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**Summary record of the 2808th meeting**

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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,<sup>1</sup> A/CN.4/543,<sup>2</sup> 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,<sup>3</sup> 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

<sup>1</sup> Reproduced in *Yearbook ... 2004*, vol. II (Part One).

<sup>2</sup> *Ibid.*

<sup>3</sup> See 2797th meeting, footnote 3.

Special Rapporteur rightly referred, in his general conclusions and in paragraph (f) of the explanation to principle 4, to the limitations and exceptions to strict liability. It would, however, be better if the common concept—as the Special Rapporteur himself described it—of strict liability could be further developed in the actual text of the principles. Paragraph 2 of alternative B of draft principle 4 seemed inadequate. Nor did he understand why the draft principle referred only to the law of the State of origin and not to the applicable rules of international law. Lastly, a provision that compensation in the case of fault liability could be unlimited might also have been inserted in the draft principle. Such provisions were, he believed, fairly common.

5. Different considerations applied to the question of including provisions in the draft principles on liability for environmental damage as such and for environmental damage in areas situated outside national jurisdiction. It might well be wondered whether contemporary treaty practice justified the formulation of the corresponding general provisions *de lege lata*. It seemed clear that the Special Rapporteur saw no such justification. The number of treaty provisions relating to liability for environmental damage outside national jurisdiction, or liability for environmental damage as such, could be counted on the fingers of one hand. The article by Arsanjani and Reisman, cited in paragraph 36 of the report, concerning an international liability regime for the protection of global commons stated that the law was still at an early and very tentative stage.<sup>4</sup> That comment applied with still greater force to the liability regime for environmental damage outside national jurisdiction. The Special Rapporteur had therefore been correct in referring to the possibility that the Commission might at least achieve some progressive development of international law. If the text was to take the form of general guidelines, consideration could well be given to the proposal to include provisions on liability for environmental damage as such and for damage outside national jurisdiction. There remained, however, a host of questions, particularly in relation to the global commons, to which there was no realistic answer in sight. For example, who should receive compensation for damage? Who was the victim, with the consequent right to bring a claim against the polluter? How would damage be assessed?

6. All the provisions that he had mentioned could be considered civil liability or operator liability issues, but the Commission's basic problem was to define the role of the State in such a regime. Recalling the divergent views that had been expressed on the subject, he felt that he should once again pay tribute to the Special Rapporteur, who had shown good sense and great realism in drafting the provisions relating to States in such a way that they could be accepted by people with differing views on the question of any possible State liability for harm. In most cases, the provisions were presented in the form of obligations for States to take all necessary measures, such as adopting legislation, conducting negotiations or cooperating with other States. There was no reference to a direct obligation of compensation. At the same time, the

provisions of draft principle 5 imposed a residual, secondary liability on the State. In his view, the utmost flexibility was required. Draft principle 6 should deal primarily with the State of origin, not with the "States concerned".

7. States might well be able to accept provisions of the kind appearing in draft principles 5 and 6 if it was specifically stated that they were general principles or guidelines rather than draft articles. In that context, he considered that it would be worth deciding immediately on the form that the provisions would take. Once the decision had been taken, the Commission could consider questions of substance more effectively. He understood, however, the position of the many members who believed that it would be preferable to leave the decision until later. Personally, he was in favour of adopting the provisions drafted by the Special Rapporteur in the form of general principles or guidelines. The Drafting Committee could work on the text during the second part of the session.

8. Mr. CHEE congratulated the Special Rapporteur on his innovative approach to the difficult question of the protection of innocent victims of harm arising from hazardous activities. He particularly appreciated the Special Rapporteur's extensive references to the views expressed by many delegations in the Sixth Committee.

9. As for the scope of the topic, he was in favour of the suggestion that it should be the same as that of the draft articles on prevention of transboundary harm from hazardous activities. It seemed that the draft principles set "significant harm" as the threshold for triggering liability. The glossary of terms used was detailed and extremely useful. The draft principles gave a clear statement of what needed to be done.

