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

Topic:

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

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CONTENTS

Scope and related provisions of the draft articles

I. Proposed articles

1. The Special Rapporteur proposes the following five draft articles:

CHAPTER I

GENERAL PROVISIONS

Article 1. Scope of the present articles

The present articles apply with respect to activities and situations which are within the territory or control of a State, and which give rise or may give rise to a physical consequence affecting the use or enjoyment of areas within the territory or control of any other State.

Article 2. Use of terms

In the present articles:

1. "Territory or control"

(*a*) in relation to a coastal State, extends to maritime areas in so far as the legal régime of any such area vests jurisdiction in that State in respect of any matter;

(*b*) in relation to a State of registry, or flag-State, of any ship, aircraft or space object, extends to the ships, aircraft and space objects of that State while exercising a right of continuous passage or overflight through the maritime territory or airspace of any other State;

(*c*) in relation to the use or enjoyment of any area beyond the limits of national jurisdiction, extends to any matter in respect of which a right is exercised or an interest is asserted;

2. "Source State" means a State within the territory or control of which an activity or situation occurs;

3. "Affected State" means a State within the territory or control of which the use or enjoyment of any area is or may be affected;

4. "Transboundary effects" means effects which arise as a physical consequence of an activity or situation within the territory or control of a source State, and which affect the use or enjoyment of any area within the territory or control of an affected State;

5. "Transboundary loss or injury" means transboundary effects constituting a loss or injury.

Article 3. Relationship between the present articles and other international agreements

To the extent that activities or situations within the scope of the present articles are governed by any other international agreement, whether it entered into force before or after the entry into force of the present articles, the present articles shall, in relations between States parties to that other international agreement, apply subject to that other international agreement.

Article 4. Absence of effect upon other rules of international law

The fact that the present articles do not specify circumstances in which the occurrence of transboundary loss or injury arises from a wrongful act or omission of the source State is without prejudice to the operation of any other rule of international law.

Article 5. Cases not within the scope of the present articles

The fact that the present articles do not apply to the obligations and rights of international organizations, in respect to activities or situations which either are within their control or affect the use or enjoyment of areas within which they may exercise any right or assert any interest, shall not affect:

(*a*) the application to international organizations of any of the rules which are set forth in the present articles in reference to source States or affected States, and to which international organizations are subject under international law independently of the present articles;

(*b*) the application of the present articles to the relations of States as between themselves.

2. The field of application of the present topic was provisionally described in the schematic outline presented in the Special Rapporteur's third report,[1] and reviewed in his fourth report.[2] The five draft articles set out above correspond to section 1 of the schematic outline, modified in accordance with paragraph 63 of the fourth report. These draft articles are best considered as a group, because together they determine the orientation and essential elements of the topic. They also provide a means of assessing the propositions of principle discussed in the fourth report, and of relating those propositions to a more systematic survey of State practice. A representative range of materials has been cited; but it has seemed useful to take a comprehensive and lightly documented view of the five draft articles, so that questions of architecture are not lost in copious illustration.

II. The regulatory function

3. It has often been noted that the title of the present topic speaks in its French language version of "activities (*activités*) not prohibited by international law" and in its English language version of "acts not prohibited by international law". Although the title is open to question in either formulation, it was certainly not intended that these terms should be used interchangeably. "Acts"—and the companion term "omissions"—refer always to the conduct of the State in reference to its obligations as a subject of international law; "activities"—and the associated term "situations", which will later be explained (paras. 31-32 below)—refer to physical manifestations, occurring within the territory of a State, or elsewhere under its control. Thus the distinction between "acts" and "activities" immediately focuses attention upon some of the hallmarks of this topic. The topic concerns the regulatory duties of the State, which are the counterpart of its sovereignty over its territory and its nationals.[3] It therefore makes no fundamental distinction between public activities and private activities, although there may be incidental differences, for example in the way that obligations or procedures are framed.[4] Equally, the performance of the State's regulatory duties does not necessarily entail the assumption of substantive burdens by the State itself: on the contrary, one object of régime-building within the scope of the present topic may be to ensure that an activity bears the burden of prevention and reparation of transboundary accidents, without financial recourse to the territorial or controlling State.

4. Some of these characteristics can be aptly illustrated by

[1] *Yearbook... 1982,* vol. II (Part One), p. 51, document A/CN.4/360. The text of the schematic outline appears in paragraph 53 of the report.

[2] *Yearbook... 1983,* vol. II (Part One), p. 201, document A/CN.4/373. The text of the schematic outline is annexed to the report.

[3] *Ibid.,* p. 203, para. 8 and footnote 22.

[4] See e.g. the Vienna Convention on Civil Liability for Nuclear Damage (Vienna, 21 May 1963) (IAEA, *International Conventions on Civil Liability for Nuclear Damage,* Legal Series No. 4, rev. ed. (Vienna, 1976), p. 7), art. VII of which requires the operator of a nuclear installation to maintain insurance or other financial security covering his liability for nuclear damage, but permits a contracting party, or any of its constituent subdivisions, to act as its own insurer in respect of its liability as an operator.

See also the 1973 International Convention for the Prevention of Pollution from Ships (London, 2 November 1973) (IMCO publication, Sales No. 77.14.E), art. 3, para. 3, of which reads as follows:

"3. The present Convention shall not apply to any warship, naval auxiliary or other ship owned or operated by a State and used, for the time being, only on government non-commercial service. However, each Party shall ensure by the adoption of appropriate measures not impairing the operations or operational capabilities of such ships owned or operated by it, that such ships act in a manner consistent, so far as is reasonable and practicable, with the present Convention."

reference to the multilateral conventions designed to prevent the escape or discharge of oil cargoes from ships in circumstances that cause maritime pollution, and to provide compensation and other remedial measures when such an escape or discharge occurs or is threatened. The 1973 International Convention for the Prevention of Pollution from Ships[5] and its annex I specify construction standards for new and for existing ships that carry oil cargoes; oblige contracting States to require that ships which fly their flag or sail under their authority comply with these standards; and entitle such States to issue certificates of compliance, which other contracting States are to accept unless there is a manifest discrepancy. The Convention also requires contracting States whose ports are visited to provide facilities for oil reception of specified standards, and to ensure that visiting ships, whether or not from other contracting States, meet the standards of the Convention.[6]

5. The 1969 International Convention on Civil Liability for Oil Pollution Damage[7] makes the shipowner absolutely liable (with certain exceptions) for an oil spillage affecting the land territory or territorial sea of a contracting State, but permits him to limit his liability for any one spillage occurring without his fault or privity, provided that he has complied with the requirements of the Convention by setting aside—through insurance or otherwise—the full amount of his liability in respect of that spillage.[8] The 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage[9] reinforces the system by providing, as a charge upon consignees of oil in contracting States, for a central fund that can make good a shortfall in and supplement compensation due under the 1969 Convention. The fund can also partially indemnify shipowners who have complied with the requirements of all relevant international instruments, including those dealing with construction and safety standards.[10]

6. In these ways, by agreeing upon the concerted exercise of the individual authority of each State in relation to activities within its territory or under its control, the contracting States have discharged any actual or contingent obligations they may have towards each other in respect of a particular kind of transboundary loss or injury. In doing so, they have in effect made joint policy decisions about the levels of prevention and reparation that they consider optimal, having regard to the cost structure of an essential industry. Within these limits, they have placed the full financial burden on the industry and its customers, realizing that not all escapes and discharges of oil will be avoided, and that compensation, although more readily available, will not always amount to full payment for the loss or injury suffered. It is an element both in prevention and in reparation that the Conventions provide for their own policing, requiring that departures from construction and safety standards, as well as incidents involving oil pollution, be investigated and reported, and that appropriate corrective and punitive action be taken.[11] It is also noteworthy that a régime, once established, provides a laboratory that can generate new initiatives and rising standards.[12]

III. The transboundary element

7. The language of draft article 1, on scope, contains three express limitations. The first is that matters falling within the scope of the topic will always exhibit a transboundary element, that is to say that the topic concerns effects felt within the territory or under the control of a State, but arising as a consequence of an activity or situation occurring, wholly or partly, within the territory or under the control of another State or States. Put more succinctly, this topic deals with the fact or possibility of loss or injury that cannot be avoided or repaired except through a measure of international co-operation. The vocabulary of the topic, set out in draft article 2—"source State", "affected State", "transboundary effects" and "transboundary loss or injury"—signifies that every chain of circumstance within the scope of the present topic crosses a boundary between the territory or control of one State and that of another or others. Of course, it does not follow that the world is polarized into source States and affected States. As the example of the conventions dealing with maritime oil pollution has already shown, the States concerned with any particular question of transboundary loss or injury see themselves both as source States and as affected States. The international instruments which regulate such matters usually contain symmetrical statements of reciprocal rights and obligations.[13]

8. It is not necessary, nor would it be appropriate, to include in these draft articles any general definition of State territory, or of matters which are under a State's control, although not within its territory. The exclusive authority of a State in relation to its territory, and to its ships and

[5] See footnote 4 above, second paragraph.

