support of States generally.

6. The Commission must also exercise caution when describing the geographical scope of the principles, especially with respect to areas beyond national jurisdiction. It was one thing to provide compensation for damage done to States and individuals in such areas but quite a different matter to require compensation for damage to the environment *per se* in those areas, if it did not result in loss to specific States or individuals. It might be sensible for States to accept obligations to prevent such damage to the environment in those areas, but it was not at all clear how a requirement of compensation would be feasible. Who would have the right to demand compensation under circumstances where there was no specific damage to any particular State or individual, and to whom would such compensation be provided? Would a State have the right to demand compensation for any unilateral measures it might have taken on its own initiative to control or reverse damage to the environment in areas beyond its national jurisdiction? In the absence of a multilateral authority or arrangements to authorize such remedial action, that would seem inappropriate.

7. The Commission must therefore be careful not to impose excessive requirements on States with respect to compensation for damage in those areas. In particular, when it said that measures must be taken to ensure that compensation was available for transboundary damage in areas beyond national jurisdiction or control, the damage should be limited to damage actually caused to States and persons in those areas.

8. The Special Rapporteur had suggested that the primary duty of compensation should lie with the operator. Such a solution would generally be the correct one; however, there were exceptions in the case of pollution from ships and from the transit of waste, and in some cases States might choose to place primary liability on an entire industry through the creation of an industry fund rather than attempt to single out individual operators. In some situations it might be impractical or even impossible to attribute the damage to a specific operator; moreover, entities other than the operator might be better placed to provide compensation and take effective remedial action.

9. Thus, the Commission should not suggest that the only option for States in all circumstances was to place primary liability on the operator. It might wish to state that although that would normally be the case, the guiding principle should be that States should take measures to ensure that adequate compensation was available for

³ See 2797th meeting, footnote 3.

victims, the decision as to what means should be adopted in specific cases to achieve that end being left to States. States should also consider the creation of supplementary sources of funding and financial security, including the possible use of State funds, to ensure that victims were adequately compensated. However, it was better not to say that such measures were required in every case, so long as adequate provision was made to compensate the victims in some way.

10. Lastly, the Special Rapporteur suggested that the draft principles should include a requirement that operators should take action to minimize damage resulting from pollution incidents. He agreed that action to contain and remedy such damage should be taken promptly, but such action seemed to him to have less to do with liability than with the prevention of harm. If that matter was not adequately covered by the draft articles on prevention of transboundary harm, it would be logical to find some way of amending or supplementing those articles rather than trying to incorporate it in the principles on liability. In any event, the Commission should be careful not to restrict the options of States unduly or to suggest that in all cases they would be required to rely on operators to control and minimize pollution damage. There might, for instance, be circumstances in which public agencies should take direct action to contain the damage and then perhaps seek reimbursement from those responsible.

11. He did not intend to comment on the substance or drafting of individual principles at the present juncture, but he did agree with Mr. Pellet that the Commission should not merely have a general debate and then refer the entire package of draft principles to the Drafting Committee. Individual principles should be discussed systematically, with the Commission taking action on one group of related principles before moving on to another group. Each principle covered a number of technical issues that deserved full discussion and decision in principle, and the Commission must ensure that sufficient time was devoted to that task.

12. Mr. KATEKA commended the Special Rapporteur for his efforts to accommodate the various views that had been expressed at the previous session and noted that the traditional concept of damage as damage to persons and property had been expanded to include damage to the environment *per se*. In addressing the topic, he wished to focus his comments on the Special Rapporteur's general conclusions.

13. He hoped that the general and residual legal regime discussed in general conclusion 1 would help in the development of specific liability regimes in the future. If the Commission endorsed that conclusion, however, he hoped that it would not leave itself with little room for manoeuvre.

14. General conclusion 2, limiting the scope of the draft principles to that of the 2001 draft articles on prevention of transboundary harm, set the threshold of "significant harm" as the trigger for liability. Like other members of the Commission, he had resigned himself to that threshold, even though he would have preferred a different one.

In that connection, friends of the environment appeared to be heading for a confrontation with friends of industry.

15. General conclusion 3 needed to be qualified: the fact that hazardous or significant risk-bearing activities were sometimes crucial for economic development should not exempt States from exercising due diligence. The conclusion called to mind the past debate on the environmental impact assessment, which had been viewed as costly, albeit beneficial in the long run.

16. On general conclusion 4, he noted that there was some vagueness with regard to the requirements which States might impose on operators as set out in paragraph 15 of the report. Draft principle 3, which sought to ensure that "victims are not left entirely on their own", was also unclear, and he shared the concerns of Ms. Escarameia on that point. The absence of a definition of the term "victim" was also a matter of concern.

17. General conclusion 5 and the related draft principle should specify that the primary duty to provide compensation for loss caused by hazardous activities lay with the operator. As noted in paragraph 14 of the report, the operator was the main beneficiary of the activity and the creator of the risk, and as such should bear the principal liability in any regime for the allocation of loss.

18. He agreed with general conclusion 6 and suggested in that connection that draft principle 2 *e*, on the definition of the term "operator", should take into account the footnote to the report at paragraph *b* of the explanation of draft principle 4 on the definition of that term in Common Position (EC) No. 58/2003 adopted by the Council of the European Union on 18 September 2003.⁴ General conclusion 7, however, gave rise to some concern. The Special Rapporteur had noted in paragraph (g) of the explanation to draft principle 4 that the scheme of limited liability was unsatisfactory insofar as it was incapable of providing sufficient incentive to the operator to take stricter measures of prevention. There was thus a need to set the limits of financial liability at a sufficiently high level. The Special Rapporteur further noted, in paragraph (i) of the same explanation, that most conventions excluded limited liability in case of fault. It should be noted that certain multilateral environmental agreements that had not yet entered into force, such as the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, did not address the realities of insurance and compensation adequately. There was thus a need for the Commission to ensure that the victim was not left at the mercy of the operators and States.