10. In paragraph 18, the Special Rapporteur referred to the obligation of States to provide in their legislation for the compensation of innocent victims. However, it was easier to impose such an obligation on a State than to compel it to make contributions to an insurance scheme. In the event of damage caused by a State to foreign nationals, the principles laid down by PCIJ in the judgment in the *Chorzów Factory* case (restitution in kind or compensation) were no longer applicable owing to revolutionary scientific and technological developments, which very often had adverse effects on people's way of life and living spaces. The fallout from nuclear activities and marine pollution were two such examples. As those activities took place on a large scale, supplementary funding mechanisms for the compensation of innocent victims had been designed to cover the operator's shortfall.

11. As to the State's role in an allocation of loss scheme, where compensation did not cover the actual loss to the victim because of a limit imposed on the operator's liability under national law, State practice revealed that several States had provided for supplementary national funding or, alternatively, had made *ex gratia* payments. The Special Rapporteur could have made a stronger case by urging States to comply with duties or obligations *erga omnes* under both principle 2 of the Declaration of the United Nations Conference on the Human Environment (Stock-

<sup>4</sup> See M. Arsanjani and M. Reisman, "The quest for an international liability regime for the protection of global commons", in K. Wellens, ed., *International Law: Theory and Practice* (The Hague, Kluwer Law International, 1998), pp. 469–492, in particular pp. 469–473.

holm Declaration)<sup>5</sup> and principle 13 of the Rio Declaration on Environment and Development (Rio Declaration),<sup>6</sup> which imposed an obligation to prevent causing environmental harm to other States. In that connection, it should be recalled that the provisions of article 3 of the Universal Declaration of Human Rights<sup>7</sup> protected individuals from any harm caused by States by referring to security of person. Many of the provisions of the Universal Declaration of Human Rights were now well-accepted norms of customary international law, which had been reaffirmed in the Proclamation of Tehran of 1968<sup>8</sup> and the Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights on 25 June 1993.<sup>9</sup> From those instruments, it could be inferred that the right to security of life implicitly included protection from environmental harm. The Special Rapporteur would therefore have been more convincing if he had proposed that all States should observe the right of individuals to be protected against environmental harm instead of referring to *ex gratia* payments to the victims of such harm arising out of hazardous activities by States.

12. A number of members of the Commission had expressed their doubts as to whether the current rules of international law compelled States to compensate victims of environmental harm arising out of hazardous activities by persons, corporations or States. It should be pointed out that the obligation of States not to cause environmental damage beyond their national jurisdiction was laid down in the arbitral award handed down in the *Trail Smelter* case. That decision referred to an obligation of States often called “the preventative principle”, which had been reaffirmed in principle 21 of the Stockholm Declaration and principle 2 of the Rio Declaration and according to which States had the responsibility to ensure that activities within their jurisdiction or control did not cause damage to the environment of other States or areas beyond the limit of national jurisdiction. Likewise, article 174, paragraph 2, of the Treaty on European Union (Maastricht Treaty) embodied the principles of precaution and preventive action. In addition, the Stockholm and Rio Declarations obliged States, international organizations and individuals to share responsibility for the protection of the environment and to cooperate to that effect. The question as to whether the obligation to protect the environment was part of general international law had also been succinctly stated by ICJ in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* case. Moreover, in its judgment in the *Gabčíkovo-Nagyymaros Project* case, the Court had stressed the great significance it attached to respect for the environment and, in his dissenting opinion in the same case, Judge Weeramantry had held such an obligation to be a fundamental principle of

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

<sup>6</sup> Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992 (United Nations publication, Sales No. E.93.I.8 and corrigenda), vol. I: Resolutions adopted by the Conference, resolution 1, annex I.

<sup>7</sup> General Assembly resolution 217 A (III) of 10 December 1948.

<sup>8</sup> Final Act of the International Conference on Human Rights, Tehran, 22 April to 13 May 1968 (United Nations publication, Sales No. E.68.XIV.2), chap. II.

<sup>9</sup> A/CONF.157/24 (Part I), chap. III.

modern environmental law well entrenched in international law.

13. Turning to the draft principles proposed by the Special Rapporteur, he said one of their notable features was that draft principle 2 (f) extended the area of responsibility for damage beyond that of national control or jurisdiction, in keeping with the provisions of the instruments and decisions that he had mentioned earlier.