[6] See, in particular, art. 4, para. 1; art. 5, paras. 1, 2 and 4; and art. 6; and annex I, regulation 5, regulation 10, para. 7, and regulations 12-19 and 21-25.

[7] Convention signed at Brussels on 29 November 1969 (United Nations, *Treaty Series*, vol. 973, p. 3).

[8] See, in particular, arts. II, III and V.

[9] Convention signed at Brussels on 18 December 1971 (IMCO publication, Sales No. 1972.10.E).

[10] See, in particular, arts. 2, 4, 5 and 10.

[11] See art. 5, paras. 2-3, and arts. 6 and 8 of the 1973 International Convention for the Prevention of Pollution from Ships (footnote 4 above, second paragraph).

[12] The 1969 International Convention on Civil Liability for Oil Pollution Damage (see footnote 7 above) and the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (see footnote 9 above) were revised in 1984. See the fourth report, document A/CN.4/373 (footnote 2 above), paras. 49 and 56 and footnote 103. See also the comments on these two Conventions, para. 16 below.

[13] Even in the minority of international agreements that relate to a single set of circumstances, there is often a stipulation concerning reciprocity if the interests of the parties should be reversed. See e.g. the Agreement between the Federal Republic of Germany and Austria concerning the Effects on the Territory of the Federal Republic of Germany of Construction and Operation of the Salzburg Airport, (Vienna, 19 December 1967) (United Nations, *Treaty Series*, vol. 945, p. 87), art. 9 of which reads as follows:

> "Upon the request of the Federal Republic of Germany, the Republic of Austria shall in accordance with the principle of reciprocity, grant to a German civil airfield whose building protection zone affects Austrian territory, the same treatment, through the conclusion of a corresponding agreement, as is accorded to the Salzburg airport under this Agreement."

aircraft on or over the high seas, is among the most fundamental and well settled of all the principles and rules that make up the universe of international law. On the other hand, even these principles and rules are susceptible at their fringes to growth and change (see para. 9 below);[14] and, within the context of the present draft articles, the phrase "territory or control" must retain a corresponding element of elasticity. To ascertain the meaning of the phrase therefore entails a *renvoi* to applicable conventions and customary law. There are, however, a few cases in which the complexities of the general law create a need for sign-posting. The three-point partial definition of "territory or control" is designed to meet that need.

9. Long before the 20th century, it was recognized that a coastal State had, as an appurtenance to its land and maritime territory, a limited right of jurisdiction over foreign ships in a contiguous zone of the high seas in respect of a range of matters affecting its security and internal order.[15] In the modern law of the sea, there are many more instances—and most notably those relating to the exclusive economic zone[16]—in which a sea area has a territorial impress in respect of some matters, but retains its high seas character in respect of other matters. It is therefore not always enough to describe even a territorial competence by reference to the area in which it subsists: the competence has also to be described by reference to its own limited nature. *A fortiori,* a competence of an extraterritorial kind can never be described in terms of an area alone: it relates always to a particular matter subject to the control of the State, whether it be described by reference to ships, aircraft, space objects or persons belonging to that State; or to the activities in which they engage or wish to engage; or to the situations upon which their use and enjoyment of areas beyond the limits of national jurisdiction may depend.

10. For these reasons, in the proposed partial definition of "territory or control" in article 2, paragraph 1, subparagraphs (*a*) and (*c*) deal with the two polarities. Subparagraph (*a*) refers to the territorial competence of the coastal State, indicating that this is a limited competence in relation to some areas. Subparagraph (*c*) refers to matters which are not within the territorial competence of any State: it therefore relates the concept of "control", not directly to the areas in which an extraterritorial jurisdiction may be exercised, but to the rights and interests which any State may exercise or assert within those areas. In relation to the high seas, and to other areas beyond the limits of national jurisdiction, every activity, such as fishing, and every situation, such as the existence of a fishing resource, in which the ships or nationals of more than one State participate or have an interest, necessarily involves a transboundary element and the possibility that activities under the control of one State will have physical consequences that affect use or enjoyment by the ships or nationals of other States. So, for example, the 1949 International Convention for the Northwest Atlantic Fisheries prescribes as its objective "the investigation, protection and conservation of the fisheries of the Northwest Atlantic Ocean, in order to make possible the maintenance of a maximum sustained catch from those fisheries ...", and contemplates the possible need for limitations of catch and catching seasons.[17]

11. In matters which impinge upon the territory of States, the limitation of scope in terms of "territory or control" must be more finely drawn. The first guideline, demonstrated in subparagraph (*a*) of the partial definition (art. 2, para. 1), is that there should be no detraction from the legal powers and authority that belong to the State in virtue of its territorial sovereignty. The justification for subparagraph (*b*) of the partial definition is that customary law itself qualifies the rights that belong to the territorial sovereign by vesting in flag-States the right of innocent passage for their ships.[18] Although the right of overflight has a conventional origin,[19] the practical consequences of the confer-

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[14] See also e.g. the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (London, Moscow and Washington, 27 January 1967) (United Nations, *Treaty Series,* vol. 610, p. 205), art. VI of which provides, in part:

> "States Parties to the Treaty shall bear international responsibility for national activities in outer space, including the moon and other celestial bodies, whether such activities are carried on by governmental agencies or by non-governmental entities, and for assuring that national activities are carried out in conformity with the provisions set forth in the present Treaty. ..."

See also the United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982) (*Official Records of the Third United Nations Conference on the Law of the Sea,* vol. XVII (United Nations publication, Sales No. E.84.V.3), p. 151, document A/CONF.62/122), which provides in part:

> *Article 139. Responsibility to ensure compliance and liability for damage*
>
> "1. States Parties shall have the responsibility to ensure that activities in the Area, whether carried out by States Parties, or State enterprises or natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals, shall be carried out in conformity with this Part. ...
>
> "..."

[15] See art. 24 of the Convention on the Territorial Sea and the Contiguous Zone (Geneva, 29 April 1958) (United Nations, *Treaty Series,* vol. 516, p. 205); and art. 33 of the 1982 United Nations Convention on the Law of the Sea (see footnote 14 above, second paragraph).

[16] See part V (arts. 55-75) of the 1982 United Nations Convention on the Law of the Sea (footnote 14 above, second paragraph).

[17] See the preamble and art. VIII, para. 1, of the Convention (Washington, 8 February 1949) (United Nations, *Treaty Series,* vol. 157, p. 157).

[18] See arts. 5 and 14 of the Convention on the Territorial Sea and the Contiguous Zone (see footnote 15 above), and art. 8, para. 2, and art. 17 of the 1982 United Nations Convention on the Law of the Sea (see footnote 14 above, second paragraph). The phrase "right of continuous passage" has been used in subparagraph (*b*) of the proposed partial definition because, in terms of the 1982 United Nations Convention on the Law of the Sea, the expression "right of innocent passage" is most sufficiently comprehensive to cover the various types of passage recognized in that Convention (see arts. 38 and 53).

[19] See art. 5 of the Convention on International Civil Aviation (Chicago, 7 December 1944) (United Nations, *Treaty Series,* vol. 15, p. 295); art. 1, sect. 1, of the International Air Services Transit Agreement (Chicago, 7 December 1944) (*ibid.,* vol. 84, p. 389); art. 1 of the International Air Transport Agreement (Chicago, 7 December 1944) (*ibid.,* vol. 171, p. 387); arts. 38 and 53 of the 1982 United Nations Convention on the Law of the Sea (see footnote 14 above, second paragraph); and numerous bilateral agreements on air transport.