19. General conclusion 8 was a step in the right direction. The Special Rapporteur had acknowledged the need to include the global commons in the Commission's consideration of liability. It would be helpful if the Special Rapporteur could at some point in the future attempt to define the global commons, working out modalities for the bringing of claims, including the setting up of a global fund for the preservation of the environment, to be administered by an existing or a new agency. The Special

⁴ *Official Journal of the European Union*, no. C 277 E, 18 November 2003, p. 10.

Rapporteur had noted that damage was caused by multiple sources, which were sometimes difficult to pin down, owing to their diversity. Nevertheless, the global commons should not be regarded as a no-man's-land where environmental degradation was concerned.

20. With regard to general conclusion 9, he noted that the Special Rapporteur, when introducing his second report, had asked whether the Commission could impose such an obligation on States, adding that there was no consensus on the matter in the Commission. He himself was in favour of imposing an obligation on States in the allocation of loss. Admittedly, the notion of State liability was complex and controversial; however, the Commission could not leave victims unprotected, regardless of whether they were States, natural or legal persons or the environment *per se*. In certain cases the operator had limited liability, and there were also exceptions in which it incurred no liability. In the case of a State that authorized a risk-bearing activity that subsequently resulted in damage despite the taking of preventive measures, it was not fair to let the victim bear the loss without compensation, whether from contributions, insurance or *ex gratia* payments provided by States.

21. He commended the Special Rapporteur for the detailed draft principle 2, on use of terms. He welcomed in particular principle 2 (b), in which “damage to the environment” was defined as “loss or damage by impairment of the environment or natural resources”. Likewise, principle 2 (g), on “measures of reinstatement”, was an important remediation measure as it was often not possible to compensate for environmental damage in monetary terms, and the natural process of recovery could be lengthy, while cleaning up after an incident did not necessarily restore the lost value or appearance of the environment.

22. Of the two alternatives proposed for draft principle 4, he preferred alternative A. The text should cover both the State of origin and the operator. Draft principle 5 should have a more detailed explanatory note, especially with regard to contributions from the principal beneficiaries of an activity. Draft principle 10, on the settlement of disputes, was too weak and needed to be given more substance.

23. On the final general conclusion, the Special Rapporteur had said that he had no preference as to the form that the outcome of the Commission's work should take. He himself would prefer the Commission to adopt the form used for the topic of prevention of transboundary harm from hazardous activities, namely draft articles. As the legal regime for the allocation of loss constituted the second part of the topic of international liability, it was logical to adopt the same format. In conclusion, with the exception of draft principle 3, which was incoherently worded, he would have no hesitation in labelling the Special Rapporteur's text draft articles and referring them to the Drafting Committee.

24. Mr. FOMBA, reflecting on the role of States in the context of liability, said that whether a State was an operator or a victim, a sword of Damocles, in the form of the obligation of due diligence, hung over its head. The

question that arose, then, was whether a State should seek to minimize or eliminate the risk of damage at the source. In any case, the obligation involved was one of conduct and not of result.

25. On that basis, two distinct situations might arise. The first entailed a wrongful act constituted by the failure of a State to fulfil its obligation to exercise due diligence. If that case was the only one that arose, there would be no problem, as the Special Rapporteur had noted in paragraph 25 of his report. However, in a second scenario, there was no wrongful act: either the State had exercised due diligence to the best of its ability and no damage had been incurred, or else the State had exercised due diligence but damage had nevertheless been incurred. The latter situation entailed a potential risk that could not be eliminated. Even if one set aside the problem of State responsibility for a wrongful act, a situation contemplated in draft principle 9, the sensitive problem of State liability remained.

26. The notion of “strict State liability” gave rise to further questions, however. The actual, potential and desirable consequences, both practical and theoretical, of that notion must be determined, as must the status of the matter in international positive law. The Commission must also determine whether the topic really provided material for codification and/or progressive development. In addition, it must seek to reconcile what was desirable in terms of outcome with what was possible. Lastly, it must look at the solutions that the Special Rapporteur had provided to those problems and assess them critically. When a non-State operator, whether a natural or legal person, was the source of damage, then his or her liability was strict or absolute, at least in theory, regardless of whether the State had or had not exercised due diligence. The rationale and viability of such a solution were open to question, however. The matter must be clarified in the light of the State's role as either operator or victim, and the logical and practical conclusions drawn.

27. The Special Rapporteur's method, whereby he presented observations from States on the principal questions relating to compensation for damage, drew general conclusions and proposed draft principles on a preliminary basis, appeared to be a step in the right direction, even if certain aspects of the topic might have been more fully developed. As for the report's scope, the Special Rapporteur addressed the main issues posed by the topic, proposed various possible approaches, and invited further suggestions from the Commission.

28. With regard to the title, the use of the term “allocation of loss” rather than “compensation for loss” seemed to be the lesser of two evils, as it sidestepped, at least partially, the conceptual and interpretative problems posed by the notion of liability. As for the scope *ratione materiae*, he agreed with the view expressed in paragraph 11 of the report that the scope of the topic should be the same as that of the draft articles on prevention of transboundary harm from hazardous activities. However, the Commission must determine how closely it could follow the previous model. The question of the definition of terms had been rightly raised by Mr. Pellet.

29. As the proposed legal regime dealt with the exclusive or at least primary liability of the operator, the “polluter pays” principle should obviously form its basis, a view supported by the footnote to the report at paragraph *a* of the explanation of draft principle 3 on the Common Position adopted by the Council of the European Union.⁵ He therefore agreed that that principle should be reflected forcefully and clearly in the draft text.

30. He also agreed with the Special Rapporteur that the principle of prompt and adequate compensation (draft principle 4) was a key provision of the draft principles. The two alternative texts proposed were complementary and should be worded so as to reflect the fact that the State could itself be the victim of damage. He shared the doubt that had been expressed about the capacity of small countries to fulfil fully and systematically their obligations to provide prompt and adequate compensation, as called for in draft principle 4.

31. Although he himself agreed that the definition of the environment should refer to damage to the environment *per se*, such an approach had not been unanimously endorsed. It might therefore be useful to find out more about practice in the matter, as had been suggested.