14. Draft principle 3 dealt with compensation for damage suffered by innocent victims in areas beyond national jurisdiction. One of the notable features of the compensation scheme proposed by the Special Rapporteur was that it provided for reinstatement of the environment and not simply monetary compensation. Furthermore, on the basis of the “polluter pays” principle, liability would be assigned to the operator, while the role of the State was to be limited to providing supplementary funding. Accordingly, loss should be borne primarily by the operator.

15. In draft principle 4, the Special Rapporteur introduced the concept of prompt and adequate compensation, which could be traced back to the Hull formula (“prompt, adequate and effective compensation”). The Special Rapporteur had, however, chosen to omit the word “effective”, which appeared in the Hull formula.

16. In cases where compensation was not adequate, the Special Rapporteur provided for supplementary funding mechanisms. Such mechanisms were not unknown in the sphere of marine pollution or in that of damage caused by nuclear activity. In that connection, he drew attention to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage and the Protocol of 1992 to amend the Convention and read out the relevant provisions of the Convention on Supplementary Compensation for Nuclear Damage. Those two Conventions, as well as the 1992 OECD pollution insurance scheme, were perfectly in keeping with the Special Rapporteur’s suggestions contained in draft principles 3, 4 and 5.

17. In proposed draft principle 6, the Special Rapporteur introduced an insurance mechanism and other financial schemes to ensure that any company or other operator engaged in hazardous activities would provide financial guarantees. For the implementation of those schemes, the draft principles proposed the establishment of a supplementary fund to make up for inadequate compensation. Among all the schemes proposed for providing compensation for innocent victims of environmental harm, that seemed to be the most successful and credible. The operation of the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage was in principle similar to that of an insurance scheme: the victim was compensated from a fund that would make payments to the operator responsible when it was unable to provide compensation. Under the proposed scheme, the State was expected to play a central role. The need for such a scheme had been well understood by OECD, which had considered, in a 1992 document entitled “Environmental Monographs, No. 42: Pollution Insurance”, that it was time to devise a compre-

hensive system aimed at speedily compensating victims in all kinds of situations.

18. Draft principle 8 concerning recourse procedures related to internal judicial or administrative procedures for settling claims for damages. The standard of national treatment should apply in such proceedings. At the international level, draft principle 10 provided for diplomatic and judicial settlement, including through arbitration or adjudication by ICJ. According to draft principle 12, entitled "Implementation", States must adopt "any legislative, regulatory and administrative measures that may be necessary to implement the above provisions". Moreover, States were expected to cooperate with one another to implement the provisions according to their obligations under international law. Like the Special Rapporteur, he considered that insurance and supplementary funding schemes needed to be implemented on a regional or sectoral basis. In conclusion, he recalled that the Commission had undertaken that exercise in compliance with a General Assembly resolution<sup>10</sup> and that it must not be daunted by the challenge it faced of protecting the planet's environment.

19. As to the final form that the draft principles should take, the Special Rapporteur, like other Special Rapporteurs in the past, should replace the term "principles" by "articles". It would be useful to refer to the Convention on Supplementary Compensation for Nuclear Damage and the work done by OECD on polluter insurance as well as to the declaration of legal principles governing ultrahazardous activities by Wilfred Jenks.<sup>11</sup> He personally was in favour of a framework convention containing general principles that could be used to establish sectoral or regional schemes.

20. Mr. MONTAZ, referring to the protection of the global commons, said that, while the Special Rapporteur acknowledged that there was no commonly agreed definition, his conclusions suggested that, for him, that notion encompassed not only the high seas beyond national jurisdiction, but also the airspace above, outer space and Antarctica, although there might be some disagreement on the last point. The term was not included among those defined in draft principle 2 and, in draft principle 3, paragraph 2, the Special Rapporteur merely affirmed that the text also covered damage "in areas or places beyond the jurisdiction or control of States". Personally, he took the view that that phrase did not include Antarctica, for some States had scientific equipment stationed there over which they exercised effective control and other States had territorial claims to that region. He therefore wondered whether the Special Rapporteur intended to exclude Antarctica from the scope of the draft principles. Similarly, some circumspection was called for with regard to the inclusion of outer space, the zone situated above airspace, which unquestionably came within the sovereignty of the State. The wording of paragraph 2 was therefore inappropriate. More precise wording should be found and incorporated in the list of terms.