Although the law relating to the overflight of space objects is less developed, it has seemed desirable to include an express reference to them in subparagraph (*b*) of the partial definition because the Convention on International Liability for Damage caused by Space Objects (London, Moscow and Washington, 29 March 1972) (United Nations, *Treaty Series,* vol. 961, p. 187) expressly contemplates the presence of space objects within the air space of other States, or in air space beyond the limits of national jurisdiction; see art. II of that Convention. Moreover, manned space objects, in their descent through the atmosphere, now appear to have some of the same properties as aircraft.

ment of that right are comparable with those deriving from the right of innocent passage. In both cases, the law demands and State practice affords a very substantial curtailment of the exercise of the territorial State's authority in relation to the ship or aircraft in continuous passage through its maritime territory or its airspace. In the nature of things, the extent of the territorial State's involvement is ordinarily even less in the case of transiting aircraft than in that of passing ships. Thus subparagraph (*b*) of the partial definition is, in a way, a mirror image of subparagraph (*a*). In both cases, there are some circumstances in which a territorial jurisdiction is exercisable, and therefore no transboundary relationship is apparent between the territorial State and the flag-State. There are, however, other circumstances, arising within the same geographical areas, to which the territorial State's jurisdiction does not extend, or—in keeping with the spirit and letter of the law relating to passage and overflight—should not extend. In the latter circumstances, the transboundary element is present.

12. More generally, it is evident that a very clear course of State conduct is required to modify the rule, based upon respect for State sovereignty, that a State in the territory of which an activity or situation occurs is the source State in relation to that activity or situation. In the preceding paragraphs it has been submitted that such a modification is well established in the case of ships and aircraft in passage or overflight. So, for example, the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, using the device of "channelling" all liability to the operator of the aircraft, makes it unnecessary even to inquire through which State's airspace the aircraft was travelling when the incident giving rise to the damage occurred.[20] To turn to quite a different kind of case, there would seem no reason to doubt the reception in customary law of the provision of the Convention on International Liability for Damage Caused by Space Objects[21] that "a State which launches or procures the launching of a space object" (art. 1 (*c*)) from the territory of another State shares with that other State the liability for damage caused by the space object launched. In that case there are two source States, whose liability towards third States is joint and several (art. V). The Convention does not regulate the relationship between the source States, but invites them to undertake such regulation for themselves.[22]

13. To pursue this line of inquiry much further at the present stage might entail needless and therefore unjustified speculation about the application of rules, yet to be drawn, in relation to particular situations of fact. There are, however, two pointers that deserve notice. First, the precedent established in relation to the launching of space objects can obviously be applied in other contexts, if States have the will to do so. In the Commission's debates on the present topic, there have been references to the problems that can arise when sophisticated but inherently dangerous industries are "exported" to States which lack the expertise to establish and enforce adequate regulatory standards. Some form of joint undertaking —especially if supported by the technical monitoring that can on occasion be provided by an international organization—might offer a solution to some of these problems. Secondly, the régime established in the 1962 Convention on the Liability of Operators of Nuclear Ships,[23] and in a range of bilateral agreements containing comparable provisions,[24] could well be regarded as evidence that the State which registers and licenses a nuclear ship is always a source State in respect of transboundary loss or injury arising from a nuclear incident involving that ship. The 1962 Convention also "channels" to an operator all claims relating to such an incident, and creates an absolute, although limited, liability to pay compensation in respect of loss or injury suffered (see in particular art. II, paras. 1-2, and art. III, para. 1). Claims may be brought, at the claimant's option, in the courts either of the licensing State or of the affected State; nor is it material where the nuclear incident occurred. The operator is required to maintain insurance or other financial security covering his liability to the extent prescribed by the licensing State. It remains an obligation of the licensing State to ensure that the operator complies with the requirements of the Convention; if necessary, the licensing State must itself meet the liability of the operator (see in particular art. III, para. 2, art. X, para. 1, and art. XIII).

14. It may therefore be said that there are some circumstances in which an activity remains under the control of one State even when the activity is physically located within the territory of another State. In those cases, there are two source States in respect of the one activity: in the case of the launching of space objects the obligations are shared between the two source States; but in the case of nuclear ships the State in the territory of which the nuclear incident occurs is fully indemnified pursuant to the obligations of the licensing State. In neither case is the relationship between the two source States a transboundary

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[20] See, in particular, art. 1, para. 1, art. 2, para. 1, and art. 23 of the Convention (Rome, 7 October 1952) (*ibid.*, vol. 310, p. 181).

[21] See footnote 19 above, second paragraph.

[22] The definition of "launching State" in art. I (*c*) includes also a "State from whose territory or facility a space object is launched". Art. V, para. 2, provides that "a launching State which has paid compensation for damage shall have the right to present a claim for indemnification to other participants in the joint launching", and that "the participants in a joint launching may conclude agreements regarding the apportioning among themselves of the financial obligation in respect of which they are jointly and severally liable". Damage occurring within a State from whose territory a space object is launched will in general be outside the scope of the Convention. Art. VII provides that the Convention shall not apply to damage caused by a space object of a launching State to nationals of that launching State or to foreign nationals invited to participate in the operation of the space object.

[23] Convention signed at Brussels, 25 May 1962 (IAEA, *op. cit.* (footnote 4 above), p. 34).

[24] See e.g. the Treaty between the Federal Republic of Germany and the Republic of Liberia on the Use of Liberian Waters and Ports by the N.S. [nuclear ship] *Otto Hahn* (Bonn, 27 May 1970) (Federal Republic of Germany), *Bundesgesetzblatt* (Bonn), part II, No. 34, 21 July 1971, p. 953); the Agreement between the United States of America and Italy on the Use of Italian Ports by the N.S. *Savannah* (Rome, 23 November 1964) (United Nations, *Treaty Series*, vol. 532, p. 133); the Exchange of notes constituting an Agreement between the United States of America and Italy concerning Liability during Private Operation of the N.S. *Savannah* (Rome, 16 December 1965) (*ibid.*, vol. 574, p. 139); the Exchange of notes constituting an Agreement between the United States of America and Ireland relating to Public Liability for Damage caused by the N.S. *Savannah* (Dublin, 18 June 1964) (*ibid.*, vol. 530, p. 217); the Agreement between the Netherlands and the United States of America on Public Liability for Damage caused by the N.S. *Savannah* (The Hague, 6 February 1963) (*ibid.*, vol. 487, p. 113); the Operational Agreement between the Netherlands and the United States of America on Arrangements for a Visit of the N.S. *Savannah* to the Netherlands (The Hague, 20 May 1963) (*ibid.*, p. 123).

one, except in relation to third States; however, if third States are affected States, they have a right of recourse against both source States. This principle is clearly demonstrated in a bilateral agreement between the Netherlands and the United States of America governing questions of public liability in respect of the visit to Netherlands ports of the United States nuclear ship *Savannah*.[25] This agreement indemnifies the Netherlands, in the case of a nuclear incident involving the *Savannah* during her voyage or visit, in respect of claims relating to loss or injury, whether sustained in the Netherlands or across international boundaries in third States or elsewhere.[26]

15. The pattern that emerges from this examination of State behaviour is a simple and wholesome one. States remain primarily accountable for the things that happen within their own territories, but which produce physical effects beyond their national boundaries. Conversely, States are entitled to expect that other States will observe the same rule. States, in exercise of their territorial sovereignty, have a choice whether to allow the importation of activities that are inherently dangerous; and in a few cases they have made it a condition of importation that the "exporting" State should retain an international liability for the safe conduct of the activity. Of course, as Commission members have pointed out, in the real world economic pressures force the hands of Governments, obliging them to admit activities which produce benefits, even if they cannot curb the injurious side effects, either within their own territories or across international boundaries. Nevertheless, the path to improvement is to strengthen the alliance between legal principle and the enlightened self-interest of both the source State and the international community. In one case only—that of ships in passage—the territorial State has a general obligation to allow foreigners the use of its territory; and, for practical purposes in an interdependent world, the overflight of civil aircraft on scheduled services falls within the same category. In these cases only does international practice at present appear to treat as a transboundary matter the relationship between the territorial State and the State whose ships or aircraft are rightfully within its territory. In this respect, as in others, the possibility of an evolution in the general law remains open.[27] Therefore the definition of "territory or control" must be open-ended, and responsive to legal change.

16. Discussion under this head has been mainly concerned with issues that arise because of the unequal legal relationships between land and sea areas. The sea is servient in varying degrees to land-based jurisdiction, which in its turn gives way to rights of passage. The regulation of maritime activities has special features. Because the ship is a moving object, which places itself physically within the territory of the receiving State, that State, within its own jurisdictional competence, has the means to redress many forms of loss or injury arising from a shipping activity. Therefore the demand for international regulation has stemmed less from a need to avoid and repair transboundary loss or injury than from a need to limit and systematize the controls exercised unilaterally by the receiving State. There are, however, lessons of general application, brought into sharp focus by the régimes relating to the sea carriage of oil (see paras. 4-5 above) and to the visits of nuclear ships (see paras. 13-14 above). In controlling the forces of nature, the need and motivation for international co-operation are not limited to circumstances in which there are, or may be, adverse transboundary effects. In establishing régimes, States will be guided by practical considerations, giving much more weight to natural boundaries than to the precise point at which political boundaries intervene. In doing so, they will often apply their solutions indifferently to circumstances which do or may entail transboundary effects, such as oil escapes from ships on the high seas or in passage, and to similar circumstances which entail no transboundary effects, such as oil escapes from the same ships tied up in foreign ports. Equally, they will choose to treat important questions, such as ship construction standards, as if they could in themselves be productive of adverse transboundary effects. This does not invalidate the transboundary criterion, which lies at the root of the whole topic: it merely shows that it will in practice often be given an enlarged application.

