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Fourth report on international liability for injurious consequences arising out of acts not prohibited by international law, by Robert .Q. Quentin-Baxter, Special Rapporteur

Topic:
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INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW

[Agenda item 6]

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Fourth report on international liability for injurious consequences arising out of acts not prohibited by international law, by Mr. Robert Q. Quentin-Baxter, Special Rapporteur

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Delineation of the topic

A. The duty to avoid, minimize and repair transboundary harm

1. Every topic begins with a concept. Usually the concept comes ready made: "treaties between States", "the most-favoured-nation clause", "diplomatic privileges and immunities" are examples. Sometimes the concept has itself to be crystallized, as when "State responsibility" was removed from its familiar textbook setting, relating to the treatment of aliens, and was restated more generally as the consequence attaching to any breach of an international obligation.¹ Only when that had been done was it possible to proceed inductively, finding significant patterns of conduct in the practice of States. It was the study of the origin of State responsibility that gave rise to the study of the present topic;²

* Incorporating documents A/CN.4/373/Corr.1 and 2.

¹ See the report of the Sub-Committee on State Responsibility, approved by the Commission at its fifteenth session (*Yearbook ... 1963*, vol. II, pp. 227-228, document A/5509, annex I).

² The Special Rapporteur's three previous reports on the topic were: (a) preliminary report (*Yearbook ... 1980*, vol. II (Part One), p. 247, document A/CN.4/334 and Add.1 and 2); (b) second report (*Yearbook ... 1981*, vol. II (Part One), p. 103, document A/CN.4/346 and Add.1 and 2); (c) third report (*Yearbook ... 1982*, vol. II (Part One), p. 51, document A/CN.4/360).

for there were indications in State practice of patterns of behaviour that could not readily be explained by reference to rules of prohibition. It was thought by the Commission that an obligation might subsist even when circumstances precluded the wrongfulness of a particular act or omission of the State.³ Moreover, it had become a commonplace that scientific and technological advances had multiplied the circumstances in which legitimate activities entailed the possibility—or even the certainty—of transboundary harm.

2. The long title of the present topic was therefore conceived as one that would not foreclose or predetermine the avenues of future development. It has often been said that the real purpose of the topic is to deal with a "twilight zone",⁴ and that most of the activities which the Commission intended to treat were not currently prohibited by international law, but were on the

³ See article 35 (Reservation as to compensation for damage) and the commentary thereto of part I of the draft articles on State responsibility, adopted by the Commission at its thirty-second session (*Yearbook ... 1980*, vol. II (Part Two), pp. 61-62).

⁴ See the observations made by Mr. Yankov at the thirty-third session of the Commission (*Yearbook ... 1981*, vol. I, p. 226, 1687th meeting, para. 1).

way to being so prohibited.⁵ Yet it is equally true to say that the topic is concerned with the regulation of activities that are in principle useful and legitimate, and should therefore not be prohibited, even though the conduct of these activities entails an element of transboundary harm or the risk of such harm.⁶ These are the two sides of a single coin. From either point of view, the central concept is that conditions attach to the conduct of an activity which is in principle legitimate, but inherently dangerous.⁷ The evidence of this concept is to be found in a large and fast-growing range of treaty practice, establishing the conditions upon which particular activities may be conducted without engaging the responsibility of the source State for wrongfulness, even if the conduct of the activity gives rise to transboundary loss or injury.⁸

3. The situations that dramatize and lend urgency to the topic are those that were first described systematically by Jenks,⁹ that is, situations in which scientific and technological progress has allowed the development of activities that carry with them a small but inescapable risk of very serious accident. There are two possible—but not necessarily incompatible—lines of approach to the regulation of such problems. One starting-point is to stress the dissimilitude between the modern situations of “ultra-hazard” and any that mankind has previously experienced, and to find that these situations do not lend themselves to regulation by the classical method, that is, by engaging the responsibility of States for wrongful acts. From this premise would arise a need

⁵ See the Special Rapporteur’s preliminary report, document A/CN.4/334 and Add.1 and 2 (see footnote 2 above), para. 14.

⁶ See e.g. the following observations made in the Sixth Committee of the General Assembly in 1982 by the representative of the Soviet Union, Mr. Lukyanovich: “... As for the subject of international liability for injurious consequences arising out of acts not prohibited by international law, the Commission was still at the initial stage of its consideration ... Operations using the latest scientific and technical developments were in themselves lawful, but the possibility of harm resulting from their use could not be excluded ... The Commission should continue its study of the subject on the basis of a genuinely comprehensive consideration of the practice of States in [each] field.” (*Official Records of the General Assembly, Thirty-seventh Session, Sixth Committee*, 39th meeting, para. 34).

⁷ See the observations made at the thirty-second session of the Commission by Mr. Riphagen (*Yearbook ... 1980*, vol. I, p. 245, 1630th meeting, paras. 29-30; and by Sir Francis Vallat (*ibid.*, p. 250, 1631st meeting, para. 36).

⁸ Activities and situations dealt with in State practice which the Special Rapporteur has at present in view include the following: use and regulation of rivers crossing or forming an international boundary and avoidance of damage from floods and ice; use of land in frontier areas; spread, across national boundaries, of fire or any explosive force, or of human, animal or plant disease; activities which may give rise to transboundary pollution of fresh water, of coastal waters or of national airspace, or to pollution of the shared human environment, including the oceans and outer space; development and use of nuclear energy, including the operation of nuclear installations and nuclear ships and the carriage of nuclear materials; weather modification activities; overflight of aircraft and space objects involving a risk of accidental damage on the surface of the earth, in airspace or in outer space; and activities physically affecting common areas or natural resources in which other States have rights or interests.

⁹ C. W. Jenks, “Liability for ultra-hazardous activities in international law”, *Recueil des Cours de l’Académie de droit International de la Haye*, 1966-1 (Leyden, Sijthoff, 1967), vol. 117, p. 105.

to invoke a new and exceptional system of obligation under which the causal connection between a legitimate activity and the occurrence of serious harm replaces a wrongful act of the State as the generator of an obligation.¹⁰

4. Such an exceptional system of obligation, governed by the principle of causality or strict liability, may indeed be seen as separate from and complementary to the classical system of State responsibility for a wrongful act or omission. One Commission member, favouring this approach, has suggested that the subject-matter of the present topic should be treated as an additional chapter of the topic of State responsibility, a chapter in which the mere occurrence of transboundary loss or injury would take the place of a wrongful act or omission as giving rise to an obligation for the source State to provide reparation.¹¹ In the terminology which the Commission has used throughout its discussions on State responsibility, this additional chapter would introduce a new system of “secondary” rules. The essential problem in promoting such a system of “strict” or “absolute” or “no-fault” liability¹² is to keep it within proper limits; for most would agree that strict liability, like atomic energy, is a good servant but a bad master.

5. This theme has been stressed again and again during the various discussions of the present topic in the Commission and in the Sixth Committee of the General Assembly. It was said, for example, at the thirty-seventh session of the General Assembly, that strict liability was always the product of a particular conventional régime and that it had no place in customary international law.¹³ It has been urged that the adoption of the principle of strict liability would radically change the rules of attribution, which limit State responsibility to the consequences of wrongful acts or omissions.¹⁴ It has been argued, moreover, that it would be premature to embark upon the description of a new system of obligation before the completion of the Commission’s current study of the classical system of State responsibility for wrongful acts or omissions.¹⁵ To some extent these

¹⁰ For a recent review of the issues, see G. Handl, “State liability for accidental transnational environmental damage by private persons”, *American Journal of International Law* (Washington, D.C.), vol. 74 (1980), p. 525.

¹¹ See the observations made by Mr. Thiam at the thirty-fourth session of the Commission (*Yearbook ... 1982*, vol. I, p. 284, 1743rd meeting, paras. 39-41).

¹² See the preliminary report, document A/CN.4/334 and Add.1 and 2 (see footnote 2 above), paras. 15-16, and the second report, document A/CN.4/346 and Add.1 and 2 (*idem*), paras. 11-14.

¹³ See e.g. the observations made by the representatives of the German Democratic Republic, Mr. Görner (*Official Records of the General Assembly, Thirty-seventh Session, Sixth Committee*, 38th meeting, paras. 34-35), the Soviet Union, Mr. Lukyanovich (*ibid.*, 39th meeting, para. 34); Czechoslovakia, Mr. Tyc (*ibid.*, 46th meeting, para. 9); and Israel, Mr. Baker (*ibid.*, 47th meeting, para. 10).

¹⁴ See e.g. the observations made by the representative of the United Kingdom, Mr. Berman (*ibid.*, 48th meeting, para. 20); and by the representative of France, Mr. Museux (*ibid.*, 38th meeting, para. 17).

¹⁵ See e.g. the observations made by the representative of Israel, Mr. Baker (*ibid.*, 47th meeting, para. 9).

critical comments may have reflected anxiety about the fact that the scope of the present topic is as yet ill defined; but they are also a vindication of the Commission's initial decision that the present topic should not be equated with a description of the principle of strict liability.

6. That decision in no way reflects upon the present value or the future significance of the principle of strict liability. Indeed, it seems self-evident that, if a low risk of very serious transboundary loss or injury must be tolerated as the price of maintaining a beneficial activity, the occurrence of that loss or injury should give rise to a right to reparation as ample as if the loss or injury had been attributable to a wrongful act of the source State. Nevertheless, it would be reckless to disregard the warnings summarized in the preceding paragraph. It is necessary to show that the principle of strict liability is not a stark and exceptional departure from the classical system of State responsibility for wrongful acts and omissions, but an ultimate development of broader tendencies, well grounded in existing State practice. Strict liability—whether assumed by the State itself or imposed upon others involved in the conduct of an activity—is a frequent ingredient in a recipe with endless permutations, all designed to prevent, minimize and provide reparation for harm that was foreseeable, not always in its actual occurrence but at least as a substantial possibility.¹⁶

7. Since the Working Group established by the Commission at its thirtieth session to make a preliminary study of the nature and scope of the subject submitted its report,¹⁷ it has been the Commission's consistent aim, not to describe an alternative system of obligation, but to choose the other starting-point, building upon the full breadth of existing legal foundations, finding similarities rather than contrasts in the practices that States follow as they turn from the older areas of transboundary harm to newer ones.¹⁸ The choice of this line of approach was signified in the Commission's initial decision, repeatedly reaffirmed, that the topic lay within the field of "primary" rules, i.e. rules that are governed by and do not compete with the established system of State responsibility for wrongful acts or omissions.¹⁹ The path chosen is a logical sequel to the Commission's earlier policy decision to codify the system of State responsibility generally, rather than in the particular historical context of the treatment of aliens. The duties

that a State owes, as a territorial or controlling authority, in respect of aliens within its borders can then be compared with the duties it owes in a similar capacity to other States and their citizens or inhabitants to avoid and repair transboundary harm.²⁰

8. It is, of course, true that for centuries the concept of State responsibility was scarcely articulated in any context other than that of the treatment of aliens;²¹ but that is an anachronism which the Commission has sought to remedy. It is also true that transboundary harm, not amounting to a clear-cut violation of sovereignty, is a modern phenomenon; but the spate of recent State practice, in the form of agreements or negotiated settlements, affords adequate guidance for the mapping of this new area. As in other branches of international law, the starting-point is the exclusive authority that States enjoy in respect of national territory, and the correlative duty they owe to other members of the international community.²² Characteristically, they discharge this duty by reaching agreements which accommodate their mutual or respective interests, prescribing a course of conduct that will avoid the possibility of wrongfulness in their mutual relations. The régimes that States construct almost always give pride of place to the measures they consider necessary to avoid the occurrence of transboundary harm; but, if they believe that these measures will not cover all contingencies, they may also make specific provision as to reparation for any loss or injury that does occur.

9. The schematic outline of the present topic²³ reflects—but perhaps does not fully reflect—the flexible procedures and unlimited range of options of which States make use in constructing régimes to avoid, minimize and provide reparation for various kinds of transboundary loss or injury. Indeed, some have asserted that no rule emerges from the diversity of State practice.²⁴ Certainly, there is no simple formula to reconcile one State's right to freedom of action with another State's right to freedom from adverse trans-

¹⁶ See the Special Rapporteur's three previous reports (see footnote 2 above): preliminary report, document A/CN.4/334 and Add.1 and 2 (*idem*), para. 29; and the second report, document A/CN.4/346 and Add.1 and 2 (*idem*), para. 8.

²¹ "The textbooks show that the doctrine of international responsibility is not highly developed. Primarily it deals with the responsibility of a State for injuries to aliens in its territory and only marginally with State responsibility for direct injury to the rights of other States. Even in the latter category, there are few references to general principles that pertain specifically to situations of environmental injury ..." (J. Barros and D. M. Johnston, *The International Law of Pollution* (New York, the Free Press, 1974), p. 74.)

²² "Territorial sovereignty cannot limit itself to its negative side, i.e. to excluding the activities of other States; for it serves to divide between nations the space upon which human activities are employed, in order to assure them at all points the minimum of protection of which international law is the guardian." (*Island of Palmas* case (1928), Arbitrator, Max Huber, United Nations, *Reports of International Arbitral Awards*, vol. II (Sales No. 1949.V.1), p. 839.)

²³ The schematic outline submitted in the third report, document A/CN.4/360 (see footnote 2 above), para. 53, and reproduced in the Commission's report on the work of its thirty-fourth session (*Yearbook ... 1982*, vol. II (Part Two), pp. 83 *et seq.*, para. 109), is annexed to the present report.

²⁴ See the observations referred to in footnote 11 above.

¹⁶ See the Special Rapporteur's three previous reports (see footnote 2 above): preliminary report, document A/CN.4/334 and Add.1 and 2, paras. 26-27 and 38; second report, document A/CN.4/346 and Add.1 and 2, paras. 73-77; third report, document A/CN.4/360, paras. 19-23 and 39.

¹⁷ Reproduced in *Yearbook ... 1978*, vol. II (Part Two), pp. 150-152.

¹⁸ See the report on the Commission's work on the topic at its thirty-second session (*Yearbook ... 1980*, vol. II (Part Two), pp. 158-161, chap. VII); at its thirty-third session (*Yearbook ... 1981*, vol. II (Part Two), pp. 146-152, chap. V); and at its thirty-fourth session (*Yearbook ... 1982*, vol. II (Part Two), pp. 83-92, chap. IV).

¹⁹ See the third report, document A/CN.4/360 (see footnote 2 above), paras. 6-8 and the references thereto.

boundary effects. As in other negotiations, States seek a balance of advantage, sometimes with a willingness to pursue their interests by a sacrifice of what they believe to be their rights, but more often by simply setting aside the vexed question of determining their respective rights and obligations in customary law. Yet in all these shifting perspectives there is one constant. The whole of State practice bears witness that a State in whose territory or under whose control a danger arises owes other States a duty to contain that danger, if possible on terms agreed with other States affected by the danger.