<sup>10</sup> General Assembly resolution 56/82 of 12 December 2001.

<sup>11</sup> See C. W. Jenks, "Liability for ultra-hazardous activities in international law", *Recueil des cours de l'Académie de droit international de La Haye, 1966-I* (Leyden, Sijthoff, 1967), vol. 117, p. 99.

21. If the global commons were included, the title of the topic, and especially the phrase in parentheses, which referred to "transboundary harm", would no longer be appropriate. For example, if activities undertaken in zones within State jurisdiction, such as the exploration or exploitation of the continental shelf, were to cause damage to the global commons beyond the continental shelf, it would be impossible to speak of transboundary damage because the limit of the continental shelf could not be treated like a border within the meaning of that term in international law: as a line separating areas subject to the sovereignty of different States. It would therefore be preferable to delete the phrase in brackets from the title. Another problem was the damage which could be caused in the territory of a State by the exploitation of resources in the global commons, such as the exploitation of resources in the international area of the seabed. He drew the Special Rapporteur's attention to article 139 of the United Nations Convention on the Law of the Sea, which specifically dealt with the question of liability resulting from the exploitation of the global commons and which might be a useful lead.

22. Furthermore, it would be necessary to determine which States could claim compensation in the event of damage to the global commons and whether the fact that all States had an interest in action gave all of them a right to compensation. In that connection, he wondered whether the Special Rapporteur agreed with the idea expressed by the authors mentioned in paragraph (f) of the explanation of draft principle 8, that States would not be entitled to demand "compensation ... beyond any clean-up or reinstatement costs which they may incur"; that would mean that only a State which had taken steps to prevent damage to the global commons would be entitled to compensation for the costs it had borne. If that were so, if no clean-up operation were undertaken, the liability of the State causing the damage would have no implications and States' collective interest in taking action would be of virtually no practical value.

23. Draft principle 1 proposed by the Special Rapporteur, on scope of application, should explicitly mention the global commons. The last sentence of draft principle 2 (h) on use of terms was superfluous, since knowing which entities were entitled to take response measures was of little relevance to the definition of such measures. While no definition of the concept of the "environment" was given in the list of terms, it might possibly be studied on the basis of the definition of the "marine environment" contained in article 1 of the United Nations Convention on the Law of the Sea. It would be worthwhile replacing the title of draft principle 3 with "Objectives" because that was the subject matter of those two paragraphs. The two alternatives proposed for draft principle 4 were not mutually exclusive and a composite text would be acceptable. Paragraph 1 of alternative A was drawn from the established principle that States were liable for activities in their territory, which it was wise to recall. Paragraph 1 of alternative B was based on the "polluter pays" principle, which should be expressly mentioned as a generally accepted principle of international law. However, paragraph 2 of alternative B seemed to be at variance with the purpose of the text, which was to set out the rules relating to the operator's liability.

24. Draft principle 10 offered nothing new; it was based on Article 33 of the Charter of the United Nations, establishing that States must settle their disputes through peaceful means. Emphasis should be placed on States' obligation to continue their efforts until disputes between them had been finally resolved. The wording as it stood offered no guarantee to victims. The wording proposed on that point by Mr. Economides at the preceding meeting deserved careful study.

25. In conclusion, the report offered a sound basis for discussion and a working group chaired by the Special Rapporteur might make it possible to achieve decisive progress.

26. Mr. Sreenivasa RAO (Special Rapporteur) thanked Mr. Momtaz for drawing attention to the difficulties linked to factoring in to the draft articles possible damage to areas beyond national jurisdiction. The standing to sue issue was a separate matter which he would discuss in the commentary. Mr. Momtaz had made the point that it was necessary to carefully define the notion of the global commons if the Commission wished to include it in the draft articles, but the question of the types of zones to be covered by that definition had nothing to do with the topic under consideration. He had no intention of trying to determine whether Antarctica formed part of the global commons, especially as opinions diverged on that matter. As for the boundaries of the continental shelf, the resources on that shelf came under national jurisdiction and, technically, he saw no difference with terrestrial resources. Admittedly, damage from activities located in those areas, which were close to the international area, was more likely to spill into a region outside national jurisdiction. For the purpose of the articles being studied, however, there was no difference between maritime and land boundaries. The real question was whether the Commission wanted to consider damage in those areas, which did not come within the exclusive control of any State, if another region was harmed. He had made a recommendation on that point as a matter of progressive development.