IV. The element of a physical consequence

17. It has already been stressed that the present topic arises from a discrepancy between natural and political boundaries. The first of the express limitations contained in draft article 1, on scope, concerns the political boundary that may divide an activity or situation from places in which its effects are felt. The second of the express limitations concerns the physical link that connects the activity or situation with its effects on the other side of the political boundary. The flow of water follows the law of gravity and ignores the man-made law of separate sovereignties.[28] The long-range circulation of air is governed by the prevailing

[25] Agreement of 6 February 1963, see footnote 24 above.

[26] Arts. 1 and 2 of the Agreement provide:

"Article 1

"The United States shall provide compensation for damage which arises out of or results from a nuclear incident in connection with the design, development, construction, operation, repair, maintenance or use of the N.S. *Savannah* provided, and to the extent, that any competent court of the Netherlands or a Commission to be established under Netherlands law, determines the United States to be liable for public liability. The principles of law which shall govern the liability of the United States for any such damage shall be those in existence at the time of the occurrence of the said nuclear incident.

"Article 2

"The United States shall indemnify any person who on account of any act or omission committed on Netherlands territory is held liable for public liability under the law of a country other than the Netherlands for damage as described in article 1."

[27] For example, there are tendencies in the 1982 United Nations Convention on the Law of the Sea (see footnote 14 above, second paragraph) to control the extent of the coastal State's involvement with foreign ships in its ports, and therefore to strengthen the analogy with ships in passage (see, in particular, art. 94, para. 6, and arts. 97, 218, 219, 220 and 223-233). Even so, the differences between the two régimes are more fundamental than the similarities.

[28] See e.g. the Convention between Norway and Sweden on Certain Questions relating to the Law on Watercourses (Stockholm, 11 May 1929) (League of Nations, *Treaty Series*, vol. CXX, p. 277), art. 1, para. 1, of which provides:

"1. The present Convention relates to installations or works or other operations on watercourses in one country which are of such a nature as to cause an appreciable change in watercourses in the other country in respect of their depth, position, direction, level or volume of water, or to hinder the movement of fish to the detriment of fishing in the latter country."

westerly winds that circle the earth in both hemispheres.[29] Sea and air currents are funnelled in variable, but persistent, patterns by topographical and other local features;[30] and any body of air or water distributes the toxic materials released into it.[31] Light and sound and radio waves have natural conductors.[32] Explosive and radioactive forces are generated by physical and chemical processes.[33] Fire and disease are fuelled and carried by the natural materials on which they feed.[34] Depletion of a renewable natural resource may hinder its regeneration and threaten its survival.[35]

18. These phenomena account for most of the activities and situations which have so far been found to require international regulation, because they do or may give rise to physical consequences with transboundary effects. This description implies a connection of a specific type—a consequence which does or may arise out of the very nature of the activity or situation in question, in response to a natural law of the kind evoked in the previous paragraph. That is to say, the activities and situations with which the present topic deals must themselves have a physical quality, and the consequence must flow from that quality, not from an intervening policy decision. Thus, the stockpiling of weapons does not entail the consequence that the weapons stockpiled will be put to a belligerent use. Yet this stockpiling may be characterized as an activity or situation which, because of the explosive or incendiary properties of the materials stored, entails an inherent risk of disastrous misadventure. That was the position taken by France and the Soviet Union in a 1976 Agreement on prevention of accidental or unauthorized use of nuclear weapons.[36]

There are comparable provisions in 20 or more other bilateral agreements applying to activities or situations which do or may give rise to a physical change in water conditions in a watercourse constituting or crossing the frontier.

[29] See e.g. the definitions of "air pollution" and "long-range transboundary air pollution" in art. 1 of the Convention on Long-range Transboundary Air Pollution (Geneva, 13 November 1979) (ECE/HLM.1/2, annex I). This Convention is open for signature or accession by the member States of the Economic Commission for Europe, as well as by States having consultative status with the Commission, and regional economic integration organizations with the requisite competence.

[30] See e.g. the Agreement for Co-operation in Dealing with Pollution of the North Sea by Oil (Bonn, 9 June 1969) (United Nations, *Treaty Series*, vol. 704, p. 3) which, pursuant to art. 1, applies

> "whenever the presence or the prospective presence of oil polluting the sea within the North Sea area, as defined in article 2 of this Agreement, presents a grave and imminent danger to the coast or related interests of one or more Contracting Parties".

Art. 6, para. 2, provides:

> "2. The Contracting Party within whose zone a situation of the kind described in article 1 occurs, shall make the necessary assessments of the nature and extent of any casualty or, as the case may be, of the type and approximate quantity of oil floating on the sea, and the direction and speed of movement of the oil."

There are comparable, although in some cases less detailed, provisions in other regional treaties for the protection of the marine environment.

Concerning the effect of localized air currents, see the *Trail Smelter* case (United Nations, *Reports of International Arbitral Awards*, vol. III (Sales No. E.1949.V.2), pp. 1905 *et seq.*), discussed in the Special Rapporteur's second report (*Yearbook... 1981*, vol. II (Part One), pp. 108 *et seq.*, document A/CN.4/346 and Add.1 and 2, paras. 22-39). See also the *Poplar River Project* case (*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), discussed in the fourth report, document A/CN.4/373 (see footnote 2 above), paras. 36 and 69).

[31] See e.g. the Convention for the Protection of the Mediterranean Sea against Pollution (Barcelona, 16 February 1976) (to appear in United Nations, *Treaty Series*, No. 16.908), art. 2 (*a*) of which defines the term "pollution" as follows:

> "(*a*) 'pollution' means the introduction by man, directly or indirectly, of substances or energy into the marine environment resulting in such deleterious effects as harm to living resources, hazards to human health, hindrance to marine activities including fishing, impairment of quality for use of sea water, and reduction of amenities."

Definitions of "pollution" in similar terms appear in other regional conventions for the protection of the marine environment. See also art. 1, para. 1, subpara. 4, of the 1982 United Nations Convention on the Law of the Sea (see footnote 14 above, second paragraph, and art. 1 (*a*) of the Convention on Long-range Transboundary Air Pollution (see footnote 29 above).

[32] See e.g. the Convention between Denmark, Finland, Norway and Sweden on the Protection of the Environment (Stockholm, 19 February 1974) (*International Legal Materials* (Washington, D.C.), vol. XIII, 1974, p. 591), art. 1 of which defines environmentally harmful activities as including:

> "... the use of land, the sea-bed, buildings or installations in any other way which entails or may entail environmental nuisance by water pollution or any other effect on water conditions, sand drift, air pollution, noise, vibration, changes in temperature, ionizing radiation, light, etc."

See also e.g. the International Telecommunication Convention (Malaga—Torremolinos, 25 October 1973) (ITU, *International Telecommunication Convention* (Geneva, 1974)), art. 35, para. 1, of which provides:

> "1. All stations, whatever their purpose, must be established and operated in such a manner as not to cause harmful interference to the radio services or communications of other members or of recognized private operating agencies, or of other duly authorized operating agencies which carry on private service, and which operate in accordance with the provisions of the Radio Regulations."

[33] See e.g. the definition of "nuclear damage" in art. I, para. 1 (*k*), of the Vienna Convention on Civil Liability for Nuclear Damage (footnote 4 above), which includes:

> "(i) loss of life, any personal injury or any loss of, or damage to, property which arises out of or results from the radioactive properties or a combination of radioactive properties with toxic, explosive or other hazardous properties of nuclear fuel or radioactive products or waste in, or of nuclear material coming from, originating in, or sent to, a nuclear installation;"

See also, in the Protocol between Belgium, France and Luxembourg to establish a tripartite standing committee on polluted waters (Brussels, 8 April 1950) (United Nations, *Treaty Series*, vol. 66, p. 285), a reference to the fact that the work of a previous tripartite committee had resulted in the conclusion of an arrangement with regard to the problems raised by the installation in the vicinity of the frontier of storage depots of explosive materials for civil use.