32. With regard to the form that the outcome of the Commission’s work should take, he believed that a preliminary decision must be taken in order to guide the Special Rapporteur in his work. The two proposed outcomes were either a proper convention, perhaps a framework convention, an option dictated by the general and residual nature of the regime envisaged and favoured by advocates of a parallel form for the texts on liability and on prevention of transboundary harm; or else a non-binding text in the form of recommendations, questions, guiding principles or model rules. The question should be considered in the light of the following criteria: the specific and technical nature of the topic, the mandate of the Commission under its Statute and its technical limitations, evaluation of the topic from the standpoint of the theoretical and practical aspects of the codification and progressive development of international law, and the need to produce an outcome that would be of practical value to States. Both options had advantages and drawbacks, depending on whether the final text was or was not to be binding, a matter that would have to be weighed carefully.

33. Above all, the Commission must clearly distinguish between what it would like to accomplish and what was actually feasible. Without wishing to go into detail, he believed that a convention that was not widely ratified, or else that was undermined by reservations to such major elements as the obligation to provide prompt and adequate compensation, would serve little purpose. On the other hand, a non-binding text would offer great flexibility and could usefully guide negotiations, but would provide no guarantees from the standpoint of legal certainty. As all States enjoyed sovereign equality, however, each would be able to assume its own responsibilities and look after its own interests.

34. In absolute terms, he would favour a binding text, but there appeared to be valid reasons not to take that

route. Accordingly, a compromise solution—or the least bad solution, from a practical standpoint—would be to opt for a non-binding text in the form of guiding principles or in any other appropriate form. He also believed that the draft principles should be referred to the Drafting Committee in order to obtain the benefit of its views. If they were not referred to that Committee at once, the Special Rapporteur should continue his work and explore practice more thoroughly. Alternatively, a working group could be established to review the draft principles in the light of criticisms voiced by members. A third alternative would be for the Commission to decide at present to refer only those principles to the Drafting Committee that presented the fewest difficulties. He himself did not favour any particular option, and would endorse any compromise agreed on by the Commission as a whole.

35. Mr. CANDIOTI said that since 2002, in a process culminating in his second report, the Special Rapporteur had skilfully guided the project and debate towards a series of formulations that finally enabled the Commission, after more than 25 years, to fulfil its mandate on the topic of international liability.

36. He agreed with the Special Rapporteur that the legal regime needed to be general and residual, leaving States the flexibility to develop more specific liability regimes at the national, bilateral, multilateral or regional level, and must also be different both from the draft articles on responsibility of States for internationally wrongful acts⁶ and from general national regimes governing civil liability.

37. With regard to the scope of the draft, he said that the nature of the activities and the threshold of harm for incurring liability must be those specified in the relevant provisions of the 2001 draft articles on prevention of transboundary harm from hazardous activities. When a hazardous activity which was not prohibited caused harm, innocent victims who were neither involved in nor direct beneficiaries of the activity should not have to bear the loss.

38. The obligation to provide compensation lay in the first instance with the operator, in keeping with the “polluter pays” principle. There should be a reasonable financial limitation on the operator’s liability, but provision should also be made for supplementary sources of funding so that the innocent victims did not have to bear the loss.

39. The definition of damage eligible for compensation should cover damage caused to persons and goods, including elements of the national and natural heritage, damage to the environment and even the environment *per se*. Damage to the global commons situated outside a State’s jurisdiction should also be included in a formulation of principles, notwithstanding the problems posed by determination of and compensation for such damage.

40. He was, however, opposed to including Antarctica as a global common, as the Special Rapporteur seemed to be advocating in general conclusion 8 (*a*), because

⁵ See footnote 4 above.

⁶ See 2792nd meeting, footnote 5.

for many years, a number of States had asserted their sovereignty over parts of Antarctica and exercised peaceful jurisdiction there under the safeguards of the Antarctic Treaty System, pursuant to which the consultative parties specifically regulated their relations and activities with regard to such matters as exploitation of natural resources, scientific investigation and environmental protection.

41. The legal regime must set out the role of the State as clearly as possible. The Special Rapporteur had rightly proceeded on the assumption that a State which permitted hazardous activities in its territory must comply with and enforce the obligations of prevention, failing which it incurred responsibility for an internationally wrongful act. If damage occurred despite compliance with the obligations of prevention, and if the financial capacity of those who incurred primary liability was insufficient to cover the damage, the need arose to impose a subsidiary or residual obligation on the State *vis-à-vis* the innocent victims, which might take the form of a supplementary fund paid into by the State and possibly by other interested parties. The Special Rapporteur's suggestion that the State should contribute to a supplementary funding system, together with international organizations and others, seemed to be a reasonable way of achieving progressive development.

42. However, the role of States should not be confined to the extent of their contribution to compensation. It must be made clear that they were under an obligation to pass legislation on implementing an adequate compensation system and establishing mechanisms to guarantee that victims had the widest access, without discrimination, to legal and administrative recourse.

43. With regard to the final form, he agreed with the Special Rapporteur's suggestion to elaborate a set of draft principles and endorsed the 12 principles proposed in the report. He supported the suggestion that a working group chaired by the Special Rapporteur could be entrusted with the task of producing a final version of the draft principles before their referral to the Drafting Committee. That work should be concluded in the course of the current session so that the Commission could refer the draft principles with commentary, as adopted on first reading, to the General Assembly in 2004. The Commission could then finally complete the second reading by the end of the quinquennium. The matter should be accorded priority, and the working group and Drafting Committee must be allowed to devote sufficient time to it during the second half of the session.

44. Mr. BROWNLIE said that, with the concept of allocation of loss, the Commission was attempting to carry out a form of social engineering project. That was why, despite the recently codified draft articles on responsibility of States, further efforts were needed to provide effective compensation to innocent victims. A number of problems remained, one being the idea of supplementary State funding and the total lack of interest within the Commission in the technical question of how such funding would actually be carried out. After all, most States concerned would not be rich, whereas the consequences of an environmental disaster could be enormous.