10. During the discussion in the Sixth Committee of the General Assembly at its thirty-seventh session, there was preponderant support either for the general tenor of the schematic outline²⁵ or, more specifically, for implementing the duty to avoid, minimize and provide reparation for transboundary losses or injuries.²⁶ Some thought that the schematic outline should be reinforced to give better guarantees that that duty would be discharged.²⁷ A few, on the other hand, were sceptical about the value of the topic or its viability.²⁸ A few others thought that a conceptual distinction must be made between the question of prevention and that of reparation,²⁹ and several saw advantage in concentrating upon the latter duty.³⁰ Most, however, were firmly in favour of maintaining the linkage between prevention and reparation indicated in the schematic outline.³¹ These and other doctrinal issues, which had

figured prominently in the Commission's discussions at its thirty-second and thirty-third sessions, in 1980 and 1981, will be reconsidered later in the present report; but a more immediate question concerns the scope of the topic. In 1980 and in 1981 the Commission took the view that the scope of the topic should not be settled or narrowed until the content could be evaluated. It was recognized that the Special Rapporteur would be able to find materials mainly in the field of the physical uses of territory, but he was invited to consider their implications in a wider context.³² His efforts to comply with those directives were reflected in sections 1, 5, 6 and 7 of the schematic outline.³³

B. The matching of scope and content

11. The schematic outline submitted to the Commission at its thirty-fourth session, in 1982, provided it with the opportunity to consider scope in relation to content. In these circumstances the balance of opinion in the Commission (newly constituted after the 1981 election) changed, and the unlimited scope clause attracted considerable criticism. This was noted in the remarks of the Commission Chairman, Mr. Reuter, when introducing the Commission's report in the Sixth Committee of the General Assembly at its thirty-seventh session:

Some members had taken the view that the topic should not be further discussed for want of any basis in general international law or because of existing difficulties. Most of the members, however, had taken the opposite view: that the draft could be limited to transboundary problems pertaining to the physical environment and that questions involving the most delicate problems that might arise in the economic sector could be set aside.³⁴

12. Although some representations in the Sixth Committee were disappointed,³⁵ most were of the same opinion as the majority in the Commission.³⁶ As has been noted, there was in the Committee strong and broadly based support for the central aim of the topic, namely, to analyse the growing volume and variety of State prac-

²⁵ See e.g. the observations made by the representative of Sweden, Mr. Danelius (*Official Records of the General Assembly, Thirty-seventh Session, Sixth Committee*, 41st meeting, paras. 13-17); Thailand, Mr. Sucharitkul (*ibid.*, 44th meeting, paras. 26-27); Finland, Mr. Hakapää (*ibid.*, 45th meeting, paras. 8-11); Canada, Mr. Bacon (*ibid.*, paras. 85-87); India, Mr. Jagota (*ibid.*, 46th meeting, paras. 90-91); Italy, Mr. Sperduti (*ibid.*, 47th meeting, paras. 33-34); Mexico, Mr. Gonzalez Galvez (*ibid.*, paras. 50-52); Tunisia, Mr. Mahbouli (*ibid.*, paras. 69-74); Australia, Mr. De Stoop (*ibid.*, 48th meeting, paras. 10-12); Indonesia, Mr. Oerip (*ibid.*, para. 72); Romania, Mr. Mazilu (*ibid.*, 49th meeting, para. 10); Morocco, Mr. Gharbi (*ibid.*, 50th meeting, paras. 36-38); Iraq, Mr. Al-Qaysi (*ibid.*, paras. 53-55); Kenya, Mr. Wabuge (*ibid.*, 51st meeting, para. 49); and Austria, Mr. Tuerk (*ibid.*, paras. 98-102).

²⁶ See e.g. the observations made by the representatives of Yugoslavia, Mr. Sahović (*ibid.*, 39th meeting, para. 7); Canada, Mr. Bacon (*ibid.*, 45th meeting, paras. 85-86); Kenya, Mr. Wabuge (*ibid.*, 51st meeting, para. 49); and Austria, Mr. Tuerk (*ibid.*, para. 99).

²⁷ See e.g. the observations made by the representatives of Madagascar, Mr. Razanakoto (*ibid.*, 46th meeting, paras. 120-123); Mexico, Mr. Gonzalez Galvez (*ibid.*, 47th meeting, para. 52); Libyan Arab Jamahiriya, Mr. Azzarouk (*ibid.*, 49th meeting, para. 53); Zaire, Mr. Balanda (*ibid.*, 51st meeting, para. 14); and Trinidad and Tobago, Mr. McKenzie (*ibid.*, para. 65).

²⁸ See the observations made by the representatives of France, Mr. Museux (*ibid.*, 38th meeting, para. 17); Venezuela, Mr. Díaz González (*ibid.*, 45th meeting, paras. 40-42); and Argentina, Mr. Barboza (*ibid.*, 49th meeting, paras. 13-20).

²⁹ See e.g. the observations made by the representative of the United Kingdom, Mr. Berman (*ibid.*, 48th meeting, para. 20).

³⁰ See the observations made by the representatives of Brazil, Mr. Calero Rodrigues (*ibid.*, 43rd meeting, paras. 63 and 65); Finland, Mr. Hakapää (*ibid.*, 45th meeting, para. 11); and Spain, Mr. Lacleta Muñoz (*ibid.*, 48th meeting, para. 97).

³¹ See e.g. the observations made by the representatives of Thailand, Mr. Sucharitkul (*ibid.*, 44th meeting, para. 27); Canada, Mr. Bacon (*ibid.*, 45th meeting, para. 86); Japan, Mr. Hayashi (*ibid.*,

46th meeting, para. 25); Syrian Arab Republic, Mr. Kahaleh (*ibid.*, 47th meeting, para. 24); Italy, Mr. Sperduti (*ibid.*, para. 34); Australia, Mr. De Stoop (*ibid.*, 48th meeting, para. 10); Sierra Leone, Mr. Koroma (*ibid.*, 49th meeting, para. 44); Morocco, Mr. Gharbi (*ibid.*, 50th meeting, para. 37); Iraq, Mr. Al-Qaysi (*ibid.*, para. 54); Bangladesh, Mr. Morshed (*ibid.*, para. 67); and Austria, Mr. Tuerk (*ibid.*, 51st meeting, para. 99).

³² See *Yearbook ... 1980*, vol. II (Part Two), p. 160, paras. 138-139; and *Yearbook ... 1981*, vol. II (Part Two), p. 152, para. 199.

³³ See annex below.

³⁴ *Official Records of the General Assembly, Thirty-seventh Session, Sixth Committee*, 37th meeting, para. 12.

³⁵ See e.g. the observations made by the representatives of Tunisia, Mr. Mahbouli (*ibid.*, 47th meeting, para. 74); Algeria, Mr. Lamamra (*ibid.*, 48th meeting, para. 37); Romania, Mr. Mazilu (*ibid.*, 49th meeting, para. 10); and Zaire, Mr. Balanda (*ibid.*, 51st meeting, para. 15).

³⁶ See e.g. the observations made by the representatives of Greece, Mr. Economides (*ibid.*, 40th meeting, para. 48); Sweden, Mr. Danelius (*ibid.*, 41st meeting, para. 16); Thailand, Mr. Sucharitkul (*ibid.*, 44th meeting, para. 26); Japan, Mr. Hayashi (*ibid.*, 46th meeting, paras. 23-24); Netherlands, Mr. Siblesz (*ibid.*, para. 47); India, Mr. Jagota (*ibid.*, para. 91); Australia, Mr. De Stoop (*ibid.*, 48th meeting, para. 11); and United States of America, Mrs. Schwab (*ibid.*, 52nd meeting, paras. 26-29).

tice relating to uses made of land, sea, air and outer space, and to identify rules and procedures which can safeguard national interests against losses or injuries arising from activities and situations that are in principle legitimate, but that may entail adverse transboundary effects. Yet the course of debate made it clearer than before that unity of purpose would collapse if either of two boundary lines were crossed. One such boundary line, described in earlier paragraphs, forbids the abrupt adoption of a new system of obligation, based upon the principle of causality or strict liability, and developed in municipal legal systems to meet situations of inherent danger.³⁷ The other boundary line forbids the wholesale transfer of pioneering experience in the field of the physical uses of territory to the even less developed field of economic regulation.³⁸

13. It should be recognized that the two boundary lines under discussion are interconnected. Neither limitation could command general respect if the other were ignored. The essential reason for invoking a new and exceptional system of obligation is that rules of prohibition, limiting the freedom of States—and therefore limiting initiatives within national societies—are too crude a method of adjusting rights and interests in some modern situations. It is therefore entirely understandable that States which seek to moderate the interplay of international economic forces should regard the principle of strict liability as a potentially useful one. Yet, as statements made in the debates in 1982 have shown, merely to raise that question is to redouble every anxiety that the principle of strict liability arouses;³⁹ and the consequence is deadlock, the very negation of the spirit of *bon voisinage*, which does shine through much of State practice relating to the adverse transboundary effects of the physical uses of territory.

14. If, however, we set aside the question of invoking a new and exceptional system of obligation, and follow instead the broadly established trends of State practice, the distinction between the regulation of economic affairs and the regulation of the physical uses of territory becomes extremely clear. The whole body of State practice relating to the latter area responds to the perceived duty to avoid, minimize and repair transboundary harm: if loss or injury occurs, it is palpable, and ordinarily the relationship of cause and transboundary effect is plain. In the economic sphere, on the other hand, there is a missing intermediate step. There is as yet no sufficiently broad agreement at the international level

about the distinctions—well developed in municipal legal systems—between fair and unfair competition. The loser in a race must attribute his loss to his own lack of prowess, not to the tenacity of his rival; but there are rules of fair play that have to be observed even in the running of races.

15. The Special Rapporteur would not think it right to deny a significant connection between the two areas under discussion. An international society which failed to act upon the perceived duty to prevent physical transboundary harm would be unlikely to tackle resolutely the more sophisticated problems of economic regulation. The techniques of the present topic—that is, the promotion of painstaking individual adjustment of competing interests in particular subject areas to reconcile liberty of action with freedom from adverse transboundary effects—might well be more productive of solutions in the economic area than undue reliance upon rules curtailing freedom of action. Nevertheless, there is no possibility of proceeding inductively from the evidence of State practice in the field of the physical uses of territory to the formulation of rules or guidelines in the economic field. Even if it were possible to parallel the principles, factors and modalities mentioned in sections 5, 6 and 7 of the schematic outline with materials drawn from State practice in the economic field, those materials might not reveal a sufficient unity to permit a common development. The Commission, which thought it wise to separate the topic of State succession in matters relating to treaties from other aspects of State succession, would probably find it advisable to sever the treatment of loss or injury arising from the physical uses of territory from losses or injuries arising from causes of an economic character.

16. Within the two boundary lines described above (paras. 12-13), the topic takes its shape. It is required of States only that, as territorial or controlling authorities, they act conscientiously to reconcile their separate interests, so that the freedom of action of one State, and of its citizens or inhabitants, does not become the involuntary burden of other States, and of their citizens or inhabitants. When States have the will to regulate a particular area of international conduct, their representatives bring to the conference table the totality of their experience as lawyers or technologists, and they tend to find solutions that build upon similarities in their domestic situations. Nowhere is this tendency more evident than in conventional régimes relating to physical uses of territory; the standards that States have established within their own jurisdictions are usually those they would wish to have prevail in their relations with other States and, when conditions are propitious, international arrangements make reciprocal use of municipal procedures and instrumentalities.

17. Once the nature and thrust of the topic have been understood in the sense described in the preceding paragraph, there is a rather general expectation that the field of application will include all physical uses of territory giving rise to adverse physical transboundary effects. No short phrase exactly describes the full extent of

³⁷ See the observations referred to in footnotes 13, 14 and 15 above.

³⁸ See in particular the observations made by the representative of the United States of America, Mrs. Schwab (*Official Records of the General Assembly, Thirty-seventh Session, Sixth Committee, 52nd meeting, paras. 25-29*):

“The United States considered the scope of the topic to be too broad ... The failure to narrow the concept substantially was a fatal flaw in the balance of the schematic outline. ...” (*Ibid.*, para. 26.)

“For all these reasons, her delegation supported the predominant view in the Commission that the topic should be limited to the physical environment or, at most, to physical damage caused by physical actions.” (*Ibid.*, para. 29.)

³⁹ See the observations referred to in footnote 36 above and those supporting a contrary view referred to in footnote 35 above.

this field of application, and some doubts have been raised by an injudicious reliance upon references to "environment" or "physical environment". A warning about this source of ambiguity was given during the Commission's discussions at its thirty-second session, in 1980,⁴⁰ and a similar question arose during the consideration of the Commission's report in the Sixth Committee of the General Assembly, at its thirty-seventh session, in 1982.⁴¹ It should therefore be confirmed that there was never an intention to propose a reduction in the scope of the topic to questions of an ecological nature, or to any other subcategory of activities involving the physical uses of territory; nor, indeed, did any speaker in the Sixth Committee urge the desirability of such a reduction.

18. Some pertinent comments were however made in the Sixth Committee upon the question of "control". It was noted, for example, that ships in territorial waters were in some respects in the same legal position as any other foreign-owned chattel, in other words, that they fell within the jurisdiction of the State to which the territorial sea belonged.⁴² Several speakers drew attention to the problems of developing countries, one observing that

... the Commission should keep in mind the reality of actual circumstances and in particular the need for industrial development in developing countries, the absence of technical expertise to detect or monitor harmful effects which might follow from acts which were otherwise lawful, and the fact that the control of certain activities was in the hands of contractors or multinational agencies.⁴³

In this context, as in the case of ships, it seems worth emphasizing again that the schematic outline does not require States to bear a direct—much less an absolute—liability in respect of loss or injury occasioned by activities within their territories or under their control. It implies only that such States should take the initiatives that they alone can take to sponsor régimes

⁴⁰ Sir Francis Vallat observed:

"On the question of limitations, he agreed that it would be wise to focus attention on what might be described as environment in its broad meaning, and not to become involved in economic and social questions for the time being. He hesitated over the use of the term 'environment', however, because in its narrow sense it had become connected with the expression 'environmental law' and the concerns of ecology. It must be made clear that what the Commission was concerned with in the topic under consideration was acts having physical consequences and therefore connected with the environment in the broader sense." (*Yearbook ... 1980*, vol. I, p. 249, 1631st meeting, para. 32.)

⁴¹ See in particular the observations made by the representative of India, Mr. Jagota:

"His delegation had not visualized that the scope of the proposed articles would be restricted to the physical environment. It had expected them to be of more general application and to establish or refer to regimes involving hazardous activity, activities in outer space, activities relating to the exploitation of resources straddling a land or maritime boundary, utilization of shared resources and so forth. ..." (*Official Records of the General Assembly, Thirty-seventh Session, Sixth Committee*, 46th meeting, para. 91.)

⁴² See the observations made by the representative of the Netherlands, Mr. Siblesz (*ibid.*, para. 46).

⁴³ Observations made by the representative of Sri Lanka, Mr. Marapana (*ibid.*, 51st meeting, para. 84). See also, in particular, the observations made by the representative of Zaire, Mr. Balandia (*ibid.*, para. 17).

which offer acceptable assurances of avoiding, minimizing and repairing transboundary losses or injuries.

C. Relationship with other primary obligations

19. Indeed, some are of the opinion that the expectations mentioned in the preceding paragraph are too low, that the provisions indicated in the schematic outline⁴⁴ are too fragile and permissive to afford substantial protection; but here there is a basic misunderstanding. The rules contained in the schematic outline are not a substitute for specific conventional or customary rules that engage the responsibility of the State. The present topic has been described, with fairly general approval, as "a catalyst in the field of primary rules".⁴⁵ It is not its purpose to multiply prohibitions. Indeed, it cannot do so and yet remain true to its description; nor can it modify or supplant any established legal obligation. Thus a failure to consult under section 2 of the schematic outline, or to provide proper regulation under section 3, is no more than an element to be taken into account if the activity in question does give rise to transboundary harm. Nevertheless, it may be wrongful—independently of any provision made in pursuance of the present topic—to subject another State or its citizens to an undisclosed risk of serious transboundary loss or injury.⁴⁶ In such a case, the disclosure of the risk, and the effort to obtain the other State's agreement to a feasible régime, would be the only alternative to purging the activity of its harmful transfrontier effects.

20. This very important issue was well discussed in the Commission at its thirty-third session, in 1981,⁴⁷ but it was overshadowed by other issues at the following session and must now be restated. One starting-point is, of course, to recall the origins of the topic, which were evoked in paragraph 2 of this report. The topic concerns activities which are "on the way to being ... prohibited" or, alternatively, are being saved from prohibition because adequate guarantees have been provided as to the avoidance of adverse transboundary effects and, if necessary, as to reparation for such effects. Because these activities are near the moving frontier between lawfulness and unlawfulness, the Commission members found it difficult to agree, at the twenty-fifth session, in 1973, on whether to describe such activities as licit or illicit.⁴⁸ Both nuances were preserved in the title of the

⁴⁴ See annex below.

⁴⁵ See the second report, document A/CN.4/346 and Add.1 and 2 (see footnote 2 above), para. 18.

⁴⁶ See e.g. the view expressed by Handl:

"... a frontier activity is reasonable only to the extent that its modalities reflect the findings of transnational safety analyses that consider the possible transnational environmental consequences of national action ..." ("An international legal perspective on the conduct of abnormally dangerous activities in frontier areas: the case of nuclear power plant siting", *Ecology Law Quarterly* (Berkeley, Calif.), vol. 7, (1978), p. 38.)

⁴⁷ *Yearbook ... 1981*, vol. I, pp. 217-230, 1685th and 1686th meetings and 1687th meeting, paras. 1-31, and pp. 250-255, 1690th meeting, paras. 32-71.

⁴⁸ During the discussion on article 1 of part I of the draft articles on State responsibility at the twenty-fifth session of the Commission, Mr. Kearney raised the question of

present topic by the use of the awkward periphrasis "acts not prohibited by international law". The same idea is reflected in the more recent tendency of some Commission members, and of some representatives in the Sixth Committee, to describe the obligations that engage State responsibility for wrongful acts and the obligations dealt with in the present topic as dealing with "different shades of prohibition".⁴⁹

"... the difference between the responsibility of a State for an internationally wrongful act and its responsibility for an act which was not wrongful as such, or, to use the common-law expression, a case in which there was 'liability without fault'." Mr. Kearney went on to state:

"Current developments were tending to make the distinction between those two cases less and less clear. Environmental pollution raised a whole series of problems as to circumstances in which the probability of risks as compared with the fact of wrongful action was a governing factor. The use of outer space involved similar problems ..." (*Yearbook ... 1973*, vol. I, p. 7, 1202nd meeting, paras. 22-23.)