[34] See e.g. the Treaty between Hungary and Romania concerning the Régime of the Hungarian-Romanian State Frontier and Co-operation in Frontier Matters (Budapest, 13 June 1963) (United Nations, *Treaty Series*, vol. 576, p. 275), art. 28, paras. 2 and 3, of which provides:

> "2. If a forest fire breaks out near the frontier, the Party in whose territory the fire began must do everything in its power to contain and extinguish the fire and to prevent it from spreading across the frontier.
>
> "3. If, however, a forest fire threatens to spread across the frontier, the competent authorities of the Contracting Party in whose territory the threat has arisen shall immediately warn the competent authorities of the other Contracting Party so that the necessary measures may be taken to contain the fire at the frontier."

There are comparable provisions in other treaties dealing with frontier régimes.

[35] See e.g. the 1949 International Convention for the Northwest Atlantic Fisheries (para. 10 and footnote 17 above) and other regional and bilateral agreements containing provisions concerning the conservation of living resources, as well as the Convention on Fishing and Conservation of the Living Resources of the High Seas (Geneva, 29 April 1958) (United Nations, *Treaty Series*, vol. 559, p. 285) and many provisions of the 1982 United Nations Convention on the Law of the Sea (footnote 14 above, 2nd para.).

[36] Exchange of Notes between France and the Union of Soviet Socialist Republics constituting an Agreement on Prevention of Accidental or

(*Continued on next page*)

19. Although the direct physical linkage which has just been described is one of the three essential elements that fix the scope of the present topic, this physical linkage is not interrupted by any human or other failing within the conduct of an activity or situation, or by any extraneous circumstance—unless, perhaps, that circumstance is so overwhelming that the original activity or situation has no further relevance. These propositions have the support of common sense; for in some cases—as the 1976 French-Soviet Agreement bears witness[37]—human error in the handling of dangerous materials, or even sabotage or other unlawful interference, are the risks that loom largest. State practice, although little developed in comparison with the magnitude and variety of the problems, offers some corroboration and no conflicting evidence. For instance, in relation to activities that concern the use and transport of nuclear materials, the device of "channelling" all liability to a designated "operator" ensures that the activity will be accountable for the conduct of all subcontractors and others engaged in the enterprise.[38] Under the 1963 Vienna Convention on Civil Liability for Nuclear Damage, the operator's liability extends to damage caused by nuclear material in carriage to or from the nuclear installation, and even when such material is stolen.[39] The liability of the operator is excluded only when a nuclear incident is directly due to an act of armed conflict, hostilities, civil war or insurrection—and, at the option of the host State, if the incident is due to a grave natural disaster.[40] In relation to the broadly similar provisions of the 1960 Paris Convention on Third-party Liability in the Field of Nuclear Energy, the Federal Republic of Germany and Austria reserved the right to extend the operator's liability to the excluded areas.[41] Both Conventions are silent as to the residual accountability of the State on the territory of which a nuclear incident causing damage occurs; but any rights of recourse available under general rules of international law are preserved.[42]

20. It should again be noted that State practice does not confine itself within the limits of draft article 1, on scope, which aims to describe the circumference of the trunk of the tree, not that of its canopy or root system. Just as régimes may extend to circumstances in which there is no true transboundary element, so also they may transcend the requirement of a physical consequence. This can happen for the simple reason that States find it convenient to treat a problem requiring international co-operation as if that problem gave rise to a transboundary consequence. For instance, neither the cultivation of the opium poppy, nor the entry of opiates into commerce, in itself entails a physical consequence with transboundary effects; but international measures to reduce cultivation and regulate commerce may be more successful than the efforts of individual States to control at their borders an illicit traffic in narcotic drugs. On the other hand, it will sometimes be found that the only efficient method of controlling an activity that falls within the scope of the present topic is to extend the control to a related activity, not in itself within the scope of the topic. For example, the manufacture and sale of household detergents would seem at first sight at least as innocent of transboundary implications as the manufacture and sale of opiates. Yet when household detergents are sold over the counter and used in household cleaning they inevitably contaminate waste water; and if this waste water flows into an international watercourse—or even into a confined sea—there is a physical consequence with pronounced transboundary effects. To meet this danger, the 1968 European Agreement on the Restriction of the Use of Certain Detergents in Washing and Cleaning Products requires contracting States to prevent the marketing of washing or cleaning products containing synthetic detergents which are less than 80 per cent biologically degradable.[43]

21. The last example prompts a more general reflection. Although draft article 1, on scope, which follows in this respect the pattern most common in international legislation,[44] suggests a sequence of criteria, beginning with an

(*Footnote 36 continued*)
Unauthorized Use of Nuclear Weapons (Moscow, 16 July 1976) (*Journal Officiel de la République française, Lois et décrets* (Paris), 108th year, No. 251, 25-26 October 1976, p. 6231).

[37] The French-Soviet Agreement (see footnote 36 above) provides:

"Having regard to the views exchanged concerning measures to avoid any risk of such accidental or unauthorized use, it was agreed that the following provisions should be adopted:

"1. Each Party undertakes to maintain and possibly to improve, as it deems necessary, its existing organizational and technical arrangements to prevent the accidental or unauthorized use of nuclear weapons under its control.

"2. The two Parties undertake to notify each other immediately of any accidental occurrence or any other unexplained incident that could lead to the explosion of one of their nuclear weapons and could be construed as likely to have harmful effects on the other Party."

[38] See the definitions contained in the following provisions: art. 1, para. (*a*) (i) ("A nuclear incident") and arts. 3-6 of the Convention on Third-party Liability in the Field of Nuclear Energy (Paris, 29 July 1960) (IAEA, *op. cit.* (footnote 4 above), p. 22); art. I, para. (*k*) ("Nuclear damage") and para. (*l*) ("Nuclear incident"), and art. II, of the Vienna Convention on Civil Liability for Nuclear Damage (footnote 4 above); art. I, para. 7 ("Nuclear damage") and para. 8 ("Nuclear incident"), and art. II of the Convention on the Liability of Operators of Nuclear Ships (footnote 23 above).

[39] See art. II and art. VI, para. 2, of the 1963 Vienna Convention (see footnote 4 above); see also art. 4 and art. 8, para. (*b*), of the 1960 Paris Convention (footnote 38 above).

[40] Article IV, para. 3, of the 1963 Vienna Convention (see footnote 4 above); see also art. 9 of the 1960 Paris Convention (footnote 38 above).

[41] Reservation to art. 9 (see IAEA, *op. cit.* (footnote 4 above), p. 32).

[42] Art. XVIII of the 1963 Vienna Convention (see footnote 4 above); and annex II of the 1960 Paris Convention (see footnote 38 above).

[43] Art. 1 of the Agreement (Strasbourg, 16 September 1968) (United Nations, *Treaty Series*, vol. 788, p. 181).

[44] See e.g. the typical definition of "pollution" quoted in footnote 31 above. See also, as an example typical of bilateral treaties relating to watercourses, the General Convention between Romania and Yugoslavia (Belgrade, 14 December 1931) (League of Nations, *Treaty Series*, vol. CXXXV, p. 33), art. 1 of which reads in part:

"...

"In the absence of any previous agreement between them, the two States will abstain from any alteration of the existing installations and works, and from any measures or operations which might modify the hydraulic system in the territory of the neighbouring State and thus affect its interests or acquired rights."

Again, art. 7 of the Agreement between Mexico and the United States of America to Co-operate in the Solution of Environmental Problems in the Border Area (La Paz, Baja California (Mexico), 14 August 1983) (*International Legal Materials* (Washington, D.C.), vol. XXII, No. 5, 1983, p. 1025) provides:

"The Parties shall assess, as appropriate, in accordance with their respective national laws, regulations and policies, projects that may have significant impacts on the environment of the border area, so that appropriate measures may be considered to avoid or mitigate adverse environmental effects."

activity or situation and continuing through a physical consequence to transboundary effects, the method of constructing a régime very often begins at the other end. The fact that effects are experienced or apprehended, and are traceable to causes not wholly within the territory or under the control of the affected State, creates a demand for action by source States to curb a physical consequence or to reduce its transboundary effects, if necessary by modifying the activity or situation from which it arises. The draft convention prepared by UNEP for the protection of the ozone layer (of the earth's upper troposphere and stratosphere) provides a good example of suspected physical consequences in search of their generating activities. In one alternative version, article 2 of the draft convention requires the contracting parties to "take appropriate measures ... to protect human health and the environment against adverse effects resulting from human activities, should it be found that these activities have or are likely to have adverse effects by reason of their modification of the ozone layer".[45] A less speculative example is provided by the Conventions on civil liability relating respectively to the sea carriage of oil (see paras. 4-5 above) and to the use of nuclear materials (see para. 19 above), which bring together every phase of activity that may contribute to an oil spillage or a nuclear incident through the device of "channelling" liability to a designated operator. In short, the physical consequence, actual or potential, is the central element of every problem, in relation to which the values of freedom to undertake activities, and of freedom from transboundary interference, may need to be brought into balance.