45. His other point was a technical one: members had linked the emphasis on the operator to the "polluter pays" principle, one which the Commission had never sought to codify, although in his view it should at some point take up such topics. The Special Rapporteur had also recognized that the operator would benefit to some degree from limited liability, although he had argued that there must be a balance. However, it must be borne in mind that, under State responsibility, there was a well-established principle that the State in control of territory was responsible for harm resulting from activities on that territory of which it either knew or should have known. Thus, there was an important *lex lata* principle governing the background responsibility of the State for the prevention of harm by operators, and the Commission was in danger of inadvertently creating a situation that was more protective of the operator and the State behind the operator than was the case under existing principles of State responsibility.

46. Mr. Sreenivasa RAO (Special Rapporteur) agreed that, in focusing on the operator, the Commission should not take the pressure off the State. However, if it was agreed that the principles of State responsibility were not affected by the current exercise, then perhaps the Commission was not straying too far from that basic *lex lata* principle. Mr. Brownlie was right to raise the case of a State whose conduct was irreproachable but which knew, or should have known, that certain activities could result in harm, notwithstanding its own best efforts. To what extent, for instance, was the *Corfu Channel* case relevant to the current topic? Although he did not wish to start a discussion on that matter, it was a valid point, and he hoped that residual principles which were being elaborated without prejudice to strict responsibility or to other principles would cover the kind of situation in which a State's liability could still be incurred. It would be useful to reflect that matter in the commentary at some point.

47. Mr. KOSKENNIEMI said that on a number of occasions in the course of the Commission's consideration of the topic, it had been argued that the topic was in fact pointless, since, as Mr. Brownlie noted, there was already the well-established principle that a State was responsible if it knew or should have known of the activities which had taken place on its territory: that was the *Corfu Channel* standard. He was not certain whether that standard was still valid. There had been considerable debate and indeed disagreement among environmental lawyers over the past 25 years on whether the *Corfu Channel* case still played a role.

48. He wished to challenge Mr. Brownlie to pursue his point if he was really so certain of the continuing validity of the *Corfu Channel* principle that the State was always responsible for activities of which it knew or should have known; for if it was indeed still valid, then the bottom fell out of the current project. He also agreed with the Special Rapporteur that some sort of reference to the problem was needed.

49. Mr. BROWNLIE confirmed that he did indeed regard the *Corfu Channel* principle as well established, but stressed that he was merely using it as a comparator for the current topic, which he had always supported. If the Commission was not careful, it might produce a lower

standard of liability for the State in control of a territory than applied under the State responsibility principle as reflected in the *Corfu Channel* case.

50. Mr. KOSKENNIEMI said that if the Commission was of the view that the *Corfu Channel* standard was valid, then a provision should be included in the draft to the effect that the principles were without prejudice to the rule that States were responsible and liable for acts undertaken on their territory of which they knew or should have known.

51. Mr. CHEE noted that, in the *Trail Smelter* arbitration, the Tribunal had found that no State had a right to cause environmental damage. On the contrary, States were under an obligation to ensure that no such harm occurred in areas within their national jurisdiction. The underlying concept was that States should not cause damage to others through transboundary pollution.

52. Mr. MANSFIELD reminded members that it was the Commission that had initially conceived the topic as limited to wrongful acts attributable to the State. That had not been the only possible approach. The draft articles on prevention were enormously important, but accidents were bound to occur, despite state-of-the-art prevention techniques and even if the State complied with the highest standards and also required its operators to do so. In such cases, unless the Commission accepted the notion that loss lay where it fell, there was a gap, one that Mr. Brownlie had proposed to close through “social engineering”. In his own view, that gap was so obvious to the Sixth Committee and the international community that if the Commission failed to deal with the topic sensibly, it would lose credibility in the General Assembly and would constitute an open invitation for others to become involved in the exercise, despite the fact that the Commission was clearly the body best suited for finding a constructive way forward. The Special Rapporteur had been of substantial help to the Commission in that regard.

53. Ms. XUE endorsed Mr. Mansfield’s remarks and said that Mr. Brownlie and Mr. Koskenniemi were still talking about the basis for the rules, whereas in practice States had tended to avoid the debate on the legal basis, instead embarking on different approaches, such as “social engineering”. Thus, regardless of the legal basis, a regime needed to be developed to ensure that the victims would not be left to bear the loss alone. States needed to balance the potential benefits of ultrahazardous activities to society as a whole against the possibility that innocent victims might sustain loss. To cite one example, the Convention on Third Party Liability in the Field of Nuclear Energy had been concluded so that the nuclear power industry could be developed while simultaneously ensuring public safety in case of accident. The question now was whether general principles could be envisaged that were consistent with current practice. That was the debate that the Special Rapporteur had been trying so hard to summarize. Some members believed that a convention was possible, whereas others, herself included, argued that it was not, because the topic concerned a regional, sectoral matter which could not be dealt with on a general basis. It was not a question of continuing the debate on the basis for the rules, but of deciding what kind of “social engineering”

could be envisaged so that in the future, when States addressed a particular problem, they had general guidelines to follow or at least to refer to.

54. Mr. BROWNLIE stressed that he had most certainly not attacked the draft, and that he agreed with everything said by Mr. Mansfield and Ms. Xue. He had merely made two analytical points which, if taken seriously, might help to advance the draft. He felt like a civil engineer who, having proposed laying a railway track so as to circumvent a marshy area, was then accused of being opposed to railways. His point, which he had made for purposes of comparison in evaluating the draft, had yet to be addressed.

55. Mr. GAJA said that although the Special Rapporteur described his text as a series of draft principles, in form it more closely resembled articles of a convention. While the Special Rapporteur seemed prepared to add or remove certain elements, he had understandably expressed reluctance to continue to produce more drafts, more studies or more detailed commentaries until such time as the Commission decided on the form that the text should take and identified its basic content. The Commission must not continue to place the burden on the Special Rapporteur; the time had come for it to make up its mind.

56. He saw no great difference between the option of draft principles and that of a convention. While the latter option seemed preferable to many members of the Commission, there was a danger that, even if it was endorsed by the General Assembly, it might not be ratified by certain States whose participation would be essential for the regime to be successful.