27. When *erga omnes* obligations existed, anyone was entitled to act. Conversely, a State could seek compensation only if it had itself suffered injury or, if the global commons had been damaged, exclusively for the cost of cleaning up that damage. When damage affected areas beyond national jurisdiction, the source of the damage had to be pinpointed. If the activity in question was located in an area beyond the jurisdiction of any other State, the question was whether the situation should be covered by the draft articles. He had no definite stance on that issue. If, however, the activity in question—for example, seaboard exploration—was already governed by other legal rules, it should be excluded from the study so as to avoid duplication.

28. Mr. AL-BAHARNA noted that the fairly general support which the Sixth Committee of the General Assembly had lent to the first report on the legal regime for allocation of loss in case of transboundary harm arising out of hazardous activities<sup>12</sup> had encouraged the Special Rapporteur to propose some draft principles in his second report

on the subject. In the debate, delegations had particularly welcomed the Special Rapporteur's conclusion that States had an obligation to ensure that some arrangement existed to guarantee equitable allocation of loss by means of a model that would be general and residual in character. That conclusion had likewise received wide support from Commission members, who had considered that such an arrangement would help to shape more detailed regimes for especially hazardous activities. For his part, the Special Rapporteur had noted in paragraph 36 of his second report that the legal regime for the allocation of loss should also safeguard the relevant rules on State responsibility and should not duplicate or conflict with the operation of civil liability regimes within national jurisdictions. Some of the delegations that had taken part in the debates in the Sixth Committee had contested the idea that States should enact legislation in order to establish a system for the equitable allocation of loss. They had held, on the one hand, that international law did not establish any such obligation and, on the other, that an effective regime enabling innocent victims to recover loss and damage directly from the operator would require a considerable measure of harmonization of national laws. As they took the view that such a level of harmonization would be difficult to achieve in current circumstances, they had believed that it would be preferable for States to hold sectoral or regional negotiations. They had further been of the opinion that the topic on the whole did not easily lend itself to codification and progressive development.

29. Work on international liability had already gone beyond the stage of conceptual criticism. It would be useful for the Commission to review the Special Rapporteur's proposals and adopt a pragmatic approach. The scheme proposed by the Special Rapporteur was not inconsistent with a progressive development exercise. The Commission could draw analogies with the international instruments mentioned in the second report, including the Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal, the Protocol to amend the Vienna Convention on Civil Liability for Nuclear Damage, the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment and the Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context. The fact that few States were parties to such instruments did not affect the value of the rules that they established, which were on the whole relevant to the legal regime on liability proposed in the draft principles.

30. In those principles, the Special Rapporteur had addressed all the problems and concerns raised by members of the Commission and delegations in the Sixth Committee. Draft principle 9 thus took account of the need to clearly distinguish between the purview of a liability regime for acts not prohibited by international law and that of the rules applicable to unlawful acts under the law of State responsibility. The relationship between the two topics examined in the study of international liability (prevention and liability) was affirmed in draft principle 1, which stated that the draft principles applied to damage caused by hazardous activities coming within the scope of the draft articles on prevention of transboundary harm

<sup>12</sup> See 2804th meeting, footnote 4.

from hazardous activities. The threshold of harm must be consistent with the threshold defined in the draft articles on prevention. The definition of damage provided in draft principle 2 was wide enough to include all sorts of activities. Nevertheless, for the sake of consistency, the threshold of “significant damage” should be adopted under the topic of liability.