V. The third element: effects upon use or enjoyment

22. The distinction between a physical consequence, actual or potential, and its transboundary effects upon use or enjoyment is clearly enunciated in the award of the *Lake Lanoux* tribunal, dealing with the fact that France proposed to draw off, within its own territory, water that would have flowed to Spain, substituting water of equivalent quantity and quality, so that the flow reaching the Spanish border would not have been substantially affected:

> ... The unity of a basin is supported at the legal level only to the extent that it conforms to the realities of life. Water, which is by nature a fungible thing, may be restored without alteration of its qualities from the viewpoint of human needs. A withdrawal with return, as contemplated in the French project, does not alter a state of affairs established in response to the demands of life in society.[46]

One reason that this and other well-known passages of the *Lake Lanoux* award have a lasting importance is that they do not encourage a divergence of legal and social principles. If it is recalled that Spain had hoped to gain an additional advantage as the price of its agreement to the technicality that water had been exchanged, it should also be recalled that France had earlier proposed to offer Spain no more than monetary compensation for water to be drawn off and not returned.[47] Upon a different view of the course of legal development, it might well have been judged that the only key to the fortress of another State's sovereign self-interest was an equally impervious technical argument, and that the only way of investing the fortress was to insist upon the right to veto decisions with which one did not agree.

23. Although the existence of the physical consequence is a prerequisite, the tenor of State practice—especially in regard to the construction of régimes—is to give a good deal of weight to an affected State's appraisal of the "realities of life" and of tendencies inconsistent with "a state of affairs established in response to the demands of life in society". It is of course true that the distinction between a physical consequence and its effect is most easily seen when the extent of the physical consequence can be monitored and controlled. This is well illustrated in treaties, old and new, relating to the régime of boundary waters. The 1909 Boundary Waters Treaty between Great Britain and the United States of America,[48] concerning the Great Lakes and other waterways of the Canadian-United States border, established a threefold priority of uses (for domestic and sanitary purposes, for navigation, and for power and irrigation), allowing no substantial conflict of any use with one to which a higher priority had been given (art. VIII). The International Joint Commission was created to survey these and other requirements of the Treaty (art. VII). In other provisions a cautious balance was struck, for example in regard to the rights of each party, and of its constituent States and provinces, to use and divert waters within its own territory, provided that there was no material injury to navigation, that—in certain circumstances—the use and diversion had been examined by the International Joint Commission, and that any use or diversion "resulting in any injury on the other side of the boundary, shall give rise to the same rights and entitle the injured parties to the same legal remedies as if such injury took place in the country where such diversion or interference occurs" (art. II).[49] In its long life, the Boundary Waters Treaty and its guardian Commission have known popularity and relative neglect; but there can be no mistaking the quiet influence of the Treaty on the conduct of United States-Canadian transboundary relations and the force of its example in other parts of the world.

24. The Finnish-Soviet Agreement of 1964 concerning Frontier Watercourses[50] was a sequel to another treaty between the two countries, concerning the régime of the frontier and providing for the settlement of frontier inci-

[45] Second revised draft convention for the protection of the ozone layer, prepared by the UNEP secretariat (UNEP/WG.93/3).

[46] United Nations, *Reports of International Arbitral Awards*, vol. XII (Sales No. 63.V.3), p. 304, para. 8; see also *Yearbook... 1974*, vol. II (Part Two), p. 196, document A/5409, para. 1064.

[47] United Nations, *Reports of International Arbitral Awards...*, p. 292 and p. 316, para. 24.

[48] Signed at Washington, 11 January 1909 (United States of America, *Treaty Series*, No. 548 (Washington, D.C., 1924)).

[49] A recent example of North American initiatives aimed at permitting a person in one State who suffers or is threatened with injury by pollution in another State to bring an action there, on the same basis as if the injury or threatened injury had occurred in that State, is the legislation on access to the courts, on a uniform and reciprocal basis, in cases of transboundary pollution, already enacted in the States of Montana and New Jersey, introduced in the legislature of the Canadian Province of Ontario, and understood to be under active consideration in the States of Colorado and New York.

[50] Signed at Helsinki, 24 April 1964 (United Nations, *Treaty Series*, vol. 537, p. 231).

dents.[51] The régime established is of more than average interest because this frontier is a *mélange* of land and lake and waterway, blended with the economic and social life of small communities. Thus the Agreement provides:

Article 2

No measures may be taken, in disregard of the procedure laid down in chapter II of this Agreement,[52] in frontier watercourses or on the banks thereof which might so alter the position, depth, level or free flow of watercourses in the territory of the other Contracting Party as to cause damage or harm to the water area, to fisheries, to land or to structures or other property; which might create a danger of flooding, cause a significant loss of water, alter the main fairway or interfere with the use of the common fairway for transport or timber-floating; or which might in some other like manner be prejudicial to the public interest. . . . The Contracting Parties shall ensure that frontier watercourses and structures situated therein are maintained in such a state that the damage or harm referred to in this article does not ensue.

. . .

There follow provisions to ensure the free flow of water, with special regard to transport, timber floating and the passage of fish (art. 3). In regard to pollution: "The Contracting Parties shall, to the extent required, jointly decide upon the standards of quality to be set for water in each frontier watercourse or part thereof. . .", and jointly observe and take measures to maintain the established standards (art. 4). There is to be reparation for damage caused by one contracting party in the territory of the other; and this reparation may by agreement take the form of compensating privileges in the watercourses of the other party (art. 5).

25. The two bilateral treaties just considered—although made on different continents and half a century apart—treat the question of boundary waters in a similar way. In their provisions can be seen the kinds of effects on use or enjoyment which States typically foresee and wish to avoid. They are concerned that transboundary consequences may interfere with other uses and activities; and they therefore make stipulations as to the priorities of uses. They are concerned to preserve the physical characteristics of the waterways, although they do not rule out the possibilities of agreement to change. Damage to property is to be avoided and, if not avoided, repaired. In the older treaty, pollution, defined simply in terms of injury to health or property, is prohibited.[53] In the more recent treaty, the modern awareness of the complexities of pollution problems calls for a more sophisticated approach: the potential effects of pollution are recorded, and are as far as possible to be avoided; but the obligations are framed in terms that recognize the impossibility of dealing in absolutes. Standards of quality are to be set by mutual agreement in regard to particular watercourses; and the accommodation of some potentially polluting uses is contemplated.[54] In each treaty—and in large numbers of other comparable treaties—there are many indications of the relative values which the parties attach to the effects of an actual or prospective physical consequence. The treaties also tend to show that States attach equal significance to their freedom to undertake activities and to their freedom from transboundary interference.

26. However, it is just as important to stress that these treaties do not, in general, provide rules of thumb that can in themselves resolve future issues. More usually, they are concerned to provide criteria by which such issues can either be avoided or, if the occasion arises, be resolved by the methods indicated. These methods range from the application of national standards of treatment in matters affecting the other party or its citizens, to reference of issues to the decision of a joint boundary commission or to the ultimate decision of the parties themselves.[55] Conversely, because these treaties provide for continuing evaluation, the parties can and do reserve to themselves the right to add criteria to those which the treaty indicates. In the case of the 1909 Boundary Waters Treaty between Great Britain and the United States of America, for example, the brief reference to pollution already cited[56] does little more than establish a frame of reference for an inquiry whether any particular kind and quantity of adulteration constitutes or may constitute pollution "to the injury of health or property". There are similarly wide elements of appreciation in the more elaborate provisions relating to pollution in the 1964 Finnish-Soviet Agreement, article 4 of which, after references to various other possible consequences or effects, concludes by mentioning pollution which might cause "substantial scenic deterioration or might endanger public health or have similar harmful consequences for the

[51] Treaty of 23 June 1960 (*ibid.*, vol. 379, p. 277).

[52] Chapter II establishes a joint commission with immediate responsibility for matters relating to the utilization of frontier watercourses.