At the same meeting, Mr. Hambro stressed that

"... consideration would have to be given to the problem of State responsibility for acts which had formerly been regarded as lawful, but which in the light of recent scientific developments must now be considered wrongful, and there progressive lawyers had a role to play; it was their duty to shift the frontier between what was legal and what was illegal ..." (*Ibid.*, pp. 7-8, para. 32.)

See also the remarks of Mr. Castañeda (*ibid.*, p. 10, 1203rd meeting, para. 16).

Mr. Ago attempted to accommodate both viewpoints in his text of the Commission's draft report on its twenty-fifth session, proposing a reference to:

"... responsibility for possible injurious consequences arising out of the performance of certain lawful activities, or activities which international law may not yet have definitively prohibited—such as certain maritime activities, activities in the atmosphere or in outer space, and nuclear and other activities, particularly in connection with the protection of the environment" (A/CN.4/L.198, para. 26).

That formula provoked a discussion concerning the extent to which certain activities, or ways of performing activities—particularly those referred to by way of example—had already become wrongful, or were likely to become so, or would remain lawful but would be subject to regulation because they involved certain risks. See the remarks of Mr. Kearney, Mr. Sette Câmara, Mr. Ramangasoavina, Mr. Ago, Mr. Hambro, Mr. Castañeda, Mr. Yasseen, Sir Francis Vallat and Mr. Ustor (*Yearbook ... 1973*, vol. I, pp. 211-213, 1243rd meeting, paras. 40-53, and 1244th meeting, paras. 1-9). To avoid prejudging these questions, the Commission adopted the following wording in its report on its twenty-fifth session:

"... liability for possible injurious consequences arising out of the performance of certain lawful activities; especially those which because of their nature give rise to certain risks" (*Yearbook ... 1973*, vol. II, p. 169, document A/9010/Rev.1, para. 38).

In the same report, the Commission referred also to "the so-called responsibility for risk" and to "that other form of responsibility which is the protection against the hazards associated with certain activities that are not prohibited by international law" (*ibid.*, paras. 38 and 39).

⁴⁹ See e.g. the observations made at the thirty-third session of the Commission by Sir Francis Vallat:

"He could not agree with the view that because any breach of a duty existing under international law must constitute an internationally wrongful act, and was therefore subject to the rules contained in part I of the draft, it necessarily fell outside the scope of the present topic ... The concepts of acts not prohibited by international law and internationally wrongful acts were not mutually exclusive." (*Yearbook ... 1981*, vol. I, p. 230, 1687th meeting, paras. 26 and 28.)

21. The phrase "on the way to being ... prohibited" has another important aspect: it conveys the idea of movement and of instability. The present topic is concerned with process; and this is reflected in the emphasis upon procedure in sections 2, 3 and 4 of the schematic outline. It is not the policy of the law to perpetuate ambivalent situations, but rather to break them down into elements of right and wrong. That is the process which takes place whenever the parties concerned construct a régime, or agree that a potential problem can be overcome without resort to such a régime. As has been pointed out in the Commission's debates, there is in some areas a growing body of conventional rules which would give rise to international responsibility. The International Law Association in its recently adopted "Montreal Rules",⁵⁰ which provide the Commission with a valuable new point of reference, takes the view that there is also, at least in regard to pollution, a body of customary rules giving rise to State responsibility. These are the kinds of development which it is the very purpose of this topic to promote.

22. Nevertheless, it is not within the province of the present topic to pronounce when any particular activity "on the way to being prohibited" has reached that destination. Therefore it is logically as well as practically impossible for the Special Rapporteur to draw a dividing line between wrongful acts and acts which, although not prohibited, give rise to liability. Where there is a clear and undisputed breach of a conventional or customary obligation, States will no doubt deal with the matter on that basis. Where, however, there is doubt or disagreement that a transboundary loss or injury has been occasioned by a wrongful act—and that is by no means the exceptional case—it is natural that the States concerned should canvass the matter on the wider basis of recompense for a loss or injury sustained. As one Commission member has noted:

"... States were sometimes prepared to make good loss and damage by the payment of a sum of money which they were not prepared to admit was made in compensation. The States which accepted what were therefore termed *ex gratia* payments did so in the knowledge that such payments were intended as compensation. In that way, yesterday's *ex gratia* payment became tomorrow's obligation."⁵¹

23. Tactical reasons may favour a denial of liability, even when both parties are aware that the circumstances under which a claim arose could be characterized as the consequence of a wrongful act. Yet, in the twilight zone

See also the observations made in the Sixth Committee of the General Assembly, in 1982, by the representative of the Netherlands, Mr. Siblescu:

"...at first sight there seemed to be an absolute separation between the two topics covered in chapters III and IV of the Commission's report (A/37/10), one dealing with prohibited conduct and the other with acts not prohibited by international law. In fact, however, it seemed rather to be a question of different shades of prohibition ..." (*Official Records of the General Assembly, Thirty-seventh Session, Sixth Committee*, 46th meeting, para. 44).

⁵⁰ Resolution No. 2 1982 on legal aspects of the conservation of the environment, adopted by the International Law Association at its Sixtieth Conference, held in Montreal from 29 August to 4 September 1982 (the text of the resolution is cited in full in footnote 52 below).

⁵¹ *Yearbook ... 1981*, vol. I, p. 224, 1686th meeting, para. 24 (Mr. Sucharitkul).

with which the present topic deals, unless the precedents for a case in question are clear and apposite, there may be few indications in doctrine or State practice that can help the parties to determine whether or not the responsibility of the source State for a wrongful act or omission has been engaged. In doubtful circumstances, the source State will be slow to admit such responsibility, because the admission will restrict correspondingly its right to take initiatives without the prior consent of other States that may be affected. However, the source State should have much less hesitation in agreeing to repair the loss or injury suffered, unless there are relevant considerations which argue for a different distribution of costs. It must be stressed again that the present topic has twin objectives: it encourages the construction of régimes, when these are needed to give precision to the respective rights and obligations of the States concerned; but, when that precision is lacking, it asserts the duty to avoid and to repair transboundary loss or injury, without a prior finding of the responsibility of the source State for a wrongful act or omission.

24. In order to show more concretely the relationship between the matters dealt with in the present topic and other primary rules of obligation, it may be useful to make some comparisons with the coverage of the "Montreal Rules".⁵² If one regards the entire field of

⁵² Resolution No. 2 1982 on legal aspects of the conservation of the environment, adopted by the International Law Association, reads as follows:

"The sixtieth Conference of the International Law Association held in Montreal, 29 August-4 September 1982:

"Having received and considered the report of the Committee on Legal Aspects of the Conservation of the Environment,

"Approves the statement of the Rules of international law applicable to transfrontier pollution recommended in the Committee's report as follows:

"Article 1 (Applicability)

"The following rules of international law concerning transfrontier pollution are applicable except as may be otherwise provided by convention, agreement or binding custom among the States concerned.

"Article 2 (Definition)

"(1) 'Pollution' means any introduction by man, directly or indirectly, of substance or energy into the environment resulting in deleterious effects of such a nature as to endanger human health, harm living resources, ecosystems and material property and impair amenities or interfere with other legitimate uses of the environment.

"(2) 'Transfrontier pollution' means pollution of which the physical origin is wholly or in part situated within the territory of one State and which has deleterious effects in the territory of another State.

"Article 3 (Prevention and abatement)

"(1) Without prejudice to the operation of the rules relating to the reasonable and equitable utilization of shared natural resources, States are in their legitimate activities under an obligation to prevent, abate and control transfrontier pollution to such an extent that no substantial injury is caused in the territory of another State.

"(2) Furthermore, States shall limit new and increased transfrontier pollution to the lowest level that may be reached by measures practicable and reasonable under the circumstances.

"(3) States should endeavour to reduce existing transfrontier pollution, below the requirements of paragraph 1 of this article, to the lowest level that may be reached by measures practicable and reasonable under the circumstances.

interaction of States, in relation to physical activities that entail transboundary harm or hazard, as an apparatus through which some rules about the wrongfulness of causing harm are being distilled, it could be said that the authors of the Montreal Rules have set out to record the final product of the distillation process up to the present time in their chosen field of transboundary pollution. The topic we are now considering, on the other hand, is concerned with the dynamics of the distillation process—itsself a response to the duty to avoid, minimize and repair physical transboundary harm—and with the measures States must take to adjust and accommodate their respective rights and interests, when those rights and interests cannot be determined merely by reference to applicable customary and conventional rules.

25. There are very important elements which are common to the Montreal Rules and to the present topic. There is, first, the recognition—in article 4, dealing with highly dangerous substances—that some activities, or ways of doing things, may be absolutely prohibited, and therefore removed from the general area of adjustment of rights and interests. Secondly, article 3, paragraph (1), articulates the basic principle of the duty

"Article 4 (Highly dangerous substances)

"Notwithstanding the provisions in article 3, States shall refrain from causing transfrontier pollution by discharging into the environment substances generally considered as being highly dangerous to human health. If such substances are already being discharged, States shall eliminate the polluting discharge within a reasonable time.

"Article 5 (Prior notice)

"(1) States planning to carry out activities which might entail a significant risk of transfrontier pollution shall give early notice to States likely to be affected. In particular, they shall on their own initiative or upon request of the potentially affected States, communicate such pertinent information as will permit the recipient to make an assessment of the probable effects of the planned activities.

"(2) In order to appraise whether a planned activity implies a significant risk of transfrontier pollution, States should make environmental assessment before carrying out such activities.

"Article 6 (Consultations)

"Upon request of a potentially affected State, the State furnishing the information shall enter into consultations on transfrontier pollution problems connected with the planned activities and pursue such consultations in good faith and over a reasonable period of time.

"Article 7 (Emergency situations)

"When, as a result of an emergency situation or of other circumstances, activities already carried out in the territory of a State cause or might cause a sudden increase in the existing level of transfrontier pollution, the State of origin is under a duty:

"(a) to promptly warn the affected or potentially affected States;

"(b) to provide them with such pertinent information as will enable them to minimize the transfrontier pollution damage;

"(c) to inform them of the steps taken to abate the cause of the increased transfrontier pollution level.

"Recommends that these rules be designated the 'Montreal Rules of international law applicable to transfrontier pollution';

"Requests the Secretary-General of the Association to transmit the report to the Secretary-General of the United Nations for submission to the International Law Commission."

(ILA, *Report of the Sixtieth Conference, Montreal, 1982* (London, 1983), pp. 1-3.)

to avoid, minimize and repair substantial transboundary loss or injury, deriving its authority from the award in the *Trail Smelter* case,⁵³ from principle 21 of the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration),⁵⁴ and from the trends of State practice.⁵⁵ Thirdly, although this does not clearly appear from the actual language of the Montreal Rules, it is the unmistakable intention of the Rules to enunciate the regulatory duties of the State in relation to any activity within its borders, whether or not conducted by the State itself; and in this also the Rules follow the seminal precedent of the *Trail Smelter* case. Fourthly, article 3, paragraph (2), dealing with new or increased transboundary pollution, recognizes that the standards of the State's obligations must be related to technical and economic possibilities; and that, too, is a principle upon which the tribunal in the *Trail Smelter* case acted.⁵⁶ Finally, articles 5, 6 and 7 recognize the extreme importance of exchange of information and consultation with other interested States, whenever there is a significant risk of transboundary pollution.

26. In other ways the Montreal Rules and the present topic are in sharp contrast and have complementary roles. For the reasons explained above (para. 24), the Montreal Rules necessarily proceed by exclusion, eliminating from their purview (art. 2, para. (2)) the whole area of the globe not included within the territory of a State, eliminating not only the protection of that area, but also the protection of State territory itself from sources of pollution arising in or under or above the high seas, or in outer space. Secondly—although this emerges from the comment on article 2, paragraph (2), rather than from the text—the Montreal Rules exclude also any form of long-range pollution, even though originating and causing adverse effects within the territory of a State.⁵⁷ Thirdly, the Montreal Rules (art. 2, para. (1)) are concerned essentially with the chronic or cumulative effects of pollution, excluding the release of substances which are merely “likely to” result in deleterious effects of the nature described in the definition.⁵⁸ Thus the first impression of a study of the Montreal Rules might be a realization that areas in which clear-cut customary rules about the wrongfulness of causing harm can perhaps be discerned are

small—much less than the tip of the proverbial iceberg which is the proper subject-matter of the present topic.

27. The meagreness of this coverage could be offset by a gain in precision within the area covered; but here also there are difficulties. The familiar problems of approximation and appraisal crop up even within the confines of a specific obligation engaging the responsibility of the State. “Admittedly, it is impossible to formulate a general rule of international law fixing a level at which the damages produced by transfrontier pollution can be deemed to be substantial.”⁵⁹ “The yardstick must rather be determined in the light of the technical standard and the level of pollution generally accepted in the region concerned or even of the level of general damage caused by human influence on the environment.”⁶⁰ These are universal truths, but differences in appraisal among interested parties are least likely to be resolved in a context in which those parties are debating the lawfulness of the conduct of one of their number. Admittedly, this was done in the *Trail Smelter* case, and this is an aspect of its uniqueness; but although the tribunal felt obliged by its terms of reference to fix the point of wrongfulness, it fixed the ultimate level of Canada's legal obligations without reference to the point of wrongfulness.⁶¹ That is the usual practice of States, which establish régimes to avoid, minimize and repair loss or injury pragmatically, although with a shrewd sense of what the law demands of them.

28. To pursue the issue a little further, it may be useful to consider the way in which article 3, paragraph (1), of the Montreal Rules would operate. “From the fact that causing substantial damages on the territory of other States constitutes an internationally wrongful act results the duty for the polluting State to cut down transfrontier pollution to such an extent that the transfrontier damages cannot any more be termed substantial.”⁶² In other words, an attempt has been made to combine the notion of avoiding a wrongful act or omission of the State with that of avoiding substantial transboundary loss or injury; but despite the apparently absolute nature of the obligation described in the statement quoted, the real effect of this amalgam is to produce a very weak obligation indeed. Under article 3, paragraph (1), wrongfulness flows only from the fact of loss or injury, not from exposure to the risk of loss or injury; and, as has been mentioned (para. 26 above), activities that are merely “likely to” cause loss or injury have been excluded, in order to narrow the field of application. It does not however follow—as article 3, paragraph (1), and the commentary might seem to imply—that the actual occurrence of transboundary loss or injury will always entail the responsibility of the source State for a wrongful act or omission; for the responsibility of the source State will not be engaged

⁵³ United Nations, *Reports of International Arbitral Awards*, vol. III (Sales No. 1949.V.2), pp. 1905 *et seq.*

⁵⁴ *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), p. 5.

⁵⁵ See, in particular, paras. 1-4, 11 and 16 of the comments on article 3 submitted by the Committee on Legal Aspects of the Conservation of the Environment (ILA, *Report of the Sixtieth Conference, Montreal 1982 ...*, pp. 160 *et seq.*).

⁵⁶ See the second report, document A/CN.4/346 and Add.1 and 2 (see footnote 2 above), paras 27-28, 30-31 and 33-39.

⁵⁷ See para. 4 of the comments on article 2 submitted by the Committee on Legal Aspects of the Conservation of the Environment (ILA, *Report of the Sixtieth Conference, Montreal, 1982, ...*, pp. 159-160).

⁵⁸ See para. 2 of the comments on article 1 (*ibid.*, p. 158).

⁵⁹ Para. 8 of the comments on article 3 (*ibid.*, p. 162).

⁶⁰ Para. 9 of the comments on article 3 (*ibid.*, p. 163).

⁶¹ See the second report, document A/CN.4/346 and Add.1 and 2, (see footnote 2 above), paras. 39, 64 and 66.