57. For drafting purposes, however, the ultimate form of the text was important. The Commission should bear in mind that it was not in a position to propose general and residual rules that were universally applicable. It could state the relevant concerns, identify those responsible for meeting those concerns and prompt States to address existing needs, but it could not provide a single, universally applicable model. The most satisfactory vehicle would therefore be a framework convention, which, rather than stating a number of obligations, would provide the necessary momentum for establishing a variety of tailor-made regimes.

58. As for the basic tenets of the draft principles, he noted that the scope of the text was broader than that of the draft articles on prevention of transboundary harm from hazardous activities, since it also covered damage to the global commons. In that context, he did not believe that a State taking measures of reinstatement should be expected to bear the cost of those measures. Nor did he believe that the draft text provided enough protection for victims who had the misfortune to find themselves in the same territory as the operator. There should be a comprehensive reparation system for harm, wherever it might occur.

59. The draft principles could be grouped in three categories: in chronological terms, the first related to response action, the second to the reparation of harm and the last to procedural remedies. With regard to the first category, a prompt and effective response should, according to draft

principle 7, be the primary responsibility of the operator. Such a provision would seem to restrict the role of the State of origin, which might need to take action if the operator lacked adequate means or simply failed to take the required action. Such a restriction would be regrettable. As Mr. Matheson had said, the State of origin should take control of response action, even if it decided to do so by way of delegation to the operator. Other States involved should bear the main responsibility for action in their respective territories.

60. Draft principles 3 to 6 did not provide for full compensation, which, he agreed, would be unrealistic. The basic principle was that the operator should bear the costs, with supplementary compensation provided by States, preferably through the establishment of a compensation fund. He agreed that the operator's liability would have to be limited, in order for him or her to be covered by insurance; except in cases of fault, which would, however, be difficult to prove. The term "operator" should be more carefully defined more precisely. Altogether, the principles could be expressed synthetically, and could then be worked out in detail within each specific regime. As to draft principle 8, remedies at the international level should be encouraged, since they were likely to be more favourable to victims.

61. He supported the suggestion that a working group should be established, chaired by the Special Rapporteur, to define the nature of the proposed text and identify more precisely the principles to be included. Given the time required for translation, it was unrealistic to expect that the work could be completed in the second half of the present session. The first step would be to establish a text that could be submitted to the General Assembly in 2005, accompanied by the appropriate commentaries.

62. Mr. PAMBOUTCHIVOUNDA wondered whether Mr. Gaja's categorization of the topics could, by highlighting the underlying structure, help the Commission decide whether the text should ultimately take the form of a declaration or of draft articles.

63. Mr. ECONOMIDES said that there seemed to be almost unanimous agreement within the Commission that the scope of the draft principles should be the same as that of the draft articles on prevention of transboundary harm from hazardous activities. He wondered, however, whether it might not be more appropriate to transfer the second half of draft principle 1 ("namely activities not prohibited by international law which involve a risk of causing significant transboundary harm through their physical consequences") to the commentary.

64. In draft principle 2 (a) (iii), the phrase "economic interest" might have too broad a meaning. It should be specified that such an interest must be well established and based on law or custom. The phrase "taking into account savings and costs", also in principle 2 (a) (iii), should be explained in the commentary. The same went for the word "disastrous" in principle 2 (d).

65. The wording of draft principle 3 should be substantially strengthened so as to bring greater benefits to victims. In particular, he questioned the need for the

phrase "within the limits prescribed under national law". He shared the view of Mr. Pellet and Mr. Fomba that the "polluter pays" principle, which now formed part of positive law, should be stated more forcefully. Moreover, the principle should be set forth in the text as the basis for operator liability, not consigned to the commentary. Greater emphasis should also be given to the *erga omnes* obligation on all States to protect the global commons for the benefit of the international community as a whole.

66. With regard to draft principle 4, he supported Mr. Pambou-Tchivounda's suggestion that the two alternatives should be merged to form a new provision, which would emphasize the primary responsibility of the operator but also the supplementary contribution that the State of origin could make to compensation for damage. Indeed, the State might find itself internationally responsible if it did not take the necessary precautionary measures to avoid significant transboundary harm. That question, however, was governed by the "without prejudice" clause contained in draft principle 9. Furthermore, a separate principle should be formulated providing for the operator's strict liability, which, in the current state of international law, constituted the basic norm for liability arising from hazardous activities, as indicated in paragraph (d) of the explanation.

67. Yet another principle should deal with the limitations on the operator's liability, which currently constituted the rule governing strict liability regimes. He also concurred with the Special Rapporteur's suggestions that the limits of financial liability should be set at a sufficiently high level, that limitations on liability in case of fault on the part of the operator should be excluded and that provision should be made for exemption from liability for reasons commonly cited in national legislation and international conventions regulating hazardous activities.

68. With regard to draft principle 7, he considered that the position of States likely to be affected should be strengthened by expressly according them the right to take steps to remind the State of origin of its obligations in respect of hazardous activities undertaken by the operator.

69. With regard to draft principle 8, he would be in favour, in order to avoid the vagaries of private international law, of including in the text itself a recommendation concerning the choice of the competent court, in accordance with the solution already adopted by the international instruments referred to in paragraph (c) of the explanation. Draft principle 8—or an additional principle—should also provide for the obligation to recognize and execute the ruling of a foreign court. Such a provision appeared in a footnote at the end of the explanation of draft principle 8 in the Special Rapporteur's report.

70. As for environmental damage caused to the global commons, any State was entitled to act in the international interest, although the Commission should recommend that such action should, as far as possible, be of a collective nature, carried out by the relevant international organizations.

71. With regard to draft principle 10, he agreed with Ms. Escameia and others that the current text contributed

nothing new. He therefore suggested that more substance might be given to the text by adding in paragraph 1, after the word “negotiations”, the word “investigation” and, after the word “conciliation”, the words “recourse to regional bodies or agreements”. Paragraph 2 should then be reworded along the following lines: “For a dispute not resolved in accordance with paragraph 1, the parties shall find, as quickly as possible, other mutually acceptable means to settle their dispute, *inter alia*, through (a) arbitration or (b) submission of the dispute to the International Court of Justice.” It was also worth emphasizing that the obligation to settle international disputes was an obligation of result rather than a simple obligation of means.