[53] The 1909 Boundary Waters Treaty between Great Britain and the United States of America (see footnote 48 above) provides as follows in art. IV:

"It is further agreed that the waters herein defined as boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other."

[54] The 1964 Finnish-Soviet Agreement, concerning frontier watercourses (see footnote 50 above) provides:

"Article 4

"The Contracting Parties shall take measures to ensure that frontier watercourses are not polluted by untreated industrial effluents and sewage, by waste materials from timber-floating or wastes from ships or by other substances which, immediately or in course of time, might cause shoaling of the watercourses, harmful changes in the composition of the water, damage to the fish-stock or substantial scenic deterioration or might endanger public health or have similar harmful consequences for the population and the economy.

"The Contracting Parties shall, to the extent required, jointly decide upon the standards of quality to be set for the water in each frontier watercourse or part thereof and shall, in accordance with the procedure laid down in chapter II, co-operate in keeping the quality of the water in frontier watercourses under observation and in taking measures to increase the self-cleansing capacity of the said watercourses.

"Where certain measures might cause pollution of a watercourse or part thereof and reduce the self-cleansing capacity of the water in the territory of the other Contracting Party, such measures may only be carried out subject to the conditions specified in chapter II of this Agreement."

[55] See the 1909 Boundary Waters Treaty between Great Britain and the United States of America (footnote 48 above), art. II (para. 23 above) and arts. IV, VIII, IX and X; and the 1964 Finnish-Soviet Agreement concerning Frontier Watercourses (footnote 50 above), arts. 8-11. Art. 10 provides in part:

"Save as otherwise provided in this Agreement, the provisions of the law in force in each country shall be taken into account in any decision [of the Joint Finnish-Soviet Commission on the Utilization of Frontier Watercourses]."

[56] See footnote 53 above.

population and the economy".[57] In the case of the 1909 Boundary Waters Treaty between Great Britain and the United States of America, either party has the right unilaterally to refer to the International Joint Commission, for examination and report, "any other questions or matters of difference arising between them involving the rights, obligations or interests of either in relation to the other or to the inhabitants of the other, along the common frontier ..." (art. IX).[58]

27. To keep a perspective, it is necessary to consider why boundary waters treaties[59] of the kind discussed in the four preceding paragraphs present such good demonstration material regarding the relationship between physical consequences and their effects. Boundary waters treaties are not uncommon; but, as a class of treaties relating to transboundary effects, they present unusual features. It is in the very nature of waters lying along a boundary that they can be of little advantage to either riparian unless there is a high level of co-operation between them. More clearly, perhaps, than in any other class of case, national self-interest is identified with the common interest; and these treaties are therefore at one end of a sliding scale. The waters which divide and join the riparians are like a knot tied by nature itself, and the fortunes of each depend upon the other. In situations that are less geographically concentrated there will in all probability be some matters that are just as vital to life in both the neighbouring States; but it is much less likely that these vital matters will be all-embracing.

28. At one end of the scale, represented by the boundary waters treaties, a display of criteria—assigning priorities to certain uses, and describing the limits and conditions that govern a residual right of unilateral action—give each party a degree of assurance that decisions that have to be taken jointly will conform to established guidelines. Towards the other end of the scale, these guidelines may serve exactly the opposite purpose, offering the parties the advance assurances they need, and reducing to a minimum the condition of prior agreement as a fetter upon each State's freedom.[60] In either case, the criteria stated, and the procedural contexts in which they appear, are indications of the value that the parties attach to avoiding, minimizing or repairing physical consequences that affect the other party's use or enjoyment of its own territory. Often the consequences to be avoided are those that would change a situation upon which the parties have come to rely.[61] Frequently, as in article 2 of the 1964 Finnish-Soviet Agreement on boundary waters (see para. 24 above), it will be left to one party to make the initial judgement that a prospective course of action may create a danger; but the same article goes on to state another case in which each party reserves to itself the right to form an initial opinion about the possible harmfulness of the course of action proposed.[62] In régime building, it is for the parties, taking into account the applicable principles and factors, to determine

[57] See footnote 54 above.

See also art. IV, para. 10, of the 1960 Indus Water Treaty (Karachi, 19 September 1960) (United Nations, *Treaty Series*, vol. 419, p. 125), which provides an important but different example of the need to strike a balance between the interests of source States and those of affected States in dealing with the pollution of watercourses:

"10. Each Party declares its intention to prevent, as far as practicable, undue pollution of the waters of the rivers which might affect adversely uses similar in nature to those to which the waters were put on the effective date, and agrees to take all reasonable measures to ensure that, before any sewage or industrial waste is allowed to flow into the rivers, it will be treated, where necessary, in such manner as not materially to affect those uses: provided that the criterion of reasonableness shall be the customary practice in similar situations on the rivers."

[58] See footnote 48 above.

[59] "Boundary waters" treaties are those that primarily concern lakes, rivers or estuaries forming a boundary, rather than rivers which simply cross a political boundary.

[60] See e.g. art. IV, para. 10, of the 1960 Indus Waters Treaty (footnote 57, 2nd para.).

Similarly, in chap. IX of the Treaty of La Plata River and its Maritime Limits between Argentina and Uruguay (Montevideo, 19 November 1973) *International Legal Materials*, (Washington, D.C.), vol. XIII, No. 2, March 1974, p. 225; see also *Yearbook ... 1974*, vol. II (Part Two), p. 299, document A/CN.4/274, para. 121), the parties define "pollution" as the direct or indirect introduction by man into the aquatic environment of matter or energy which may cause noxious effects (art. 47), and pledge themselves, within a framework of mutual co-operation (art. 52), to apply preventive measures conforming to international standards (arts. 48-49), with provision for exchanging information concerning the proposed national norms (art. 50) and for reparation of detriment suffered as a consequence of pollution caused by operations within their territory or under their control (art. 51).

Occupying a position midway along the scale, the 1974 Convention on the Protection of the Environment between Denmark, Finland, Norway and Sweden (see footnote 32 above) defines "environmentally harmful activities" by reference to criteria or physical consequences and their transboundary effects (art. 1). Art. 2 provides:

"In considering the permissibility of environmentally harmful activities, the nuisance which such activities entail or may entail in another Contracting State shall be equated with a nuisance in the State where the activities are carried out."

Although the Convention provides for consultations between the States concerned as to the permissibility of activities that entail or may entail "considerable nuisance", and for submission of that question to an intergovernmental commission for an opinion, the final decision is to be taken by the appropriate court or administrative authority in the source State (see arts. 3, 11 and 12).

[61] The Agreement between Poland and the German Democratic Republic concerning Navigation in Frontier Waters and the Use and Maintenance of Frontier Waters (Berlin, 6 February 1952) (United Nations, *Treaty Series*, vol. 304, p. 131) contains a typical provision in this respect:

"Article 18

"Existing water engineering works, bridges, dams, sluices, embankments, etc. on frontier watercourses shall be preserved. If they are in use, each of the two Contracting Parties shall at its own expense keep them in good condition and in repair up to the frontier line unless the two Contracting Parties conclude a separate agreement on the subject.

"If need arises to reconstruct or remove any of the objects referred to in the first paragraph and such reconstruction or removal may cause a change in the water level in the territory of the other Party or impair the navigability of the river, the other Party's consent to the execution of the necessary works must be obtained.

"Such consent shall likewise be required for the construction of new bridges, dams, sluices, embankments, etc.

"If the projected works may serve common purposes, the competent authorities shall agree upon the general and detailed plans thereof, the construction costs, the apportionment of costs and the acceptance.

"The use, operation and repair of existing power installations, the restoration of destroyed power installations and the construction of new power installations on frontier waters shall be regulated by agreeement between the competent authorities of the two Parties."

[62] The provisions of art. 2 apply also to "measures which alter or block the fairway or change the course thereof, even where such measures would not have the aforementioned consequences".

See also the Convention between Hungary and Czechoslovakia relating to the Settlement of Questions arising out of the Delimitation of the Frontier between the two Countries (Frontier Statute), signed at Prague, 14 Novem-

(Continued on next page.)

what significance they attach to avoiding, minimizing and repairing physical consequences with transboundary effects. If there is no applicable régime, and agreement upon such a régime is not within reach, it is for the source State to make the initial decisions; but it should equip itself unilaterally with a régime that takes due account, and makes appropriate provision, to avoid and repair "a physical consequence affecting the use or enjoyment of areas within the territory or control of any other State". The phraseology of draft article 1, on scope, quoted in the preceding sentence, is designed to cover all the possible circumstances and, in so doing, to preserve a perfect neutrality.