⁶² Para. 10 of the comments on article 3 (*loc. cit.*, footnote 60 above).

unless the State authorities had the means of foreseeing that loss or injury was likely to be caused, as well as the duty to prevent its occurrence.⁶³

29. The paradox arises through failure to distinguish acts or omissions that are wrongful because they are prohibited from acts or omissions which, although not prohibited, entail an obligation to avoid injury and to take remedial measures if loss or injury ensues. In the case of the *Cosmos 954* satellite, a Soviet space object which crash-landed in Canadian territory, Canada claimed from the Soviet Union compensation pursuant to the Convention on International Liability for Damage caused by Space Objects of 1972,⁶⁴ and further compensation, pursuant to general principles of international law, for additional costs incurred.⁶⁵ The first head of claim was made under a treaty which accepted a measure of liability for the accidental intrusion of a space object into foreign territory, and did not characterize that intrusion as unlawful. No doubt in deference to the prevailing dogma that liability in respect of acts not prohibited had always a conventional origin, Canada's second head of claim was framed in terms of an intrusion constituting a violation of Canadian sovereignty.⁶⁶ In that way the inadequacy of legal doctrine seems to have imposed a conceptual strait-jacket which drove Canada to the curious extremity of alleging that the arrival of the space object was both licit and illicit, prohibited and not prohibited. A failure to develop the law relating to obligations arising from acts or omissions that are not prohibited must encourage States to rely more heavily on the extension of general rules of outright prohibition. Yet that is a regressive course, based on mutual restriction rather than on mutual accommodation.

30. To raise these analytical questions is not to dispute the significance and the value of the Montreal Rules. If it is wrongful for the source State to allow substantial levels of transboundary pollution—and the Special Rapporteur, although having no mandate in this area, does not doubt that it often is wrongful—the reason is not merely a literal application of the famous award of the tribunal in the *Trail Smelter* case. Contrary to the original wishes of the United States of America, but consistently with the tribunal's ultimate terms of reference, its second and final award was not based

solely on the finding that transboundary pollution “of serious consequence” had been “established by clear and convincing evidence”.⁶⁷ It was based also on the finding, after exhaustive scientific inquiry, that the pollution could have been avoided by technical measures that were within the economic capacity of the industry.⁶⁸ If that particular award has broadened into a general rule, it may well be because many of the kinds of chronic or cumulative pollution with which the Montreal Rules are especially concerned have proved to be equally avoidable. States which in future construct régimes to meet this kind of danger will do so with more assurance that, in the absence of a régime, the occurrence of substantial transboundary pollution would in all probability engage the responsibility of the source State for a failure in its duty of regulation.⁶⁹

31. The last sentence of the previous paragraph brings the matter back into a relationship with the present topic. If rules of the Montreal kind have to stand alone, they will tend to show that law lags permanently behind the march of events, seldom constraining effectively the leaders in industry and technology, but learning from their excesses to prescribe rules that the leaders are at length finding the means and self-discipline to observe. As the Montreal Rules and commentaries imply,⁷⁰ the levels of protection thus evolved may not suit so well the more limited economic and industrial options of other members of the world community; and it may therefore seem to the latter that law is in the service of power and privilege. If that tendency—which has been the subject of complaint throughout the lifetime of the United Nations—is to be effectively countered, one early step is to dismiss the dogma that law imposes no obligations until particular rules of prohibition have been crystallized. Freed from that dogma, article 3, paragraph (1), of the Montreal Rules represents the obligation that is characteristic of the present topic, that is, an obligation of unsettled content, until articulated in an agreed or accepted régime, arising from the need to avoid and repair transboundary loss or injury. Article 3, paragraph (2), of the Montreal Rules, proclaiming the wrongfulness of allowing new sources or increased levels of pollution, then represents the second stage in regulation, that is, a rule of prohibition, embodying an objective standard, emerging from the consistent practice of States in constructing régimes or settling claims.

32. If we now return to the issues posed in paragraph 19 above, it should again be stressed that the rules contained in the schematic outline of the present topic

⁶³ To quote P. Reuter:

“We could, however, formulate a slightly different rule, namely, that a State is not entitled to perform acts in its territory that might be abnormally dangerous for other States, in particular neighbouring States. In such a case, it is not the materialization of the danger, i.e. a disastrous accident, that entails responsibility, but simply the performance of the act, such as the construction of the dam.” (“Principes de droit international public”, *Recueil des cours* ..., 1961-II (Leyden, Sijthoff, 1962), vol. 103, p. 592.)

For a longer extract from Mr. Reuter's paper, see the second report, document A/CN.4/346 and Add.1 and 2 (see footnote 2 above), footnote 95.

⁶⁴ United Nations, *Treaty Series*, vol. 961, p. 187.

⁶⁵ See Canada, Ministry of External Affairs, Note No. FLA-268 of 23 January 1979, annex A (*International Legal Materials* (Washington, D.C.), vol. XVIII (1979), p. 902).

⁶⁶ Note No. FLA-268, annex A, para. 21 (*ibid.*, p. 907).

⁶⁷ United Nations, *Reports of International Arbitral Awards*, vol. III ..., p. 1965. See paras. 2, 3 and 4 of the comments on article 3 submitted by the Committee on Legal Aspects of the Conservation of the Environment (*loc. cit.*, footnote 55 above).

⁶⁸ See the second report, document A/CN.4/346 and Add.1 and 2 (see footnote 2 above), paras. 27, 31 and 34-39.

⁶⁹ This would appear to be the case at least in relation to new sources of transboundary pollution of fresh water and to those rare circumstances where the transboundary consequences of a new source of air pollution can be specifically identified, but subject, in each case, to the rules of sharing (see para. 36 below).

⁷⁰ See footnotes 59 and 60 above.

are not a substitute for specific conventional or customary rules that engage the responsibility of the State. It is the main purpose of the present topic to encourage the elaboration or emergence of such rules. When such rules are determinative, there will be no occasion to refer to the flexible framework of rules or guidelines formulated in pursuance of the present topic. On the other hand, it should not be forgotten that in this area customary rules are not easily or frequently discernible. The Montreal Rules are perhaps the most ambitious attempt yet made to find and describe such customary rules. Their limited field of application, and their margins of inexactitude, have already been discussed; and, if one may judge from some positions taken in the Sixth Committee of the General Assembly in reference to the present topic, the Montreal Rules would not yet be acceptable to every State whose practice has been cited in their support. The best result is achieved by combining a nascent customary rule with the procedures outlined in pursuance of the present topic. For any one case in which a problem is resolved by an agreed application of the Montreal Rules there are likely to be many in which States—influenced perhaps by the thrust of those Rules—construct régimes that embody the duty to avoid and to repair pollution damage, and that place the burden of doing so squarely upon the State or activity which is the source of the damage.

33. In theory, there is another kind of obligation that may supervene to obviate or reduce reliance on rules and guidelines formulated in pursuance of the present topic. Wherever there are rules of sharing—for example, in relation to equal benefit from the freedoms of the high seas, or to the balance of rights between the flag State and the coastal State in case of innocent passage through the territorial sea, or to competing uses of the flow of an international watercourse—those rules must in principle provide the means of adjusting conflicts of rights or interests. In practice, however, the operation of such rules is seldom effectively separated from the question of a loss or injury caused by activities within the territory or control of one State to persons or property within or belonging to another State.

34. In the well-known case of the *Fukuryu Maru* (1954),⁷¹ injuries and losses were suffered by the crew members and owners of a Japanese fishing boat on the high seas caught in the fall-out from a United States nuclear bomb test, although outside the designated testing area. One element in the situation, which also lengthened the journeys of other Japanese fishing boats to their usual fishing grounds, was the competing uses of the high seas for fishing and for weapons testing. Another question, which Japan was disposed to answer affirmatively, was whether the risk entailed by the bomb test, in all the circumstances of the particular case, was such as to engage the responsibility of the United States of America for a wrongful act. Although such responsibility was not admitted, the United States was prompt

in its expressions of concern and in the provision of medical and other help; and it offered equally prompt assurances that the necessary steps would be taken to ensure fair and just compensation if the facts so warranted. The case was therefore settled, as many cases are settled, by the tender and acceptance of a sum of money, paid in compensation for the injuries and losses shown to have been suffered.

35. It is not within the province of the present topic to articulate the rules of sharing, except as optional methods of accommodating interests. So, to take a simple example, navigable boundary waters will seldom be of much use to either riparian unless there is mutual willingness to allow common use of the main channel. On the other hand, the element of sharing is sometimes logically prior to the questions with which the present topic is centrally concerned; for the relevant rules of sharing may identify the State under whose control an activity is conducted, and may determine whether any other State is involved in a loss or injury to which that activity gives rise. Thus, for example, a coastal State substantially controls the movement of foreign ships in passage through its territorial sea; but it plainly does not control the safety standards to which such ships are constructed.

36. Elements of sharing may also play an auxiliary role in determining the content of obligations arising out of acts or omissions not prohibited by international law. In the *Poplar River Project* case,⁷² it was not doubted that the Canadian province of Saskatchewan had the right to construct and operate a power-generating station, even though the station would inevitably give rise to a significant degree of transboundary pollution in the neighbouring American state of Montana. In deference to United States representations, the new station's pollution emission standards were in general conformity with those prevailing on both sides of the international border, although fractionally below the United States standards for new source emissions. The extent of the injury done to the United States could be expressed in terms of a reduction in the potential for increasing power generation in Montana within predetermined levels limiting the degradation of air quality. Nevertheless, as Canada was adhering to standards that were more or less uniform on both sides of the international boundary, the view was taken that Canada must be allowed without penalty to draw upon the common reservoir of tolerable increase in air pollution levels.

37. Except to the extent that the States concerned have chosen to assign priorities to competing uses, the rules of sharing seldom lend themselves to any automatic or inevitable application. For example, article V of the Helsinki Rules on the Uses of the Waters of International Rivers, adopted by the International Law Association at its fifty-second conference (Helsinki,

⁷¹ M. M. Whiteman, *Digest of International Law* (Washington, D.C., U.S. Government Printing Office, 1967), vol. 8, p. 764.

⁷² *Digest of United States Practice in International Law 1976* (Washington, D.C., U.S. Government Printing Office, 1977), pp. 590-594; *ibid.* 1978 (1980), pp. 1116-1121 and 1496-1498.

1966)⁷³ which deals with the reciprocal rights and obligations of States that share an international drainage basin, cannot be and does not purport to be more than an incomplete listing of unranked factors upon which the parties may draw in a negotiation to establish the legitimacy of any particular demand upon a shared resource. The framers of the Montreal Rules at length abandoned a proposal to include in those Rules a corresponding list of criteria for sharing,⁷⁴ no doubt because such open-ended provisions consort badly with an attempt to formulate rules that engage the responsibility of the State for a wrongful act or omission. Yet these wide margins of appreciation cannot be eliminated. The rules of sharing, even more than other rules which may play a part in determining the point of intersection of harm and wrong, are seldom reducible, in their application to a given set of facts, to a relentless, indisputably correct analysis, leading to an inescapable conclusion.

38. State practice, whether reflected in settlements that are nearly always "non-principled", or in agreements that are seldom intended to be an exact reflection of customary law, may be cited in support either of emerging rules of prohibition or of obligations that form the subject-matter of the present topic. In the case of the *Fukuryu Maru*, briefly described above (para. 34), the United States authorities may have considered anxiously whether their conduct of the nuclear

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"Article V

"1. What is a reasonable and equitable share within the meaning of article IV is to be determined in the light of all the relevant factors in each particular case.

"2. Relevant factors which are to be considered include, but are not limited to:

"(a) the geography of the basin, including in particular the extent of the drainage area in the territory of each basin State;

"(b) the hydrology of the basin, including in particular the contribution of water by each basin State;

"(c) the climate affecting the basin;

"(d) the past utilization of the waters of the basin, including in particular existing utilization;

"(e) the economic and social needs of each basin State;

"(f) the population dependent on the waters of the basin in each basin State;

"(g) the comparative costs of alternative means of satisfying the economic and social needs of each basin State;

"(h) the availability of other resources;

"(i) the avoidance of unnecessary waste in the utilization of waters of the basin;

"(j) the practicability of compensation to one or more of the co-basin States as a means of adjusting conflicts among uses; and

"(k) the degree to which the needs of a basin State may be satisfied, without causing substantial injury to a co-basin State.

"3. The weight to be given to each factor is to be determined by its importance in comparison with that of other relevant factors. In determining what is a reasonable and equitable share, all relevant factors are to be considered together and a conclusion reached on the basis of the whole."

(ILA, *Report of the Fifty-second Conference, Helsinki, 1966* (London, 1967), p. 488; text reproduced in *Yearbook ... 1974*, vol. II (Part Two), pp. 357-358, document A/CN.4/274, para. 405.)

⁷⁴ See draft articles 5 and 6 submitted by the Committee on Legal Aspects of the Conservation of the Environment (ILA, *Report of the Sixtieth Conference, Montreal 1982*, ..., pp. 168, 170 and 171). Those draft articles were not included in the resolution adopted by the International Law Association (see footnotes 50 and 52 above).

bomb test breached any international obligation. Whether they did so or not, there is no doubt at all that they recognized a duty to respond positively when the bomb tests were shown to have caused serious injuries to foreign nationals on the high seas. Obviously, the more closely State practice approaches uniformity, the better will be the prospect of identifying an emerging rule of prohibition; but as has been noted, such norms emerge slowly and meagrely in proportion to the richness of State practice. Often, as the judgments of the International Court of Justice in the *North Sea Continental Shelf* cases⁷⁵ and the *Fisheries Jurisdiction* cases⁷⁶ bear witness, law provides the parameters for solutions that allow elements of choice, in order that the best results may be secured for the various interests affected.⁷⁷ In one sense, therefore, the question which underlies this topic is whether lawyers take so narrow a view of their discipline that they do not share the sense of responsibility of others who influence the behaviour of States, and wait until the latter have provided the materials from which general rules of prohibition may be discerned.

39. To put the argument differently, it is the Commission's own invariable working rule that no attempt should be made to fix the boundary between progressive development and codification. This is not because that boundary is unreal or unimportant, but because the attempt to mark it out would magnify every possibility of disagreement and would obscure every avenue of progress. In much the same way, when States adjust their overlapping interests, they mix pragmatism with regard for principle. This does not constitute an abandonment of legal reasoning in favour of blind compromise. On the contrary, it would be irrational to attempt to resolve complex issues by searching, at the outset, for a point of intersection of harm and wrong. To do so would imply that, up to this elusive point, States are free to act as they please and that, beyond this point, their conduct is always wrongful. Nothing in the State practice which concerns this topic, or in the legal rules by which any democratic society regulates the fundamental freedoms of its members, justifies such a view. It is of course most desirable that States should delimit by agreement their respective rights and obligations in greater or smaller areas. In doing so, they liquidate—but seldom completely liquidate—the more generalized obligation with which this topic deals.

D. The continuum of prevention and reparation

40. The habit of squeezing every interpretation of State practice into the mould of rules of wrongfulness dies hard, even when the topic is by definition concerned with the consequences of acts that are *not* prohibited by international law. Thus, even in relation to the present topic, one or two representatives suggested, in the Sixth Committee of the General Assembly, at its

⁷⁵ Judgment of 20 February 1969, *I.C.J. Reports 1969*, p. 3.

⁷⁶ Judgments of 25 July 1974, *I.C.J. Reports 1974*, pp. 3 and 175.

⁷⁷ See the second report, document A/CN.4/346 and Add.1 and 2 (see footnote 2 above), paras. 53-54.

thirty-seventh session, that there was a conceptual difference between rules of prevention and rules of reparation,⁷⁸ or asked why the schematic outline refused to prohibit an act unduly injurious to others.⁷⁹ A topic dealing with liability for injurious consequences arising out of acts *not* prohibited by international law cannot prohibit acts which give rise to injurious consequences. Rules of prevention are conceptually different from rules of reparation only when the latter are triggered by wrongfulness, that is, when they arise from "secondary", not "primary", rules. From a formal standpoint, the subject-matter of the present topic must be expressed as a compound "primary" obligation that covers the whole field of preventing, minimizing and providing reparation for the occurrence of physical transboundary harm. The true parallel, suggested in earlier reports,⁸⁰ is with obligations relating to the treatment of aliens, which allow the receiving State an opportunity to repair any injury an alien in its territory has suffered, and so to avoid wrongfulness.

41. It is nonetheless true—in a looser, less doctrinaire sense—that these compound "primary" obligations contain their own "secondary" elements. In that connotation—and with all the reservations expressed in the previous paragraph—it seems to the Special Rapporteur to be legitimate to describe the rules which engage State responsibility for a wrongful act or omission, and the rules dealt with in the present topic, as embodying "different shades of prohibition".⁸¹ So, for example, the failure of a State official to deal scrupulously with an alien precipitates a situation in which a response is required of the receiving State to redress the injury done to the individual alien and his State of nationality. The case of the *Fukuryu Maru*, already considered (see para. 34 above), may be characterized in the same way: the fact of physical injury and loss to Japanese fishermen, arising out of bomb tests conducted by the United States over the high seas, calls for and receives a response from the United States to redress the injury. Naturally, it remains open to the injured State to insist that the injury was caused wrongfully, and to the acting State to deny the validity of either ground of claim. The

⁷⁸ See e.g. the observations made by the representative of the United Kingdom, Mr. Berman (*Official Records of the General Assembly, Thirty-seventh Session, Sixth Committee*, 48th meeting, para. 20).