72. As for the form that the draft should take, he remained in favour of an international convention, complementing the draft articles on prevention of transboundary harm from hazardous activities. In the interests of consistency, the Commission should adopt the same form for both projects. He would, however, be able to accept a more flexible solution, such as that adopted in the draft articles on State responsibility. The text could thus take the provisional form of a General Assembly declaration and, after two or three years had passed, the question of transforming it into a convention could be considered. It was, however, crucial that the text should be complete from the outset so that it could be easily transformed into a convention. For that reason, he would prefer draft articles to draft principles. He hoped that the Special Rapporteur would soon submit a more complete text, giving fuller coverage to all the relevant points, most of which were already mentioned in his excellent report. Moreover, the text should not be referred to the Drafting Committee until the final form had been agreed on.

73. Mr. KOSKENNIEMI said that many members of the Commission, including himself, remained uncertain whether allocation of loss was the right framework within which to deal with the topic. Concepts such as strict liability, non-fault liability, due diligence and ultrahazardous activities appeared to have gone by the board. On the other hand, the issue had remained unregulated for too long and the Commission had to take some action. Despite the undeniable conceptual, political and economic problems, it was time to stop wondering whether the right approach had been adopted, and to meet the justified expectations of the Sixth Committee and the international community as a whole.

74. Some of the draft principles were more important than others. Dealing with them as if they all had the same weight, therefore, distorted the discussion. In his view, they fell into four different categories, one of which was of overwhelming importance. The first category was reflected in draft principles 3, 4, 5 and 6, which laid down the Special Rapporteur’s thinking on the basic framework for the regime of allocation of loss. Within that category, four elements or actors could be identified: the victims; the operators, or private actors involved in activities causing transboundary damage; States; and insurance or reinsurance companies, agents or mechanisms. An arrangement should be established whereby allocation of loss could be distributed among those four elements. Some speakers had referred to the concept of “balance”. For him, the balance between the four actors was to be achieved by letting

the market determine the solution as far as possible. As the Special Rapporteur had proposed, the rules should be regulatory only in a general and residual sense: the Commission could not dictate where the loss should fall. Some might argue that leaving the solution to the market was, on the contrary, unbalanced in that it created winners and losers. There were elements of truth in both positions.

75. As he had said at the previous session, he did not think that the Commission or the United Nations had any interest in regulating in that particular area, except on one point: the need to compensate innocent victims. To highlight that need was the single most important thing that the Commission could do, and when the position of that element in the overall arrangement was determined, the others would fall into place, on the basis of market mechanisms. That was right and proper: what would be wrong would be to let the market determine the rights of the victims. In short, while regulating ways and means of ensuring compensation for innocent victims in a residual and general fashion, the Commission should place greater emphasis on the principle itself.

76. Mr. Brownlie and others had used the metaphor of social engineering, but in his view the language of law and economics was more appropriate to the vocabulary of loss allocation. Other aspects of that vocabulary included cost effectiveness, internalization and balancing. They were not neutral concepts, since they designated some entities as winners and others as losers. His only hesitation with regard to that vocabulary was that it suggested that it was impossible to regulate the need to compensate innocent victims. Although market mechanisms should be deferred to in some respects—for instance, with regard to the duty of the operator to provide insurance and the need to create compensation funds to handle possible damage to the industry as a whole—they should not be allowed to determine the fate of the victim.

77. As he had already said, the draft principles proposed by the Special Rapporteur fell into four groups. The first comprised principles 3 to 6, which together set out the basic parameters of the loss allocation scheme. They had been well formulated and were ready to be referred to the Drafting Committee, on the understanding that the language on compensation of the victim must be strengthened. The second group contained draft principles 7, on response action, and 8, on equal access and non-discrimination in the use of local remedies: two specific obligations that had to be taken into account in setting up an effective regime. Clearly, they were secondary, and some speakers had suggested that response action might be better dealt with in the context of the articles on prevention. He agreed, but had no objection to their being addressed in the present context as well. The draft principles dealt with complex topics and further debate was needed on them. Accordingly, they were not ready for referral to the Drafting Committee. If a working group was to be established to deal with certain specific issues, a course of action that he endorsed, then those two draft principles could be addressed in that context.

78. The third group comprised draft principles 1, 9 and 11, which covered the scope and nature of the principles themselves. Draft principle 1 was ready for referral to

the Drafting Committee. Concerning draft principle 9, on the general and residual nature of the principles, he had already suggested that the Commission should be more ambitious. As Mr. Economides had said, the question of what form the final product should take should be left open at the present stage. Accordingly he was not in favour of referring draft principle 9 to the Drafting Committee.

79. The fourth group comprised only draft principle 2, on use of terms. Many speakers had raised the question of the definition of damage. That was an extremely important question, since a very narrow definition might leave the victims without access to compensation, while a broad one would extend the ranks of the victims to embrace aspects of the environment, for example. Those issues were too large to be discussed in conjunction with the structural aspects of the allocation of loss scheme. Therefore, draft principle 2 should not be referred to the Drafting Committee. If a working group was established it might be asked to look into the question, but he tended to think that the best course would be to leave the question of definitions entirely to one side, perhaps to be covered in a future report by the Special Rapporteur.

80. In summary, draft principles 3 to 6 were fundamental and should be referred to the Drafting Committee. Principles 7 and 8 were of secondary importance and could be sent to a working group if one was set up. The group that dealt with the nature of the principles themselves—principles 1, 9 and 11—needed further discussion in the Commission itself or in a working group. Principle 2 should be set aside for the time being.

81. Mr. YAMADA said that when he had joined the Commission in 1992, it had been in the throes of trying to conceptualize the topic of international liability. The wealth of documents accumulated over 25 years, including the schematic outline by Mr. Quentin-Baxter⁷ and the 12 reports by Mr. Barboza,⁸ reflected the history of the Commission's travails on the topic. The breakthrough had come in 1997, when the Commission had decided to take a step-by-step approach, beginning with the question of prevention of transboundary damage from hazardous activities. Within a short span of time, the Commission had succeeded in formulating the draft articles on prevention. It was now in the second stage of the work, addressing international liability in case of loss from transboundary harm arising out of hazardous activities. As a senior member of the Commission, the Special Rapporteur was the living memory of its work on the topic,

⁷ *Yearbook ... 1982*, vol. II (Part One), document A/CN.4/360, pp. 62–64.