31. The operator bore primary liability for transboundary harm caused by activities of which he or she was the beneficiary, in accordance with the “polluter pays” principle. The operator’s liability was clearly reflected in alternative B of draft principle 4 entitled “Prompt and adequate compensation”. A definition of the term “operator” was given in draft principle 2, but that definition could not be regarded as conclusive, as it could vary depending on the nature of the activity in question. Emphasis had also been placed on the fact that the operator’s liability should be subject to temporal and financial limitations. That issue was mentioned in paragraph 2 of alternative B of draft principle 4, but that alternative did not provide for the prompt and adequate compensation of victims by the operator or an insurance scheme. Alternative A made it incumbent on the State of origin to take the necessary steps to ensure prompt and adequate compensation for damage to the environment or to natural resources, even when those resources were located beyond the jurisdiction and control of the State within whose territory the hazardous activity had been undertaken, but it gave no indication as to the States or persons to whom such compensation could be paid in that particular case.

32. He agreed with the view that the liability of the State should be supplementary in character. It was also the duty of a State to take all the necessary preventive measures and to establish funding mechanisms for the equitable allocation of loss. He shared the opinion expressed in paragraph 26 of the report that the residual liability of the State should apply in cases where the operator was unable or unwilling to fully cover loss, was insolvent or could not be identified or in certain well-defined cases where the liability of the operator was limited by insurance obligations or compensation was inadequate. Such involvement of the State was perfectly justified by the principle that victims should not be left to bear the loss by themselves. In his explanation of alternative A, the Special Rapporteur called it a compromise because it obliged the State of origin to take the necessary measures to secure compensation for persons in another State who had suffered transboundary damage, but not to establish funds in order to honour the obligation to make prompt and adequate compensation available. It might, however, be held that that possibility was implied by the idea of necessary measures to ensure compensation for victims. Alternative A required some improvement in order to highlight the principle that the State of origin had residual liability and alternatives A and B should be turned into two separate provisions.

33. On the question of the definition of damage eligible for compensation, it had been emphasized that the concept of damage should be broad enough to cover damage to the environment *per se*. The expression was defined in draft principle 2 and taken up again in several places, such as alternative B to draft principle 4, where it included both

the environment and natural resources in areas beyond State jurisdiction. It had also been suggested that damage to the global commons should be left outside the scope of application of the draft principles, for reasons which had been explained by the Special Rapporteur in paragraph 36 (conclusion 8) of his report and which he himself considered valid. In addition, the scope of the scheme for the equitable allocation of loss should be limited to that of the draft articles on prevention, which had excluded the global commons. The Commission could, however, consider the question of the global commons at some future date.

34. With respect to the compensation of victims and the protection of the environment, draft principle 3 clearly ensured that such victims were not left without compensation, within the limits and under the conditions specified in the draft principles.

35. On the nature of the liability of the operator, strict but limited liability had been considered to be the most appropriate to hazardous activities, since victims were not required to provide strict proof of a causal connection in order to establish liability. The issue was covered in alternative B to draft principle 4 and its explanation.

36. The remainder of the draft principles should not raise problems, except draft principle 10 (Settlement of disputes), whose inclusion would depend on the final form to be taken by the work on the topic. If it was to be a convention or a protocol to a convention, a clause on settlement of disputes would have to be included, along the lines of the provision in the draft articles on prevention.

37. He shared Mr. Gaja’s view that the 12 draft principles could henceforth be described as draft articles that could take the form of a convention. In 2003, the Special Rapporteur had stated that he intended to produce concrete formulations, and the draft principles proposed corresponded well to that intention. He supported the draft, with the improvements suggested, and considered it appropriate at the present stage that they should be referred to a working group to be chaired by the Special Rapporteur, to whom he extended his congratulations for the excellent work done.

38. Mr. DAOUDI reviewed the main factors to be taken into account in considering the draft principles.

39. He said that an operator would only agree to carry out hazardous activities that could cause considerable harm to persons and property as well as to the environment if his or her liability was limited. In the event of harm, the operator bore strict liability and had an obligation to provide compensation on the basis of the “polluter pays” principle. The State in whose territory the operator carried out activity did not bear liability if he or she fulfilled his duty of prevention, and that raised the sensitive issue of the relationship between that principle and the principle of the responsibility of States for wrongful acts committed in their territory.

40. It would be unacceptable if full compensation was not provided for harm caused to persons, property and the environment, and supplementary compensation therefore had to be provided by various entities, including the

States concerned, the main beneficiaries and the operators. In that connection, he endorsed the proposal made by some Governments and referred to in paragraph 27 of the report on the involvement of the State in the scheme of allocation of loss on a supplemental basis. Since he considered that the role of the State in the scheme for liability and the allocation of loss must remain the primary one, he recommended the adoption of alternative A of draft principle 4 set out in the report.