⁷⁹ See e.g. the observations made by the representative of Zaire, Mr. Baïanda (*ibid.*, 51st meeting, para. 16).

⁸⁰ See footnote 20 above.

⁸¹ This seems to be the sense in which the representatives of Italy, Mr. Sperduti, and Morocco, Mr. Gharbi, spoke, in the Sixth Committee of the General Assembly, in 1982, of the need to provide for both the "primary" duty to avoid or minimize loss or injury, and the "secondary" duty to make reparation, which came into play only in the last resort (*Official Records of the General Assembly, Thirty-seventh Session, Sixth Committee*, 47th meeting, para. 33, and 50th meeting, para. 37, respectively). See also, in this connection, the observations of Mr. Reuter at the thirty-third session of the Commission:

"... throughout the preparation of the articles in Part One of the topic of State responsibility, the Commission had taken care not to state primary rules. In his view, however, it had not been careful enough when it had drafted provisions on the exhaustion of local remedies." (*Yearbook ... 1981*, vol. I, p. 220, 1685th meeting, para. 25.)

possibility of pursuing such a claim upon two quite different grounds should not be regarded as a disadvantage; for, as the Special Rapporteur on the topic of State responsibility has reminded the Commission in his fourth report, allegations of wrongful action are a good deal more numerous than admissions.⁸²

42. It is also entirely true, as one representative in the Sixth Committee took especial pains to point out, that initiatives taken in pursuance of the present topic may be less productive of antagonism than accusations of wrongfulness. According to that representative:

It was often forgotten that the application of local remedies might go a long way towards repairing and removing injury and thereby towards avoiding putting into effect responsibility and liability in State to State relations ...

Therefore, he continued, and the Special Rapporteur agrees, particular emphasis should be placed on establishing, as an initial measure, equal access for aliens, and non-discriminatory treatment, in domestic courts. In so far as those measures yielded substantial results, they would have the additional advantage of dealing directly with harm done to private individuals by privately conducted activities, thus avoiding the artificiality of making States the nominal parties in matters that might really concern an appropriate recompense to an injured individual.⁸³

43. In short, this topic allows a soft approach to the problem of reconciling one State's freedom of action with another State's freedom from transboundary harm. Wherever possible, the topic provides the means of avoiding State to State confrontations. As in the *Poplar River Project* case,⁸⁴ it uses congruent municipal legal standards in the measurement and analysis of substantial loss or injury. In numerous treaty régimes, it refers the assessment of claims to municipal tribunals. It reduces the nightmare that a State may be absolutely liable for all physical transboundary loss or injury generated within its territory or under its control to the not so impossible dream that States are never without the shadow of an obligation in relation to situations or activities over which international law gives them exclusive or dominant territorial or other jurisdiction.

44. However soft the approach, it must not in the end leave the affected State as a mere supplicant, entitled only to whatever relief the laws and tribunals of the source State may provide. Subjection to the rule of prior exhaustion of local remedies is, in relation to the present topic, a question of deliberate choice;⁸⁵ even in matters as comparatively straightforward as the regulation by neighbouring States of transboundary civil wrongs, sub-

⁸² See p. 8 above, document A/CN.4/366 and Add.1, para. 37.

⁸³ Observations made in the Sixth Committee of the General Assembly by the representative of the Netherlands, Mr. Siblesz, delivering the statement of his colleague, Mr. Riphagen (the quotation is from the verbatim text of the statement) (*Official Records of the General Assembly, Thirty-seventh Session, Sixth Committee*, 46th meeting, paras. 48-49).

⁸⁴ See footnote 72 above.

⁸⁵ See the contrary view of the representative of the Netherlands, Mr. Siblesz (*loc. cit.*, footnote 83 above).

mission to the law of the source State is frequently qualified by conferment of jurisdiction on boundary commissioners rather than on ordinary courts, and by providing for removal to the level of diplomatic negotiation in the case of larger claims.⁸⁶ More generally, it is of course true that this system of “different shades of prohibition” is in part an appeal to self-regulation by the source State: if it cannot reach agreement with an affected State, it is at least in duty bound to take objective account of the legitimate interest of the affected State, whether by providing a protective régime or by providing reparation for a transboundary loss or injury not governed by an adequate or agreed régime. What is the alternative: continuing, unlitigated disagreement about a question to which in real life the parties never directly address themselves, namely, the theoretical point of intersection of harm and wrong? Small wonder, then, that nearly all settlements are “non-principled”.

45. On the other hand, it is self-defeating for those who approach this topic mainly from the standpoint of an affected State to assume that the risk or occurrence of physical transboundary loss or injury necessarily entails either a wrongful act or omission, or the strict liability, of the source State. If, for example, there is concern that a neighbouring State is constructing hydroelectric or atomic power stations with insufficient regard to their placement or safety margins, and a joint inquiry into these factual questions is desired, it would seldom make good sense to suggest that the neighbouring State must bear the full cost of the inquiry.⁸⁷ If there is concern that obsolete industrial methods in one country cause hazards or outright losses in another country, it may be appropriate for both countries to contribute to the costs of the clean-up.⁸⁸ If a developing State cannot afford not to become the repository of some wealthier country’s “dirty” industries, it may require international effort—perhaps monitored and organized by an appropriate international organization—to arrive at solutions that do justice to the interests of the source State and of other affected States.⁸⁹ If scientific advances show that a pollution standard once thought satisfactory has contributed to deaths from pulmonary diseases across an international frontier, any question of the liability of the source State must take into account the former “shared expectation” that no such

⁸⁶ See e.g. articles 41, 48 and 49 of the Treaty between Hungary and Romania concerning the régime of the Hungarian-Romanian State frontier and co-operation in frontier matters, signed at Budapest on 13 June 1963 (United Nations, *Treaty Series*, vol. 576, p. 275).

⁸⁷ See the contrary view expressed in the Sixth Committee of the General Assembly in 1982 by the representative of Zaire, Mr. Balanda (*Official Records of the General Assembly, Thirty-seventh Session, Sixth Committee*, 51st meeting, para. 17).

⁸⁸ See e.g. articles 5 and 7 of the Convention on the Protection of the Rhine against Pollution by Chlorides, signed at Bonn, on 3 December 1976, by France, the Federal Republic of Germany, Luxembourg, the Netherlands and Switzerland (*International Legal Materials* (Washington, D.C.), vol. XVI, No. 3 (March 1977), p. 265).

⁸⁹ See the observations made at the thirty-second session of the Commission by Mr. Sucharitkul (*Yearbook ... 1980*, vol. I, p. 246, 1631st meeting, paras. 4 and 5). See also the observations referred to in footnote 43 above.

causal relationship would exist.⁹⁰ Not every risk or occurrence of substantial, unregulated, physical transboundary loss or injury is allowed to arise through a wrongful act or omission of the source State; but it is submitted that a sustained refusal of co-operation by the source State is in such circumstances always wrongful.

46. The six preceding paragraphs do not exhaust the theoretical and practical difficulties that have been raised in connection with the simplest and most popular theme of the present topic: the continuum of prevention and reparation. While acknowledging the paramount importance of prevention, it has been felt by some that this topic can, or should, begin only where prevention leaves off.⁹¹ The Special Rapporteur does not quite understand the nature of this difficulty. It may be partly a matter of stereotyping: the term “liability” and, more particularly, the concept of strict liability, conjure up an image of compensation for a loss or injury that has not been avoided. Again, it has often enough been said that, while States continue to give attention to the need to prevent transboundary losses and injuries, they have signally failed to develop a sense of obligation to make good the losses and injuries that have not been prevented.⁹² Principle 22 of the Stockholm Declaration⁹³ remains largely undeveloped, ten years after it attracted the full support of the world community. Therefore, the argument may run, it is the function of the present topic to fill that gap.⁹⁴

47. But what is “prevention” and what is “reparation”? Reparation has always the purpose of restoring as fully as possible a pre-existing situation; and, in the context of the present topic, it may often amount to prevention after the event. In the *Trail Smelter* case,⁹⁵ the assessment of compensation for proven losses was a minor and preliminary phase of the arbitral tribunal’s work. The lion’s share of the tribunal’s attention was devoted to discussing the means by which future loss or

⁹⁰ See the contrary view expressed in the Sixth Committee of the General Assembly, in 1982, by the representative of Jamaica, Mr. Robinson (*Official Records of the General Assembly, Thirty-seventh Session, Sixth Committee*, 40th meeting, para. 32).

⁹¹ See e.g. the observations made in the Sixth Committee by the representative of Brazil, Mr. Calero Rodrigues (*ibid.*, 43rd meeting, para. 63) and, in a slightly different sense, by the representative of Spain, Mr. Laclea Muñoz (*ibid.*, 48th meeting, para. 32).

⁹² See the preliminary report, document A/CN.4/334 and Add.1 and 2 (see footnote 2 above), paras. 5-9. See also the observations made at the thirty-second session of the Commission by Mr. Riphagen (*Yearbook ... 1980*, vol. I, p. 239, 1630th meeting, para. 30).

⁹³

“Principle 22

“States shall co-operate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction.” (*Op. cit.*, footnote 54 above.)

⁹⁴ See the contrary view expressed in the Sixth Committee of the General Assembly, in 1982, by the representative of France, Mr. Museux (*Official Records of the General Assembly, Thirty-seventh Session, Sixth Committee*, 38th meeting, para. 17).

⁹⁵ See the second report, document A/CN.4/346 and Add.1 and 2 (see footnote 2 above), paras. 22, 25-28 and 34-39.

injury could be avoided, consistently with the continued economic viability of the smelting enterprise. The measure of Canada's obligations was set as adherence to a prescribed régime, believed to be sufficient to avoid future loss or injury; but, as a further condition of the operation of an enterprise that might still entail transboundary risks, Canada was required also to provide an indemnity for losses or injuries actually incurred. The measure of reparation was therefore prevention, plus a guarantee. The preventive régime represented an objective standard, comparable with article 3, paragraph (2), of the Montreal Rules:⁹⁶ the guarantee, which may be compared or contrasted with article 3, paragraph (1), of those Rules, represented a condition attaching to an act or omission not prohibited by international law. The act or omission in question was the exercise or non-exercise of Canada's regulatory powers as a territorial sovereign to allow the activity of the Trail Smelter to continue.

48. Looked at in this light, State practice is less negative than has often been supposed. The *Colorado River* case,⁹⁷ between the United States of America and Mexico, began badly with a flat denial of United States liability for large losses borne by Mexican landholders,⁹⁸ because river water, used for irrigation in the United States, had high salt levels in the transboundary flow.

⁹⁶ See footnote 52 above.

⁹⁷ On 30 August 1973, the United States of America and Mexico signed an agreement on a "permanent and definitive solution to the international problem of the salinity of the Colorado River" (see *United States Treaties and Other International Agreements*, vol. 24, part 2 (1973), p. 1968).

⁹⁸ The problems likely to arise from salinity had been foreseen as early as 1945 in hearings of the Senate Foreign Relations Committee on the 1944 Water Treaty between Mexico and the United States, and had been the subject of an exchange between Senator Millikin and Assistant Secretary of State Acheson:

"*Senator Millikin*: Do you know of any international principle that should keep us from giving Mexico the water with the salinity that it may have as it has normally developed under our own consumptive use?

"*Mr. Acheson*: No, sir.

"*Senator Milliken*: Could we give Mexico a better claim, so far as pure water is concerned, or fresh water, than we have among ourselves?

"*Mr. Acheson*: No, sir.

"*Senator Milliken*: Is there any international principle that compels that method of doing business?

"*Mr. Acheson*: No, sir.

"*Senator Milliken*: Now, return flows, to which the Senator from California refers, as they reach the Mexican border, are those flows which have returned from the last user of those waters in Arizona or in California. They are as saline as they are due to their consumptive use as envisioned by the compact. We do not add to their salinity deliberately, nor have we any way of taking the salinity out of the water except possibly by use of very elaborate chemical works, or something of that kind. Is there any international principle that would require that we do anything of that kind?

"*Mr. Acheson*: Not to my knowledge.

"*Senator Milliken*: In other words, Mexico must take the water as it arrives at the border; is that correct?

"*Mr. Acheson*: That is correct.

"*Senator Milliken*: The salinity of that water arises from geography and consumptive use rather than from the treaty; is not that correct?

"*Mr. Acheson*: That is correct."

(*Water Treaty with Mexico. Hearings before the Committee on Foreign Relations, United States Senate, 79th Congress, 1st Session* (Washington, D.C., 1945), pp. 1764-1765 and 1770-1771.)

The protracted discussions between the two parties ended more happily, with the provision by the United States of desalination and other equipment. The costs incurred by the United States in eliminating the problem were comparable with the large indemnities that Mexico had claimed; and there was also some provision for assistance to Mexican farmers in rehabilitating their land.⁹⁹ It is not a weakness in the legal precedents that States should choose to stress duties of prevention rather than of compensation. It would be more worrying if States were disposed to settle easily for the proposition that every transboundary loss or injury has its

⁹⁹ Minute No. 242 of 30 August 1973 of the International Boundary and Water Commission, on the agreement concluded by the United States of America and Mexico, provides in article 7:

"7. The United States will support efforts by Mexico to obtain appropriate financing on favourable terms for the improvement and rehabilitation of the Mexicali Valley. The United States will also provide nonreimbursable assistance on a basis mutually acceptable to both countries exclusively for those aspects of the Mexican rehabilitation programme of the Mexicali Valley relating to the salinity problem, including tile drainage. In order to comply with the above-mentioned purposes, both countries will undertake negotiations as soon as possible." (United States of America, *The Department of State Bulletin*, vol. LXIX, No. 1787 (24 September 1973), p. 396.)

At a press conference held after the signing of the minute, President Nixon's special representative for resolution of the salinity problem with Mexico, Mr. Herbert Brownell, made the following remarks and replies:

"..."

"The United States and Mexico entered into an agreement in 1944 which called for delivery of a certain quantity of water to Mexico each year, but there was nothing said in the agreement about the quality of the water, and when some of these irrigation districts opened up, like the Wellton-Mohawk District, it substantially decreased the quality of the water so that Mexico had complained that it made it impossible for them to profitably use irrigated lands in the Mexicali Valley for the growing of agricultural crops.

"Their claim was a substantial one, and many hundreds of acres, if not thousands of acres, in their calculations, were adversely affected by the low quality of the water and many acres were taken out of cultivation altogether; so that it meant a decrease in their agricultural income and it meant a decrease in the standard of living, according to their reports, of many of the farmers in that area of Mexico.

"The purpose, therefore, of this agreement was to restore the quality of the water, guarantee that for the future, and settle this irritating dispute between the two nations. And it will mean that from now on they will have usable water for the irrigation of the crops in that whole valley.

"..."

"Q. How much damage, how many million dollars in damages have the Mexican farmers asked for the damage to the Mexicali Valley croplands?

"*Ambassador Brownell*: Of course, that has never been adjudicated, but the claims have been up to about \$150 million.

"Q. Now, is the drainage ditch that is going to be lined to the Gulf of California, is that going to be in lieu of the damages that the Mexican farmers have asked?

"*Ambassador Brownell*: There is no provision for damages in this agreement whatsoever.

"Q. I know it is an 'in lieu of'. President Echeverría Alvarez said last month that the drainage ditch, the lined canal which will protect their wells in the Mexicali Valley, would be in lieu of, or part of, the damage claims that the Mexican farmers have made. Is this true?

"*Ambassador Brownell*: I think you could say that the whole settlement is in lieu of an acrimonious dispute over damages, yes. The whole settlement is in substitution for fighting it out.

"..."

(*Ibid.*, pp. 388-389.)

price, even when the affected State is a thoroughly unwilling seller.

49. It is, however, equally important that source States in fact recognize a duty to do more than secure the observance of whatever measures of prevention are considered feasible, taking due account of technical and economic possibilities, as well as of the magnitude of the risk. Source States may also contribute to filling perceived gaps in the standards of protection by making provision for liability in the event that loss or injury ensues. Questions affecting the sea carriage of oil afford a very clear example of all the variables. Ship construction and maintenance, and port facilities, are required to be of a standard that is judged to provide substantial protection at manageable cost,¹⁰⁰ and municipal courts are used to determine claims, which are governed by strict but limited liability.¹⁰¹ There is also a measure of international guarantee, charged upon the industry and its customers.¹⁰² The fact that the two principal treaties in this field are to be revised in 1984¹⁰³ is an illustration that, although basic principles do not change, their application in particular areas may call for reassessment in the light of actual experience, of improved technology, or even of an evolving sense of community standards.