⁸ Preliminary report: *Yearbook ... 1985*, vol. II (Part One), document A/CN.4/394, p. 97; second report: *Yearbook ... 1986*, vol. II (Part One), document A/CN.4/402, p. 145; third report: *Yearbook ... 1987*, vol. II (Part One), document A/CN.4/405, p. 47; fourth report: *Yearbook ... 1988*, vol. II (Part One), document A/CN.4/413, p. 251; fifth report: *Yearbook ... 1989*, vol. II (Part One) document A/CN.4/423, p. 131; sixth report: *Yearbook ... 1990*, vol. II (Part One), document A/CN.4/428 and Add.1, p. 83; seventh report: *Yearbook ... 1991*, vol. II (Part One), document A/CN.4/437, p. 71; eighth report: *Yearbook ... 1992*, vol. II (Part One), document A/CN.4/443, p. 59; ninth report: *Yearbook ... 1993*, vol. II (Part One), document A/CN.4/450, p. 187; tenth report: *Yearbook ... 1994*, vol. II (Part One), document A/CN.4/459, p. 129; eleventh report: *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/468, p. 51; and twelfth report: *Yearbook ... 1996*, vol. II (Part One), document A/CN.4/475 and Add.1, p. 29.

and was understandably frustrated over the reopening of various issues at the current stage. In his personal view, the Special Rapporteur had accurately assessed the general response to his first report⁹ and had presented recommendations based on that assessment.

82. As the Chairperson had indicated, it was high time for the Commission to make a decisive move. Its credibility was at stake. It should formulate a text for consideration on first reading and provide Governments with the opportunity to comment on the whole of the liability aspect of the project. If they were not satisfied, they would say so and their comments could be taken into account when the Commission proceeded to the second reading. If Governments considered that there was insufficient customary law to justify codification of the liability aspect, then they must convene a diplomatic conference to legislate for a new regime. Such negotiations were beyond the Commission's mandate.

83. It must be borne in mind that the hazardous activities with which the Commission was dealing were not undesirable or unnecessary: if that were the case, they could be prohibited. On the contrary, those activities were vital for the welfare of mankind and the development of countries. What was most important, therefore, was to minimize the risk that they might cause harm. The prevention aspect was by far the most important. Nonetheless, risk could not be entirely eliminated. Hence the need for a contingency plan in the event of an accident, and that was the liability aspect.

84. The notion that harm from hazardous activities was normally transmitted from the developed to the developing world did not reflect reality. Around the long coast of Japan, many shipping accidents occurred. Some involved ships from the developed world, but most of the ships were from the developing world. They were often ill-equipped and their owners and operators often did not have the financial capability to compensate for damage and abandoned their ships. It was of course desirable to establish an adequate regime of prevention and liability for hazardous activities, one that covered every private enterprise. However, that placed a substantial additional burden on emerging developing economies. Any project that was too ambitious would not be accepted by the developing countries. The negotiations for the Kyoto Protocol to the United Nations Framework Convention on Climate Change illustrated the serious problems involved.

85. Since the Commission's current endeavour was to continue with its step-by-step approach, the scope of the hazardous activities to be covered in the second stage must remain the same as in the prevention stage. The threshold of harm that triggered the regime should also remain that of "significant" harm, and the issue of whether to extend coverage to the global commons should not be reopened.

86. Most of the hazardous activities in question were carried out by private enterprises, and it was the enterprise, operator or owner that should be held responsible for compensating for any damage that occurred. What,

⁹ See 2804th meeting, footnote 4.

then, should be the obligation of the State under whose jurisdiction such operations were conducted? That obligation was to establish an adequate domestic legal regime to implement the “polluter pays” principle. Since the accidents with which the Commission was concerned were those that occurred in spite of the performance of duties of prevention, both by the private enterprise and by the State, there would most probably be no fault on the part of the enterprise and it would be necessary to subscribe to the principle of strict liability. Strict liability, it must be emphasized, could only be applied where the duty of prevention was firmly in effect. The State must offer an adequate legal regime whereby the victim, regardless of nationality, was assured of prompt reparation for the damage. The liability of the enterprise must be limited at an appropriate level, since unlimited liability would have a prohibitive effect on indispensable economic activities. The State, therefore, was obliged to establish some scheme of supplementary funding in order to alleviate the burden on the victim, such as insurance arrangements or some other form of compensation fund.

87. On the settlement of disputes, it might be possible to envisage some kind of impartial mechanism, such as assessment of harm by an independent third party, but it would not be possible to envisage any compulsory mechanism.

88. All of the above elements were already set out in the recommendations presented by the Special Rapporteur. What the Commission was working on was principles of a general and residual character. Each hazardous activity would require a specific regime that must be negotiated separately. He sincerely hoped that the Commission would be able to finalize its first reading of the draft principles at the current session.

89. Mr. MANSFIELD said that the second report gave the Commission most, if not all, of the elements needed to take the decisions necessary to produce a respectable and useful product on the topic. Obviously there remained significant differences of view, but the Special Rapporteur’s conclusions in paragraph 36 of his report pointed the way forward. As he made clear, there was much on which there was agreement, and as the debate proceeded it was becoming obvious that many of the principles commanded broad support, or at least met with no strong objection, and might be suitable for refinement by the Drafting Committee.

90. In his conclusions, the Special Rapporteur referred to the form of the product, but it was not necessary to take a decision on the matter at the present juncture. In fact, it would be easier to reach agreement when further progress had been made on the propositions that should be included in the product. As to the other conclusions, his feeling was that there was no major disagreement among members of the Commission on the following points: that the regime to be produced should be general and residual; that the scope should be the same as that of the draft articles on prevention; that best practice techniques for prevention could not entirely eliminate the risk of accidents; that innocent victims who did not participate in or benefit from the hazardous activity that had given rise to the accident should not have to bear any

loss entirely unsupported; and that the primary responsibility in most situations for compensating the innocent victim in the event of an accident should rest with the operator. There would thus seem to be broad support for principle 1, relating to scope, and principle 3, paragraph 1, on the objective of not leaving the innocent victim unsupported. However, he thought that it might be possible to go further and find some measure of agreement about the actions that States might require of operators that engaged in hazardous activities that might cause transboundary harm. For a start, the Commission might note that those requirements were no more and no less than what States were likely to require of such operators in order to deal with any risk of harm that might occur within their national jurisdictions.