41. As to the form that the draft should take, he thought that, for the sake of symmetry, the Commission should adopt draft articles on liability, as with the draft articles on prevention. However, if the topic did not lend itself to such treatment, since it was still a work in progress or for some other reason, nothing prevented the Commission from preparing a declaration of principles, on the understanding that it should contain no reference to the peaceful settlement of disputes.

42. Pointing out that the Special Rapporteur had very clearly laid out the elements of the topic and the options available to the Commission without taking any position, he proposed that the report should be referred to a working group to be chaired by the Special Rapporteur which would consider each of the draft principles in detail with a view to preparing a draft declaration of principles.

43. Mr. PAMBOU-TCHIVOUNDA said that the Commission had been greatly challenged by the comments made by Mr. Brownlie, the scheme for the classification of principles proposed by Mr. Gaja and the methodological approach so aptly suggested by Mr. Economides. He himself particularly welcomed Mr. Gaja's proposal, which introduced at least two major categories of rules: those relating to compensation and those defining procedures to be followed to ensure that it was provided. Provisions on definitions and final provisions were a third category that was not in any way residual. In his view, however, all of those rules lacked a guiding principle that could be the subject of the second report, namely, allocation of loss. After the provisions on definitions and scope, he suggested that there should be a title 1 composed of a general provision on the concept of allocation as a technique for fulfilling the obligation of providing compensation, which would in a sense parallel the provision that the Commission had drafted on the concept of prevention in its draft articles on prevention. Another general provision would be on the concept of victim, a cornerstone of the compensation scheme. A third general provision would deal with the role of the State in the liability scheme and would be based, on the one hand, on the obligation of diligence and the obligation of prevention and, on the other hand, on the authorization of the hazardous activity.

44. He also suggested that there should be a title 2 on compensation with, as a starting point, alternative B of draft principle 4, followed by draft principles 6 and 7, *inter alia*; a title 3 consisting of alternative A of draft principle 4, draft principle 5 and perhaps some new principles; a title 4 on compensation owed to a State as victim; a title 5 on procedural rules; and a title 6 on the relationship between internal law and international law and the settlement of disputes.

45. Those provisions would become draft articles to be included not in a declaration of principles, but in a framework convention relating to allocation of loss in case of transboundary harm arising out of hazardous activities and setting up a system to supplement that of prevention. The Special Rapporteur and others had spoken highly of the flexibility of "general principles with options on various elements, leaving States to pick and choose as they developed their national laws", but he feared that the international community would then be condemned not to have a frame of reference consisting of compulsory rules. Only a framework convention would get round that difficulty.

46. Mr. CANDIOTI, supported by Mr. MANSFIELD, said that the Commission had every interest in giving its utmost attention to the topic during the second part of the current session in order to complete the consideration of the draft on first reading and submit it to the Sixth Committee of the General Assembly at its fifty-ninth session. In so doing, it would increase its chances of finishing the consideration of the topic before the end of the quinquennium.

47. The CHAIRPERSON said that he fully endorsed that proposal, but all members of the Commission must take a decision on it at the next meeting.

#### **Organization of work of the session (*continued*)\***

[Agenda item 1]

48. Mr. RODRÍGUEZ CEDEÑO (Chairperson of the Drafting Committee) announced that the Drafting Committee on the topic of reservations to treaties would be composed of the following members of the Commission: Mr. Al-Baharna, Mr. Candioti, Mr. Economides, Mr. Fomba, Mr. Gaja, Mr. Kolodkin, Mr. Matheson and Mr. Pambou-Tchivounda. Mr. Comissário Afonso would serve as rapporteur.

*The meeting rose at 12.30 p.m.*

### **2809th MEETING**

*Thursday, 3 June 2004, at 10.10 a.m.*

*Chairperson:* Mr. Teodor Viorel MELESCANU

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Al-Marri, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kolodkin, Mr. Koskeniemi, 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**

\* Resumed from the 2804th meeting.