50. In spite of all the qualms to which reference has been made, majority opinion in the Sixth Committee has each year given a strong endorsement to the proposal that prevention and reparation should both be treated in the context of this topic. This was especially clear at the thirty-seventh session of the General Assembly, in 1982.¹⁰⁴ It could hardly be otherwise, if

the Commission wishes to base itself on State treaty practice. The Special Rapporteur wishes to stress that the division between sections 3 and 4 of the schematic outline¹⁰⁵ is not a division between prevention and reparation: it is a division between the steps that should be taken when States foresee a need to construct a régime of prevention and reparation, and the steps that must be taken when a physical transboundary loss or injury has occurred and the obligations of the course State have not been predetermined by any applicable or accepted régime. The policy of the schematic outline is to reflect and encourage the growing practice of States to regulate these matters in advance, so that precise rules of prohibition, tailored to the needs of particular situations—including, if appropriate, precise rules of strict liability—will take the place of the general obligations treated in this topic.

E. Strict liability

51. As the early paragraphs of this report recall, wrongfulness and strict liability are often regarded as the active principles of two quite distinct systems of obligation—the only possible systems of obligation that legal reasoning admits. The gap between the two systems, thus conceived, is very wide, because strict liability relates obligations to the occurrence of loss or injury, taking no other account of the involvement of the source State than its hierarchical connection, whether or not territorial, with the generator of the harmful consequences. With such a clear-cut distinction in mind, it is not surprising that a partisan of strict liability should be disconcerted by the open texture of the Special Rapporteur's schematic outline, and by his doctrinal struggle to liberate the concept of obligations arising without wrongfulness from the sticky embrace of State responsibility for wrongful acts or omissions. There is no doubt a certain amount of truth in the view taken by several speakers in the Sixth Committee¹⁰⁶ that the Special Rapporteur has worried more about protecting source States from unreasonable demands than

reparation expressed their agreement with the general thrust of the schematic outline. See e.g. the observations of the representatives of Greece, Mr. Economides (*ibid.*, 40th meeting, para. 48); Madagascar, Mr. Razanakoto (*ibid.*, 46th meeting, para. 123); Tunisia, Mr. Mahboui (*ibid.*, 47th meeting, para. 71); Indonesia, Mr. Oerip (*ibid.*, 48th meeting, para. 72); Bahamas, Mr. Maynard (*ibid.*, para. 84); and Egypt, Mr. El-Banhawy (*ibid.*, 50th meeting, para. 7). See, however, the observation of the representatives of Brazil, Mr. Calero Rodrigues (*ibid.*, 43rd meeting, paras. 63 and 65); Finland, Mr. Hakapää (*ibid.*, 45th meeting, para. 11); Spain, Mr. Laclea Muñoz (*ibid.*, 48th meeting, para. 97); and the Libyan Arab Jamahiriya, Mr. Azzarouk (*ibid.*, 49th meeting, para. 53); all of whom, though not doubting the importance of prevention, thought the duty of reparation should be further stressed and, in one or two cases, expressed reservations about the extent to which duties of prevention could be developed within the scope of the present topic.

¹⁰⁵ See footnote 23 above.

¹⁰⁶ See e.g. the observations made by the representative of Finland, Mr. Hakapää (*Official Records of the General Assembly, Thirty-seventh Session, Sixth Committee*, 45th meeting, para. 10). See also the observations made by the representative of Trinidad and Tobago, Mr. McKenzie, who asked why the automatic application of the rule of reparation for loss or injury did not figure in the schematic outline (*ibid.*, 51st meeting, para. 65).

¹⁰⁰ See the International Convention for the Prevention of Pollution from Ships, signed at London on 2 November 1973 (IMCO publication, Sales No. 74.01.E) and the Protocol relating to that Convention, signed at London on 17 February 1978 (*idem*, Sales No. 78.09.E).

¹⁰¹ See the International Convention on Civil Liability for Oil Pollution Damage, signed at Brussels on 29 November 1969 (*idem*, Sales No. 77.16.E).

¹⁰² See the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, signed at Brussels on 18 December 1971 (*idem*, Sales No. 1972.10.E).

¹⁰³ Substantive issues and proposed solutions are described in IMO, "Report of the Legal Committee on the work of its fiftieth session" (LEG 50/8), of 17 March 1983, paras. 10-108.

¹⁰⁴ See e.g. the observations made by the representatives of Thailand, Mr. Sucharitkul (*Official Records of the General Assembly, Thirty-seventh Session, Sixth Committee*, 44th meeting, para. 27); Canada, Mr. Bacon (*ibid.*, 45th meeting, para. 86); Japan, Mr. Hayashi (*ibid.*, 46th meeting, para. 25); Italy, Mr. Sperduti (*ibid.*, 47th meeting, para. 33); Mexico, Mr. González Gálvez (*ibid.*, para. 52); Australia, Mr. De Stoop (*ibid.*, 48th meeting, para. 10); Romania, Mr. Mazilu (*ibid.*, 49th meeting, para. 10); Sierra Leone, Mr. Koroma (*ibid.*, para. 44); Morocco, Mr. Gharbi (*ibid.*, 50th meeting, paras. 36-37); Iraq, Mr. Al-Qaysi (*ibid.*, para. 54); Bangladesh, Mr. Morshed (*ibid.*, para. 67); Zaire, Mr. Balanda (*ibid.*, 51st meeting, para. 16); Kenya, Mr. Wabuge (*ibid.*, para. 49); and Austria, Mr. Tuerk (*ibid.*, para. 99). The representative of India, Mr. Jagota, also referred to the need for a preventive régime as well as for a régime of reparation, but that remark, which appears in the verbatim record, does not appear in the summary record of the 46th meeting. The representative of the United States of America, Mrs. Schwab, indicated a readiness to contemplate duties of prevention as well as reparation, provided the scope of the topic was suitably narrowed (*ibid.*, 52nd meeting, para. 28). In addition, a number of speakers who did not refer explicitly to the duties of prevention and

about ensuring reparation for affected States. That is partly because it does not seem advisable to state the principles and factors in sections 5 and 6 of the schematic outline too fully and definitely until it is possible to make a close contextual examination of the State practice which supports them.

52. Two recent commentators on the Commission's current work on this topic, G. Handl¹⁰⁷ and C. G. Caubet,¹⁰⁸ are concerned by the extent of the Special Rapporteur's reliance upon the duty of source States to negotiate—or, if that is not possible, to provide unilaterally—suitable régimes of prevention and reparation, without the compulsion of an ultimate rule of strict liability. They would wish to strengthen the residual rule, and indeed to give it much more than a residual character. It is hardly possible and perhaps not appropriate to the balance of the present report to include any detailed commentary upon these still unpublished papers; but the Special Rapporteur must try, without misrepresenting the learned authors, to indicate the salient features of the solutions they propose. In both cases, the main effect would be to impose upon the source State an unqualified obligation, in the nature of strict liability, to provide reparation for physical transboundary loss or injury. Caubet narrows the scope of this obligation by applying the distinction between rights and interests¹⁰⁹ dwelt upon in the *Lake Lanoux* award.¹¹⁰ Handl does so by confining the scope of the presumption of strict liability (but not the scope of the topic) to Jenks's criterion of ultra-hazard—that is, the threat of exceptionally grave consequences coupled with a low probability of their occurrence—and to losses or injuries that are typical of the risks associated with the generating activity.¹¹¹

¹⁰⁷ G. Handl, "International liability of States for marine pollution", *The Canadian Yearbook of International Law*, 1983 (Vancouver), vol. XXI, p. 85.

¹⁰⁸ C. G. Caubet, "Le droit international en quête d'une responsabilité pour les dommages résultant d'activités qu'il n'interdit pas", report submitted to the Centre for Research and Studies on International Law and International Relations of the Hague Academy of International Law (1982 session), on the international responsibility of States.

¹⁰⁹ "Certain dommages correspondront à un droit, d'autres à un simple intérêt. La question du seuil du dommage indemnisable s'apparente alors à celle du seuil à partir duquel un intérêt obtient la protection juridique et devient un droit."

¹¹⁰ United Nations, *Reports of International Arbitral Awards*, vol. XII (Sales No. 63.V.3), p. 316, para. 23; see also *Yearbook ... 1974*, vol. II (Part Two), p. 198, document A/5409, para. 1068.

¹¹¹ "A truly different approach, however, has been taken by Professor Quentin-Baxter, the International Law Commission's Special Rapporteur on 'international liability for injurious consequences arising out of acts not prohibited by international law'. Particularly his second and third reports on the topic present a challenging invitation to rethink the fundamental premises for loss allocation in the international legal system. After some apparent initial hesitation, he now fully acknowledges the intrinsic merits of the notion of 'special danger' as a loss-shifting device in situations in which the acting State's conduct free of blame. He thus gives recognition to the key role of foreseeability of harm typical of a given activity, not in the sense that it be occasioned as a consequence of a particular way in which the activity is carried on, but as a statistical probability, albeit a very low one, which reasonable care cannot eliminate." (*Loc. cit.* (footnote 107 above), pp. 105-106.)

53. Caubet, confessing to heresy, settles for a "mixed régime", in which activities attract no taint of unlawfulness except when they give rise to physical transboundary loss or injury; but there is then a presumption that the loss or injury has been caused unlawfully.¹¹² The rebuttal of that presumption turns upon a threshold test, which incorporates a reference to all or most of the principles and factors enumerated in sections 5 and 6 of the schematic outline.¹¹³ Superficially, this solution may look like a more dynamic version of article 3, paragraph 1, of the Montreal Rules,¹¹⁴ but it is not. It preserves the objective element of an obligation a breach of which would engage the responsibility of the State for a wrongful act or omission; but unlike article 3, paragraph 1, of the Montreal Rules, it suppresses the subjective element. The defence of non-attributability is denied. In a way, this is an all-or-nothing solution: if the affected State fails to establish that the loss or injury has infringed its rights, the victim will be left to pursue whatever remedies municipal law and international solidarity leave open to it. But Caubet can reply cogently, first, that his threshold test favours the view that substantial transboundary loss or injury infringes a right and, secondly, that the very existence of their obligation of strict liability would give States a stronger incentive to make their own agreements embodying that principle, and taking incidental account of interests as well as of rights.

54. The real question is: how much is gained, and at what cost, by Caubet's interesting, if heretical, solution? The Special Rapporteur, who makes no great claim to orthodoxy in his own behalf, does not have a decided view, but will indicate some of the factors. Failing an explicit stipulation in an applicable régime, there must always be room for evaluation of such issues as the way in which a loss or injury should be characterized, and whether that kind of loss or injury was foreseeable; whether the loss or injury is substantial; and whether the quantum of reparation is affected by any question of sharing, or by a change in the circumstances that existed when the activity which gave rise to the loss or injury was established. Caubet seems, a little improbably, to crowd all such issues into his threshold measurement of harm. They have then to be assessed in an all-or-nothing context: everything depends upon determining the point of intersection of harm and quasi-wrong. That is what the Special Rapporteur had hoped to avoid, by relating obligations of non-wrongfulness to the way in which States actually behave, rather than to the evasive tests of

¹¹² "On en vient ainsi à envisager un régime mixte—et sans doute hérétique, du point de vue théorique—dans lequel l'activité dangereuse bénéficie d'une présomption de licéité, tandis que ses conséquences préjudiciables tombent sous le coup d'une présomption d'illicéité."

¹¹³ "Il apparaît donc nécessaire de faire respecter un certain équilibre entre les droits et intérêts des parties concernées. M. Quentin-Baxter expose de manière détaillée neuf éléments qui sont 'notamment pertinents pour apprécier l'équilibre des intérêts ...'." There follows a footnote reference to section 6 of the schematic outline.

¹¹⁴ For text, see footnote 52 above. Concerning the application of that rule, see para. 28 above.

wrongfulness which they seek to evade. There is, incidentally, no reason why the right to reparation, and the principles and factors safeguarding it, should not be stated as strongly as the Commission considers prudent and warranted by developing State practice.¹¹⁵

55. Handl has no difficulty in remaining within the field of non-wrongfulness. He approves the general thrust of the Commission's work on the present topic, seeing in that work, and in the General Assembly's continuing support, mounting evidence of the acceptance of the principle of strict liability, at least in the area of ultra-hazard. He approves, in particular, the emphasis, in earlier reports on this topic, upon the foreseeability of risks associated with a particular activity as a criterion justifying an obligation in the nature of strict liability; and he develops the concept of a risk typical of an activity.¹¹⁶ Handl does not so much depart from the schematic outline as add a bold and comprehensively argued rider: risks typical of an activity that is ultra-hazardous should be presumed to fall on the source State, eliminating the need to put in play all the other principles and factors that might enter into a balance of interests.¹¹⁷ He chooses to present his general thesis in one of the most difficult areas: the area of accidental, ship-based marine pollution. In this area the very identity of the source State must be ascertained according to the division of competence between flag State and coastal State; and States have never assumed liability for these risks, either directly or as guarantors. The economic interest in super-tankers multiplies the environmental dangers; and the strict, but limited, liability of the industry is as much to protect it from the excessive territorial jurisdiction of the coastal State as to provide an assurance of some reparation for serious accidents.

56. In a legal system with a legislature, Handl's article, and earlier work in similar vein, would provide the kind of thesis that has often set in train a more comprehensive inquiry, leading at length to legislative intervention and an abrupt change in the policy of the law. For his appeal is not only to standards of fairness and morality, well enough grounded in municipal legal systems to have a claim to be regarded as a general principle of law, but also to common sense and to efficiency. The criterion of foreseeability is applied rigorously, so that risks may be insurable and the venture actuarially

¹¹⁵ For example, the Commission states in its report on its thirty-fourth session:

"... as one Commission member pointed out, the schematic outline did envisage a rule of automatic answerability. Several members noted that this rule needed the support of a clearly stated principle that protection should be commensurate with the nature of the activity or the risk." (*Yearbook ... 1982*, vol. II (Part Two), p. 90, para. 137.)

¹¹⁶ See footnote 111 above.

¹¹⁷ "... the notion that the creation of a transnational risk should entail a strict standard of international accountability in the event that typical harm materializes transnationally is expressive of a general principle of law. As such it must be considered a clear indication of universally shared expectations about the requisite balancing of costs and benefits of a transnationally hazardous activity." (*Loc. cit.* (footnote 107 above), pp. 100-101.)

sound. Yet one must recognize that these proposals are *de lege ferenda*. They represent the kind of quantum leap that one may expect to find in a switch from one basis of obligation to another. Meanwhile the interests represented in the IMO Legal Committee have been making their own businesslike preparations for the 1984 Conference to revise the 1969 International Convention on Civil Liability for Oil Pollution Damage and the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage.¹¹⁸ It seems clear that these conventions, which govern a typical area of ultra-hazardous risk, will not be radically changed. The industry, and its clients and insurers, will continue to bear a limited liability in respect of transboundary loss or injury arising from accidental, ship-based pollution. States parties to the conventions will continue to discharge the duties they may owe to each other in respect of such losses and injuries only by establishing and maintaining the civil liability régimes represented by the revised conventions.¹¹⁹

57. It therefore seems to the Special Rapporteur that, if the Commission were to define its aims and its survey of State practice more narrowly than the title of the topic requires, by identifying acts not prohibited by international law with the strict liability of the State, it would outstrip the pace of the international community's advance and would run the risk of obscuring the genuine, underlying momentum of that advance. In this report considerable emphasis has been placed upon the difficulty of articulating the ordinary standards of State responsibility for wrongful acts and omissions in ways that offer practical solutions to current legal problems. The theoretical answer may be a move to the standards of the strict liability of the State. The Commission will not wish to neglect the reasoned arguments of Handl and others that this is a feasible standard, and the only one which finally discourages the shabby compromises that assail the biosphere and leave the victims of avoidable disasters with inadequate redress. Any solutions that the Commission offers must leave the way wide open for further advances. The schematic outline was designed to do that; and, as many have noted, the principles in section 5 need considerable development. However, it should also be borne in mind that, in making the leap to the strict liability of the State, legal doctrine falters and models in State practice are few.

F. Final considerations

58. For a number of reasons, the Special Rapporteur has chosen to present this report in the form of a general review. Some reasons are circumstantial. The priorities settled by the Commission at its thirty-fourth session, in 1982, left no possibility that draft articles on this topic could reach the Drafting Committee at the following session. The third and last part of the Secretariat's valuable study of State practice did not reach the Special Rapporteur in time for his consideration before the current session of the Commission; and the three parts,

¹¹⁸ See footnotes 101 and 102 above.