91. That led back to the fundamental point that prevention was better than cure or compensation. Anyone who had been exposed to modern management thinking recognized that in all business activities, particularly hazardous activities, the costs associated with accidents—irrespective of liability to pay compensation—were huge, perhaps the single biggest controllable cost of doing business. That was true whether the activity was a State or a private enterprise and whether it was in a developed or developing country. The logical implications were that it was sensible for States to require operators to undertake appropriate prevention actions. Also, as recognized in draft principle 7, it made sense for States to require operators to take prompt and effective action in the event of an accident, a point not covered in the prevention articles. Such action could have a major impact on the quantum of loss and on any subsequent contributions by the operator or its State of nationality. It might well be that a provision to that effect should be included in the prevention articles, though it could also be included in the present draft. It could also be cast in such a way as to enable public agencies to take action and seek compensation from the operator.

92. What else was it reasonable and sensible for States to do in relation to the time sequence of an accident? Firstly, they must ensure that operators maintained appropriate insurance to cover the foreseeable risks of the activities in which they were engaged (draft principle 6), and, secondly, they must see to it that non-discriminatory recourse procedures were available so that claimants could make claims, through normal court procedures if necessary, to take advantage of such insurance cover (draft principle 8).

93. As to the situation where compensation under normal insurance arrangements was unavailable, insufficient or inappropriate, there seemed to be two propositions on which there was relatively little controversy. The first was contained in draft principle 11, which was really a call on States to develop more detailed global or regional arrangements for particular classes of hazardous activities, with the idea that such arrangements could provide industry-wide and/or State-funded compensation in the event that the operator and its insurance arrangements were inadequate. There were a number of examples of such global or regional arrangements. Any provision on the subject would be essentially hortatory, but that did not make it unimportant.

94. Secondly, there might be a provision to encourage States in appropriate circumstances to establish arrangements for a special claims commission through recourse to which claimants would be absolved of the need to seek remedies through domestic courts. That was a well-established practice in certain circumstances, circumstances which could not, however, be prescribed.

95. If he was right in supposing that those matters were relatively uncontroversial, then many of the elements for a useful product were already at hand, and the drafting could be refined. True, some members had indicated that they had reservations about some aspects of the draft principles; for example, principle 3, paragraph 2, on compensation for transboundary damage beyond national jurisdiction, and the relationship between principle 4 (alternatives A and B) and principle 5, in that they went beyond the recourse procedures outlined in principle 8. The differences of view on those issues did not seem as great as they had been in the past and could be dealt with in the Drafting Committee. For example, on principle 3, paragraph 2, only compensation and such technical matters as who would have the legal standing to sue remained controversial. There seemed to be agreement that the State should require the operator to undertake appropriate prevention measures in respect of any risk of harm to areas beyond national jurisdiction, while simultaneously seeking to prevent transboundary harm.

96. In short, therefore, the report and the principles it contained revealed that there was much on which the Commission could already agree, and that there would probably be much more once the drafting was refined. He thanked the Special Rapporteur for the great service that he had performed in submitting his second report.

The meeting rose at 1.05 p.m.

2808th MEETING

Wednesday, 2 June 2004, at 10.05 a.m.

Chairperson: Mr. Teodor Viorel MELESCANU

Present: Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Yamada.

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) (continued) (A/CN.4/537. sect. C, A/

CN.4/540,¹ A/CN.4/543,² A/CN.4/L.661 and Corr.1, A/CN.4/L.662)

[Agenda item 4]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. KOLODKIN congratulated the Special Rapporteur on his excellent second report on the legal regime for the allocation of loss in case of transboundary harm arising out of hazardous activities (A/CN.4/540), which had managed the feat of reconciling a wide range of views on the topic and had given the Commission a sound basis for its work.

2. It seemed that, like States, the Commission was divided, above all on the question of the role of the State in a liability regime. One school of thought was that States had no legal liability in the event of loss from an act not prohibited by international law and that such liability should not form the basis of a rule of international law. According to that view, such questions should be settled by negotiation, depending on the specific kinds of activity involved or on a case-by-case basis. Another view was that the situation had developed to the point that the Commission should formulate a rule, if only in the interests of the progressive development of international law.

3. The Special Rapporteur's approach seemed to offer the possibility of achieving a result despite the divergent points of view. The most important aspect of his very sensible approach concerned the form that he considered that the Commission's final product should take: not draft articles or a convention containing specific obligations imposed on States, but general guidelines that States could use as a model in drafting international treaties or their own laws and that would provide them with guidance not only *de lege lata*, but also *de lege ferenda* in the development of legal standards. Another aspect of the Special Rapporteur's approach was the residual and general nature of the proposed principles, avoiding superfluous detail, with the possible exception of draft principle 2, which contained definitions. No less important was the Special Rapporteur's view that, in principle, the Commission should restrict the scope of its work to that of the draft articles on the prevention of transboundary harm from hazardous activities adopted by the Commission in 2001,³ in terms both of the kinds of activity involved and of the threshold of harm. The term "significant harm" had already been adequately considered during the drafting of the articles on prevention and there was no need to return to the subject for the time being.

4. He could support the principle of operator liability, if "operator" meant any person in control of the activity in question. Some legal regimes effectively assigned liability to third parties. Other solutions were possible in specific situations. As a general principle, however, operator liability was based on common practice and was consistent with the "polluter pays" principle. Alternative B of draft principle 4 was therefore preferable in that regard. The

¹ Reproduced in *Yearbook ... 2004*, vol. II (Part One).

² *Ibid.*

³ See 2797th meeting, footnote 3.