¹¹⁹ See footnote 103 above.

dealing respectively with multilateral and bilateral treaty practice and with settlements and claims, need to be considered side by side. The Special Rapporteur welcomes the interest shown in these materials in the Sixth Committee and in the Commission, and he takes this opportunity to renew earlier requests that the materials be made more widely available. The third part of the study, which is presented only as a collection of documents, would need to be put in the form of an analytical study, corresponding more closely to the two earlier parts, so that the reader can more easily understand the criteria that have governed the selection of materials.¹²⁰

59. As may be seen from the topical summary of the debates of the Sixth Committee on the Commission's report during the thirty-seventh session of the General Assembly, the chapter of the report dealing with this topic attracted great interest and predominantly favourable comment.¹²¹ Nevertheless, there was some concern that the General Assembly seemed to be getting mixed signals from the Commission about this topic; and two or three speakers took the view that the Commission should take an early decision whether to continue its consideration of the topic. The Special Rapporteur shares that view and wishes to facilitate such a decision. Eleven years after the Commission identified the topic, six years after it was described by a working group and placed on the active agenda, one year after an initial set of materials was completed, and with four reports canvassing the nature of the topic, 1984 is perhaps the earliest and the latest year in which such a decision should be taken. The work of the Commission has often involved a collegiate commitment to topics for which individual members have little enthusiasm; but the commitment must be made, or the General Assembly's agreement sought to remove the topic from the Commission's agenda.

60. Setting aside procedural issues, the main reason for the shape of the present report is its substance. It is not doubted that the progressive development and codification of any international law topic must, above all, be related to State practice. Although there is little practice that exhibits a rule of strict liability of the State in full working order, there is a rich practice illustrating the steps States take—by agreement, or within the rules of international organizations to which they belong, or even unilaterally—in exercise of their obligations, as territorial or controlling authorities, towards other States. This practice cannot, of course, be severed from the rules of State responsibility for wrongful acts or omissions, for these form the backbone of any legal system.

¹²⁰ The dissemination and interchange of ideas is affected also by the availability of documents. The publication of volume II (Part One) of the Commission's *Yearbook*, which contains the Special Rapporteurs' reports, at present goes no further in its English edition than 1979. It seems strange that Special Rapporteurs' reports, which exist in the working languages before they are discussed, should be published long after the summary records of the discussions that relate to them. The main purpose of a think-tank is not that it should be almost soundproof.

¹²¹ A/CN.4/L.352, sect. C.

Nevertheless, as international life grows more complex and is more elaborately organized, attempts to interpret international law solely in terms of breaches of imprecise or disputed rules, engaging State responsibility for a wrongful act or omission, are bound to be inadequate. This is the more true because adjudication, or any other principled determination of a legal dispute, is in this area of international law a rarity.

61. One should not, however, underestimate the vested interest in chaos. Once breach of an international obligation has been alleged and denied, the parties can settle down more or less comfortably to work out a "non-principled" solution; and they will perhaps advert to most of the principles and factors which are—or should be—in the schematic outline. Their "non-principled" solution, and many others like it, will provide ambivalent raw materials, to be drawn upon by researchers as birds build nests. The same stock of materials that fabricated the Montreal Rules must serve the cause of strict liability, and the intermediate solution presented in the third report. For that rather modest solution, State practice offers ample materials, but right of access to them is governed by doctrine. The schematic outline proposes, by drawing on treaty practice and claims settlement practice, to fill the void between the allegation and the denial that physical transboundary loss or injury has been caused wrongfully, or must in any case be repaired; but both the party that alleges and the party that denies can claim that the effort is unnecessary.

62. Some, in fact, think exactly that, reverting approximately to the positions taken prior to the *Trail Smelter* case by the United States of America and Canada.¹²² In a few such cases, wrongfulness, and strict liability for ultra-hazard, are thought to cover every important category.¹²³ Some others believe that no general rule or principle of avoiding and repairing transboundary harm exists. It is considered unrealistic to elaborate such a norm, or to suggest that States have obligations to establish standards for the prevention of loss or injury.¹²⁴ The role of international law is doubted in areas frequently covered by provisions of domestic law governing liability in actions for damages between private persons and private interests; and the test of foreseeability of damage is countered by the argument of absence of responsibility for private activities.¹²⁵ It

¹²² See the second report document A/CN.4/346 and Add.1 and 2 (see footnote 2 above), para. 63.

¹²³ This seems to be the import of the observations made in the Sixth Committee of the General Assembly in 1982 by e.g. the representative of Argentina, Mr. Barboza (*Official Records of the General Assembly, Thirty-seventh Session, Sixth Committee, 49th meeting, paras. 13-15*).

¹²⁴ See the observations made by the representative of the German Democratic Republic, Mr. Görner (*ibid.*, 38th meeting, para. 34).

¹²⁵ See the observations made by the representative of the United Kingdom, Mr. Berman (*ibid.*, 48th meeting, para. 20). See also, on the unwillingness of States to accept responsibility for the activities of private individuals and bodies corporate, the observations made by the representative of France, Mr. Museux (*ibid.*, 38th meeting, para. 17), and by the representative of Zaire, Mr. Balanda (*ibid.*, 51st meeting, para. 13).

has already been noted that the majority opinion, as expressed in the Sixth Committee, adheres to the principle of avoiding, minimizing and repairing transboundary loss, and considers that questions of prevention and reparation should not be separated. It should also be noted that majority opinion specifically rejects the notion that the treatment of the present topic should make any distinction between the obligations of the State arising from public activities and those arising from private activities.¹²⁶

63. To summarize, the motive power of the schematic outline¹²⁷ is the duty of the source State, subject to factors such as sharing and the distribution of costs and benefits, to avoid—or minimize and repair—substantial, physical transboundary loss or injury which is foreseeable, not necessarily in its actual occurrence but as a risk associated with the conduct of an activity. That duty is a concomitant of the exclusive or dominant jurisdiction which international law reposes in the source State as a territorial or controlling authority. The schematic outline stands, subject to the major qualifications that follow, as a reliable general indication of the Special Rapporteur's proposals for the development of the topic. In accordance with the clear trend of majority opinion in 1982, both in the Commission and in the Sixth Committee, the description of the scope of the topic, contained in section 1 of the schematic outline, will be confined to physical activities giving rise to physical transboundary harm. The essential reason for this change is that State practice is at present insufficiently developed in other areas. Secondly, as the detailed examination of State practice progresses, the statement of principles, in section 5 of the schematic outline, will be amplified and strengthened to the extent that State practice is found to justify; and the statement of factors, in section 6 of the schematic outline, will be correspondingly adjusted. It is this process that will determine the degree to which the solutions contained in the schematic outline approach the standard of strict liability.

64. The third and last major qualification is that, as several commentators have noted,¹²⁸ much greater account must be taken of the role of international

¹²⁶ See e.g. the observations made by the representatives of Brazil, Mr. Calero Rodrigues (*ibid.*, 43rd meeting, para. 62); the Netherlands, Mr. Siblesz (*ibid.*, 46th meeting, para. 46); Australia, Mr. De Stoop (*ibid.*, 48th meeting, para. 11); and Austria, Mr. Tuerk (*ibid.*, 51st meeting, para. 100). The representative of the United States of America, Mrs. Schwab, indicated a readiness to contemplate application to private activities provided the scope of the topic was suitably narrowed (*ibid.*, 52nd meeting, para. 27). A number of speakers who did not refer explicitly to the question of private activities expressed their agreement with the general thrust of the schematic outline. In addition to the observations of this kind referred to in footnote 104 above, see the observations made by the representatives of Thailand, Mr. Sucharitkul (*ibid.*, 44th meeting, para. 27); Canada, Mr. Bacon (*ibid.*, 45th meeting, para. 86); and Iraq, Mr. Al-Qaysi (*ibid.*, 50th meeting, para. 54).

¹²⁷ See annex below.

¹²⁸ See e.g. the observations made by the representative of Kenya, Mr. Wabuge (*Official Records of the General Assembly, Thirty-seventh Session, Sixth Committee, 51st meeting, para. 49*), and by the representative of Sri Lanka, Mr. Marapana (*ibid.*, para. 84).

organizations. Although the question can remain open, the Special Rapporteur has not contemplated that provision need be made for the contingency that an international organization might occupy the role of the source State. A more immediate concern is that the procedures indicated in sections 2, 3 and 4 of the schematic outline may all be substantially affected by the way in which States interact as members of international organizations. For example, the duty, under section 2 of the schematic outline, to provide information and to undertake consultation may often be subsumed in the obligations which States owe and discharge under the constitutions or practice of international organizations to which they belong. Similarly, it would seem that the consultative procedures of international organizations, and reference to the technical services which such organizations provide, may fulfil the functions of or obviate the need for a régime of the kind contemplated in section 3 of the schematic outline, or may have a determinant or advisory role in the assessment of reparation under section 4 of the schematic outline. It is especially in these areas that the Special Rapporteur foresees a need for further Secretariat assistance in assembling and reviewing the available literature and information materials. He would propose also, with the Commission's concurrence and the Secretariat's help, to address a short questionnaire to selected international organizations in regard to the matters raised in this paragraph.

65. As has been said before, the closest analogy to the compound "primary" obligation, which forms the basis of the proposals made in the schematic outline, may be found in the law relating to the treatment of aliens. It is a rule that gives the source State the utmost latitude to review, and, if necessary, to revise the conduct of its various organs, so that conformity with the obligation is at length achieved. It has especial value in relation to sensitive questions, such as the right to receive information from the source State when that State considers that an issue affecting its security is involved. No penalty attaches to the failure or refusal to provide information, except the normal consequence that the source State's ultimate liability may depend upon the whole course of its conduct; and it cannot diminish its responsibility for actions which it chose to take without seeking the concurrence of other States affected. The parallel with responsibility for the treatment of aliens perhaps goes a little further. Sad experience with that topic has shown that law-making is set aside if a State feels that the proposals made require too large a sacrifice of its sovereign discretionary powers in relation to matters arising within its territory or under its control.¹²⁹ What is true in the case of harm done to an alien in the territory of a State is no doubt equally true of transboundary harm emanating from the territory of a State; but moderate and acceptable solutions in any one area must improve the prospect in every other area.

¹²⁹ For the history of the effort to codify State responsibility in the context of the responsibility of the State for injuries caused in its territory to the person or property of aliens, see the report of the Commission on the work of its twenty-first session (*Yearbook ... 1969*, vol. II, pp. 229 *et seq.*, document A/7610/Rev.1, chap. IV).

66. One should take a last look, as succinctly as possible, at the many-faceted comparisons and contrasts between the principle contained in the schematic outline and that of strict liability. The Commission could have treated strict liability as an alternative set of "secondary" rules, proclaimed in the abstract and kept on ice until States were ready to put them to greater use. That idea never appealed to the Commission or to the Special Rapporteur (see para. 7 above). The reason usually given—and sometimes resurrected as a ground for stopping the present topic—was that the Commission was already heavily engaged with "secondary" rules of State responsibility and was not well placed to consider an alternative system of "secondary" rules at the same time. But there were other reasons. In the Special Rapporteur's opinion, the most fundamental reason was the need to avoid even the appearance of putting the principle of strict liability on the same level as the responsibility of States for wrongful acts or omissions. Nothing should be allowed to threaten the unity of international law. In the last resort, obligations of strict liability are obligations to make reparation, and failure to do so engages the responsibility of the State for a wrongful omission.

67. In any case, the great doctrinal problem of strict liability was not the description of the principle but the identification of its natural boundaries, and that problem would have involved an uncharted excursion into "primary" rules. It is an open question even now whether States, in their practice, will resort to the principle of strict liability on any basis other than that of empirical, case-by-case choice. That choice seems likely to be influenced by the historical accident that certain areas of activity, such as ship-based marine pollution, have developed within a civil liability framework, because the original problem was to curb the municipal law jurisdiction of coastal States. No doubt the compulsions of the sea transport industry have tended to put the economic interests of that industry well ahead of social and environmental considerations. Yet as the potential victims are coastal States, which can assert their territorial jurisdiction as a bargaining counter, it cannot be doubted that they will make a carefully calculated choice when they subscribe to the revised conventions on civil liability and the compensation fund (see paras. 49 and 56 above). Nevertheless, some States have more leverage than others in arriving at such a bargain; and it may, in the longer run, be most desirable that the flag of strict liability should be kept flying, not as a compulsion but as an option which provides the discontented with an argument and a standard of reference. That could be done, much as Handl suggests, upon the broader base provided in the schematic outline.¹³⁰

¹³⁰ "Relegating the concept of State liability to the sidelines or side-stepping it completely"—a practice increasingly in evidence today—"is a serious mistake. For, at least in so far as accidental transnational pollution is concerned, the concept remains a cornerstone in any international legal régime for the protection of the environment. ..."

68. In a very real sense, therefore, the principle embodied in the schematic outline can do more for the principle of strict liability than the latter can do for itself. The schematic outline cannot provide for the enthronement of the principle of strict liability, but it can provide that principle with a home a good deal more comfortable than a chilly set of unused "secondary" rules. Moreover, by proclaiming the duty of reparation, subject to certain factors, the schematic outline, without ever attaining the perfection of the principle of strict liability, can work pragmatically for its near-accomplishment. This is not a surprising result for, as we know, the system of strict liability is the only true alternative to the system of State responsibility for wrongful acts or omissions; and as Caubet has shown us,¹³¹ both systems suffer from the same limitation. Unless the equation is a simple one, neither system yields an answer so convincing that the parties to a dispute cannot maintain their own positions and refuse to litigate (see para. 54 above).

69. The first aim of the present topic is to induce States that foresee a problem of transboundary harm to establish a régime consisting of a network of simple rules that yield reasonably clear answers; those simple rules may be rules of specific prohibition or rules of authorization subject to specific guarantees. The second aim of the present topic is to provide a method of settlement that is reasonably fair, and that does not frighten States, when there is no applicable or agreed régime. That involves the possibility that liability will be apportioned—or even, as in the *Poplar River Project* case,¹³² that the affected State must bear the whole burden of substantial physical transboundary harm—if the applicable principles and factors modify or cancel out the presumption that the source State should repair transboundary harm (see para. 36 above).

70. To test the thesis restated in the preceding paragraph, it may be useful to take one backward look. In 1980, at its thirty-second session, the Commission, when dealing with a state of necessity as a circumstance precluding wrongfulness, asked itself whether

such an exclusion, if established, would have the effect not only of completely relieving the State of the consequences which international law attaches to an internationally wrongful act, but also of relieving it of any obligation it might otherwise have to make compensation for damage caused by its conduct ...

"... the discernible trend towards internationally negotiated allocation of transnational losses has to be recognized as an undesirable development. ... If any reasonable internalization of the costs of the transnationally hazardous activity is to be achieved between victim and polluting States, insistence on State liability as a legal concept with a non-negotiable basic content is essential. ..."

"... while it is readily admitted that the 'private law' approach is eminently reasonable ... it is only upon a clear understanding of the central role that the concept of State liability invariably plays in any system of transnational accident law that a régime that would be optimal in terms both of prevention of and compensation for transnational marine pollution damage can be devised." (*Loc. cit.* (footnote 107 above), pp. 87-89.)

¹³¹ *Loc. cit.*, footnote 108 above.

¹³² See footnote 72 above.

Finding some cases in which “States relied on the existence of the state of necessity to justify their conduct but offered to make compensation for the material damage ... caused”, the Commission concluded that

the preclusion of the wrongfulness of an act of a State does not automatically entail the consequence that this act may not, in some other way, create an obligation to make compensation for the damage, even though that obligation should not be described as an obligation “to make reparation for a wrongful act”.¹³³

71. The first point arising out of the passages quoted is that the Commission had no difficulty with the concept that an obligation engaging State responsibility for a wrongful act or omission could co-exist with an obligation relating to injurious consequences arising out of acts not prohibited by international law. The harm caused could be referred to either kind of obligation and, although one failed, the other could remain. The second point is that the latter obligation could hardly be an obligation of strict liability. If it were, it would be difficult to see why compensation or other reparation was not a regular accompaniment of damage caused in circumstances that precluded wrongfulness. Common sense leads to the same conclusion. If firemen and fire-fighting equipment cross an international boundary to fight an unattended forest fire that constitutes a common peril, the plea of necessity may well preclude wrongfulness; but what is the position as to the damage done to crops and other property? Surely it must depend not upon strict liability but upon a balance of factors. Was the fire a grave danger to the State in which it was located, or predominantly a transboundary threat? Had the local fire-fighters failed to do what might reasonably have been expected of them? How high were the costs of the transboundary expedition? In short, did the balance of factors modify or cancel out the presumption that the source State should repair transboundary harm?

72. In this rather homespun hypothetical case, the final answer may well be that, upon a balancing of factors, the affected State must tolerate, without entitlement to any recompense, even a substantial transboundary loss or injury. More typically, however—and especially when the interest of the source State in an activity is not shared by the affected State—there will be no sufficient cause to shift or modify the presumption that the source State must see to the repair of transboundary loss or injury. In these cases, which one would expect to include cases arising from situations of ultra-hazard, the affected State’s entitlement to full reparation will be the same, whether under Handl’s proposals,¹³⁴ or those of Caubet,¹³⁵ or those of the Special Rapporteur.¹³⁶ It is submitted that the differences in their solutions turn less on substance than on what Caubet has called psychological factors. For Handl it is of cardinal importance to persuade States that the strict liability standard is one of attainable virtue (see para. 55

above). For Caubet it is of equal importance to strengthen the doctrine of the wrongfulness of permitting the occurrence of substantial physical transboundary harm (see para. 53 above). For the Special Rapporteur, the first requirement is to maintain the logic of the distinction that the involvement of the source State arises from its regulatory capacity, and not from its position as a direct actor.

73. Handl—using without embellishment the major element in Jenks’s original definition of “ultra-hazard” (see para. 52 above)—carves out a sphere of ultra-hazardous activity in which the variables are not permitted to modify the strict liability of the source State. Caubet, by combining all the variables in a threshold test (see para. 53 above), arrives by synthesis at an unvarying rule of strict liability. By applying a presumption of wrongfulness when loss or injury occurs, Caubet rules out apportionment, holding the source State strictly liable or, if the balance of factors is in its favour, not liable at all (see para. 54 above). The Special Rapporteur is content to maintain a lower profile, sidestepping the complication of introducing the additional criterion of “ultra-hazard”, and confronting the State only with the commitments that arise directly from its sovereign powers over its territory and in regard to its citizenry. This solution leaves open in all cases the possibility of apportionment, if there are factors that diminish the liability of the source State. It also leaves open the possibility that the parties will in effect agree to construct retrospectively a régime of civil liability, using municipal institutions to assess the liability, but maintaining the obligation of the Source State to ensure that the appropriate reparation is made.

74. This report has not addressed directly the urgent question, evoked in this year’s Gilberto Amado Memorial Lecture,¹³⁷ of mobilizing the means of protecting from degradation the areas of the world beyond the territorial jurisdiction of any State. That question is larger than the present topic; and one of the leads into it—that of obligations *erga omnes*, and of being able to invoke such obligations—has been broached by the Special Rapporteur on the topic of State responsibility, Mr. Riphagen, in his fourth report.¹³⁸ Another lead, which may emerge from further study of the present topic, is the indispensable role of international organizations in the protection of the common natural heritage. The final theme that the Special Rapporteur would wish to evoke, as being applicable to every aspect of the present topic, has been put brilliantly in a recent article on power sharing in the law of the sea:

The idea that is here struggling to reach the surface of international consciousness is the distinction between a freedom and a power. The story of the development of international society since 1945 is the story of a progression from legal freedoms to legal powers. A freedom implies the absence of legal control. A power implies the absence of unfettered discretion. ...

...

¹³³ Para. (39) of the commentary to article 33 (State of necessity) of part 1 of the draft articles on State responsibility (*Yearbook ... 1980*, vol. II (Part Two), p. 51).

¹³⁴ *Loc. cit.*, footnote 107 above.

¹³⁵ *Loc. cit.*, footnote 108 above.

¹³⁶ Section 4 of the schematic outline (see annex below).

¹³⁷ United Nations, Gilberto Amado Memorial Lecture, *The Influence of Science and Technology on International Law*, delivered on 3 June 1983 at Geneva by Mr. G. E. do Nascimento e Silva.

¹³⁸ See document A/CN.4/366 and Add.1 above, p. 3.

To ask that the rights and duties of States, under both customary and treaty international law, be perceived in what has in the present study been called an "administrative law" perspective is to ask for a general and far-reaching change of attitude ... It might ... enable us to face with more equanimity certain areas of modern international law and practice that are otherwise a cause of serious concern, areas in which a discretionary power of States seems to be uncontrollable and yet in which its uncontrolled exercise is able gravely to prejudice the general interest of international society. ...

...

The benefit of a power is the discretionary choices that it protects. The burden of a power is respect for the interests of society as a whole, which confers the power on the holder as the agent of all its members.¹³⁹

75. As it would in any case not have been possible to discuss this topic in depth during the thirty-fifth session of the Commission, in 1983, members of the Commis-

¹³⁹ P. Allott, "Power sharing in the law of the sea", *American Journal of International Law* (Washington, D.C.), vol. 77 (1983), pp. 26-27.

sion may prefer to regard this very late report as having more the character of a very early report for the 1984 session. The report could not have been issued, even now, without the superb co-operation that the Special Rapporteur has always received from the Commission secretariat, and from the documents and translation services of the European Office of the United Nations. As has been indicated above (para. 59), the ultimate purpose of this report is to provide a background for a careful, and perhaps decisive, evaluation of the topic. The Special Rapporteur plans to submit a further report, directed to the development of section 2 of the schematic outline, which deals with fact-finding; and he would welcome any comments, on this or other questions, that Commission members may care to offer, during whatever time is available for consideration of the present item in the closing stages of the present session. He also intends to submit a report directed to the questions of scope and definitions referred to in section 1 of the schematic outline.

ANNEX

Schematic outline*

SECTION 1

1. Scope^a

Activities within the territory or control of a State which give rise or may give rise^b to loss or injury to persons or things within the territory or control of another State.

[NOTES. (1) It is a matter for later review whether this provision needs to be supplemented or adapted when the operative provisions have been drafted and considered in relation to matters other than losses or injuries arising out of the physical use of the environment.

(2) Compare this provision, in particular, with the provision contained in section 4, article 1.]

2. Definitions

(a) "Acting State" and "affected State" have meanings corresponding to the terms of the provision describing the scope.

(b) "Activity" includes any human activity.^c

[NOTE. Should "activity" also include a lack of activity to remove a natural danger which gives rise or may give rise to loss or injury to another State?^d

(c) "Loss or injury" means any loss or injury, whether to the property of a State, or to any person or thing within the territory or control of a State.^e

* Reproduced without change from the text initially submitted in the third report (see footnote 2 above). The principal changes subsequently made by the Special Rapporteur are indicated in paras. 63 and 64 above.

The footnote references are to paragraphs of the third report.

^a See paras. 46-48.

^b See para. 35.

^c See paras. 36-39.

^d See para. 42.

^e See paras. 27 and 34-35.

(d) "Territory or control" includes, in relation to places not within the territory of the acting State,

(i) any activity which takes place within the substantial control of that State; and

(ii) any activity conducted on ships or aircraft of the acting State, or by nationals of the acting State, and not within the territory or control of any other State, otherwise than by reason of the presence within that territory of a ship in course of innocent passage, or of an aircraft in authorized overflight.^f

3. Saving

Nothing contained in these articles shall affect any right or obligation arising independently of these articles.^g

SECTION 2

1. When an activity taking place within its territory or control gives or may give rise to loss or injury to persons or things within the territory or control of another State, the acting State has a duty to provide the affected State with all relevant and available information, including a specific indication of the kinds and degrees of loss or injury that it considers to be foreseeable, and the remedial measures it proposes.^h

2. When a State has reason to believe that persons or things within its territory or control are being or may be subjected to loss or injury by an activity taking place within the territory or control of another State, the affected State may so inform the acting State, giving as far as its means of knowledge will permit, a specific indication of the kinds and degrees of loss or injury that it considers to be foreseeable; and the acting State has thereupon a duty to provide all relevant and

^f See paras. 43-45.

^g See para. 37.

^h See paras. 19-23 and 39.

available information, including a specific indication of the kinds and degrees of loss or injury that it considers to be foreseeable, and the remedial measures it proposes.

3. If, for reasons of national or industrial security, the acting State considers it necessary to withhold any relevant information that would otherwise be available, it must inform the affected State that information is being withheld. In any case, reasons of national or industrial security cannot justify failure to give an affected State a clear indication of the kinds and degrees of loss or injury to which persons and things within the territory or control of that affected State are being or may be subjected; and the affected State is not obliged to rely upon assurances which it has no sufficient means of knowledge to verify.

4. If not satisfied that the measures being taken in relation to the loss or injury foreseen are sufficient to safeguard persons and things within its territory or control, the affected State may propose to the acting State that fact-finding be undertaken.

5. The acting State may itself propose that fact-finding be undertaken; and, when such a proposal is made by the affected State, the acting State has a duty to co-operate in good faith to reach agreement with the affected State upon the arrangements for and terms of reference of the inquiry, and upon the establishment of the fact-finding machinery. Both States shall furnish the inquiry with all relevant and available information.

6. Unless the States concerned otherwise agree,

(a) there should be joint fact-finding machinery, with reliance upon experts, to gather relevant information, assess its implications and, to the extent possible, recommend solutions;

(b) the report should be advisory, not binding the States concerned.

7. The acting State and the affected State shall contribute to the costs of the fact-finding machinery on an equitable basis.

8. Failure to take any step required by the rules contained in this section shall not in itself give rise to any right of action. Nevertheless, unless it is otherwise agreed, the acting State has a continuing duty to keep under review the activity that gives or may give rise to loss or injury; to take whatever remedial measures it considers necessary and feasible to safeguard the interests of the affected State; and, as far as possible, to provide information to the affected State about the action it is taking.ⁱ

SECTION 3

1. If (a) it does not prove possible within a reasonable time either to agree upon the establishment and terms of reference of fact-finding machinery or for the fact-finding machinery to complete its terms of reference; or (b) any State concerned is not satisfied with the findings, or believes that other matters should be taken into consideration; or, (c) the report of the fact-finding machinery so recommends, the States concerned have a duty to enter into negotiations at the request of any one of them with a view to determining whether a régime is necessary and what form it should take.

2. Unless the States concerned otherwise agree, the negotiations shall apply the principles set out in section 5; shall also take into account, as far as applicable, any relevant factor, including those set out in section 6, and may be guided by reference to any of the matters set out in section 7.

3. Any agreement concluded pursuant to the negotiations shall, in accordance with its terms, satisfy the rights and obligations of the States parties under the present articles;^j and may also stipulate the extent to which these rights and obligations replace any other rights and obligations of the parties.

4. Failure to take any step required by the rules contained in this section shall not in itself give rise to any right of action. Nevertheless, unless it is otherwise agreed, the acting State has a continuing duty to keep under review the activity that gives or may give rise to loss or injury; to take or continue whatever remedial measures it considers

ⁱ See paras. 30-33.

^j See paras. 24-25 and 40.

necessary and feasible to safeguard the interests of the affected State; and, as far as possible, to provide information to the affected State about the action it is taking.^k

SECTION 4

1. If any activity does give rise to loss or injury, and the rights and obligations of the acting and affected States under the present articles in respect of any such loss or injury have not been specified in an agreement between those States, those rights and obligations shall be determined in accordance with the provisions of this section. The States concerned shall negotiate in good faith to achieve this purpose.

2. Reparation shall be made by the acting State to the affected State in respect of any such loss or injury,^l unless it is established that the making of reparation for a loss or injury of that kind or character is not in accordance with the shared expectations of those States.^m

3. The reparation due to the affected State under the preceding article shall be ascertained in accordance with the shared expectations of the States concerned and the principles set out in section 5; and account shall be taken of the reasonableness of the conduct of the parties, having regard to the record of any exchanges or negotiations between them and to the remedial measures taken by the acting State to safeguard the interests of the affected State.ⁿ Account may also be taken of any relevant factors, including those set out in section 6, and guidance may be obtained by reference to any of the matters set out in section 7.

4. In the two preceding articles, "shared expectations" include shared expectations which

(a) have been expressed in correspondence or other exchanges between the States concerned or, in so far as there are no such expressions,

(b) can be implied from common legislative or other standards or patterns of conduct normally observed by the States concerned, or in any regional or other grouping to which they both belong, or in the international community.

SECTION 5

1. The aim and purpose of the present articles is to ensure to acting States as much freedom of choice, in relation to activities within their territory or control, as is compatible with adequate protection of the interests of affected States.^o

2. Adequate protection requires measures of prevention that as far as possible avoid a risk of loss or injury and, in so far as that is not possible, measures of reparation;^p but the standards of adequate protection should be determined with due regard to the importance of the activity and its economic viability.^q

3. In so far as may be consistent with the preceding articles, an innocent victim should not be left to bear his loss or injury; the costs of adequate protection should be distributed with due regard to the distribution of the benefits of the activity; and standards of protection should take into account the means at the disposal of the acting State^r and the standards applied in the affected State and in regional and international practice.

4. To the extent that an acting State has not made available to an affected State information that is more accessible to the acting State concerning the nature and effects of an activity, and the means of verifying and assessing that information, the affected State shall be allowed a liberal recourse to inferences of fact and circumstantial evi-

^k See paras. 30-33.

^l See paras. 26, 29 and 41.

^m See paras. 27 and 35.

ⁿ See paras. 26 and 32, as well as section 2, article 8, and section 3, article 4, of this schematic outline.

^o See para. 10.

^p See para. 9.

^q See paras. 24-25.

^r See paras. 22-23.

dence in order to establish whether the activity does or may give rise to loss or injury.⁵

SECTION 6

Factors which may be relevant to a balancing of interests¹ include:

1. The degree of probability of loss or injury (i.e. how likely is it to happen?);
2. The seriousness of loss or injury (i.e. an assessment of quantum and degree of severity in terms of the consequences);
3. The probable cumulative effect of losses or injuries of the kind in question—in terms of conditions of life and security of the affected State, and more generally—if reliance is placed upon measures to ensure the provision of reparation rather than prevention (i.e. the acceptable mix between prevention and reparation);
4. The existence of means to prevent loss or injury, having regard to the highest known state of the art of carrying on the activity;
5. The feasibility of carrying on the activity by alternative means or in alternative places;
6. The importance of the activity to the acting State (i.e. how necessary is it to continue or undertake the activity, taking account of economic, social, security or other interests?);
7. The economic viability of the activity considered in relation to the cost of possible means of protection;
8. The availability of alternative activities;
9. The physical and technical capacities of the acting State (considered, for example, in relation to its ability to take measures of prevention or make reparation or to undertake alternative activities);
10. The way in which existing standards of protection compare with:
 - (a) the standards applied by the affected State; and
 - (b) the standards applied in regional and international practice;
11. The extent to which the acting State:
 - (a) has effective control over the activity; and
 - (b) obtains a real benefit from the activity;
12. The extent to which the affected State shares in the benefits of the activity;
13. The extent to which the adverse effects arise from or affect the use of a shared resource;
14. The extent to which the affected State is prepared to contribute to the cost of preventing or making reparation for loss or injury, or of maximizing its benefits from the activity;
15. The extent to which the interests of:
 - (a) the affected State, and
 - (b) the acting State are compatible with the interests of the general community;

⁵ See paras. 28 and 32.

¹ *Idem.*

16. The extent to which assistance to the acting State is available from third States or from international organizations;

17. The applicability of relevant principles and rules of international law.

SECTION 7

Matters which may be relevant in negotiations concerning prevention and reparation⁴ include:

I. *Fact-finding and prevention*

1. The identification of adverse effects and of material and non-material loss or injury to which they may give rise;
2. The establishment of procedural means for managing the activity and monitoring its effects;
3. The establishment of requirements concerning the structure and operation of the activity;
4. The taking of measures to assist the affected State in minimizing loss or injury.

II. *Compensation as a means of reparation*

1. A decision as to where primary and residual liability should lie, and whether the liability of some actors should be channelled through others;
2. A decision as to whether liability should be unlimited or limited;
3. The choice of a forum in which to determine the existence of liability and the amounts of compensation payable;
4. The establishment of procedures for the presentation of claims;
5. The identification of compensable loss or injury;
6. The test of the measure of compensation for loss or injury;
7. The establishment of forms and modalities for the payment of compensation awarded;
8. Consideration of the circumstances which might increase or diminish liability or provide an exoneration from it.

III. *Authorities competent to make decisions concerning fact-finding, prevention and compensation*

At different phases of the negotiations, the States concerned may find it helpful to place in the hands of their national authorities or courts, international organizations or specially constituted commissions, the responsibility for making recommendations or taking decisions as to the matters referred to under headings I and II.

SECTION 8

Settlement of disputes⁶ (taking due account of recently concluded multilateral treaties that provide for such measures).

⁴ See para. 40.

⁶ See para. 26.