29. One other facet of the present topic can be well illustrated in almost any range of treaty practice. In human affairs there is of necessity a starting point, by reference to which both change and continuity are measured. So, in the boundary waters treaties that have been considered, the measurement of effects is very largely in terms of protection of the existing situation: there is to be no avoidable interference with established uses; and the physical characteristics of the waterways are not to be changed, except by agreement (see paras. 23-24 above). Sometimes, as in the case of damage caused by space objects, regulation can precede the development of the activity to which it relates. Another example of timely regulation is provided by the 1975 Agreement between Canada and the United States of America relating to the Exchange of Information on Weather Modification Activities.[63] Very often, however, regulation begins when uses and abuses are already well established. Such a case is the 1979 Convention on Long-range Transboundary Air Pollution,[64] dealing with existing situations that have assumed a sinister aspect, both because the emissions of air pollutants have cumulative effects and because the harmful nature of these effects is better understood. In such a context it is most clearly seen that the need for change must be evaluated both in terms of the benefits promised and of the costs entailed;[65] and it becomes the essence of régime-building to arrive at a fair distribution of costs and benefits.

30. In short, the values of use or enjoyment are seldom measured in terms of absolutes. Freedom from pollution is ordinarily established in any given context at levels that are technically and economically attainable, and that are judged sufficient to meet the needs of the activities which depend upon them, as well as the requirements of the human situation. Activities involving a relatively small, but ineradicable, element of risk are not on that account proscribed; but, as in the case of the launching of space objects—or the realignment of a flood embankment in boundary waters—the governing régime should make provision for reparation, if the measures taken to avoid transboundary effects upon use or enjoyment do not succeed in their objective. And, while established uses and amenities have usually a preferred position, neither a treaty régime nor an unregulated situation of long standing can constitute a barrier to economic, social, technological or legal change. A new norm of customary law—perhaps facilitated in its development by the patterns of régimes established pursuant to the themes of the present topic—may require such a change. This change may also be required by the obligation to co-operate, on the basis of a fair distribution of costs and benefits.

31. Facets of the duty of co-operation have also seemed to require the inclusion in draft article 1, on scope, of a reference to situations, in the phrase "activities and situations". The present topic is concerned almost exclusively with obligations arising from human activities; and activities entail initiatives within the territory or control of the source State taken in pursuance of its own rights of use or enjoyment, but with a proper regard for their transboundary implications. Sometimes, however, it is not so much an identified activity as the existence of a state of affairs, within the territory or control of the source State, which gives rise or may give rise to physical consequences with transboundary effects. The affected State may then expect or call upon the source State to take account of the situation, to make at least a limited response, and perhaps to consider in good faith the case for a more sustained response. In the last-named case, the investigation may lead to the identification of activities that should be regulated, or to some limited measures that should be taken for the affected State's benefit, with an equitable allocation of costs. The main classes of cases falling within this general description can now be illustrated.

32. First, there are cases in which a source State has a duty to give a warning of immediate danger, whether arising from an activity or from a natural cause. The warning may relate, for example, to the approach of an oil slick,[66] or

(*Footnote 62 continued*)
ber 1928 (League of Nations, *Treaty Series*, vol. CX, p. 425), art. 26, para. 2 (*c*), of which contains a comparable provision:

"The Contracting Parties shall not allow any works calculated to disturb the flow of the water or the regularization of frontier watercourses. If works contemplated are likely to have a desirable effect on the bed of frontier watercourses, the competent technical department of the other Party must be consulted."

[63] Signed at Washington, 26 March 1975 (United Nations, *Treaty Series*, vol. 977, p. 385).

[64] See footnote 29 above.

[65] Under the heading "Fundamental principles", art. 2 of the 1979 Convention provides:

"The Contracting Parties, taking due account of the facts and problems involved, are determined to protect man and his environment against air pollution and shall endeavour to limit and, as far as possible, gradually reduce and prevent air pollution including long-range transboundary air pollution."

In arts. 3 and 4, the Convention provides for a concerted international effort towards the development of policies and strategies to combat the discharge of air pollutants, and, in art. 5, for consultations, upon request, between source States and affected States. Under the heading "Air quality management", art. 6 continues:

"Taking into account articles 2 to 5, the ongoing research, exchange of information and monitoring and the results thereof, the cost and effectiveness of local and other remedies and, in order to combat air pollution, in particular that originating from new or rebuilt installations, each Contracting Party undertakes to develop the best policies and strategies including air quality management systems and, as part of them, control measures compatible with balanced development, in particular by using the best available technology which is economically feasible and low- and non-waste technology."

[66] See e.g. the Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution (Kuwait, 24 April 1978) (*International Legal Materials* (Washington, D.C.), vol. XVII, No. 3, 1978, p. 501) provides in art. IX, para. (*b*):

"(*b*) Any Contracting State which becomes aware of any pollution emergency in the Sea Area shall, without delay, notify the Organization referred to under article XVI and, through the secretariat, any Contracting State likely to be affected by such emergency."

There are similar provisions in other regional agreements for the protection of the marine environment, and also in art. 198 of the 1982 United Nations Convention on the Law of the Sea (see footnote 14 above, second paragraph).

to danger from floods or drifting ice,[67] or to risks arising from an outbreak of fire or pests or disease;[68] and the source State may have a related duty to take any measures within its power to contain the danger.[69] Secondly—and this case involves a more intricate relationship with activities—the affected State may be dependent upon the maintenance of a state of affairs from which it benefits, within the territory or control of the source State; or, conversely, may wish to seek the co-operation of the source State in ending a state of affairs by which it is continually troubled. Thus, it may require the bed of a river to be kept in its present course,[70] or desire the maintenance and continued operation of river installations,[71] which may or may not be the product of a past activity falling within the scope of the present topic. To take a different example, the affected State may be unable, without the active co-operation of the source State, to combat a danger of flood[72] or disease,[73] to protect a migratory living resource,[74] or to conserve a high seas fish stock.[75] In most of these cases, a past activity may have contributed to the problem, or a present activity may have to be accommodated; but the dynamic element is supplied by the need of the affected State, rather than the interest of the source State.

33. This rather long section of the report has been primarily concerned with the essential distinction between physical consequences—which are unevaluated facts, actual or prospective—and their effects upon use or enjoyment. The illustrative materials have been drawn largely from bilateral treaties, which often separate the two elements, leaving substantial discretion for subsequent exercise by the parties, but assembling some criteria by which effects are to be measured. In the case of multilateral régimes establishing a limited liability or setting safety standards, the work of assessing the risk of physical consequences, and of evaluating their possible effects, often finds no more than fleeting reference in a preambular paragraph. In these cases, the physical consequences and their effects have been evaluated before the treaty was drafted: the evaluation stands like the answer to a mathematical problem and does not show the working upon which the answer was based. Yet even in these cases the separate elements of consequence and effects are lurking, and occasionally attract attention. Thus, in the dispute between

[67] See e.g. the Agreement between Bulgaria and Turkey concerning Co-operation in the Use of the Waters of Rivers flowing through the Territory of both Countries (Istanbul, 23 October 1968) (United Nations, *Treaty Series*, vol. 807, p. 117), art. 3 of which reads in part:

"The two Contracting Parties agree to exchange information concerning floods and floating ice by the most expeditious means possible."

Other treaties dealing with watercourses which intersect or form a frontier contain similar provisions.

[68] See e.g. art. 28, paras. 2 and 3, of the Treaty between Hungary and Romania concerning the Régime of the Hungarian-Romanian State Frontier (footnote 34 above); art. 28, para. 5, provides:

"5. If it is reported that pests harmful to forest vegetation have appeared near the frontier and are showing a tendency to spread, the Parties shall exchange information and shall take the necessary preventive measures or joint control measures."

Arts. 3 and 4 of the 1969 *International Health Regulations* require that WHO be notified immediately when it is discovered that certain diseases or organisms are present in the territory of a member State.

[69] See footnote 34 above; see also art. IX, para. (*a*), of the Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution (footnote 66 above).

"(*a*) The Contracting States shall, individually and/or jointly, take all necessary measures, including those to ensure that adequate equipment and qualified personnel are readily available, to deal with pollution emergencies in the Sea Area, whatever the cause of such emergencies, and to reduce or eliminate damage resulting therefrom;"

Comparable provisions appear in other regional agreements for the protection of the marine environment and in art. 199 of the 1982 United Nations Convention on the Law of the Sea (see footnote 14 above, second paragraph).

[70] See e.g. the Treaty between Hungary and Romania concerning the Régime of the Hungarian-Romanian State frontier (footnote 34 above):

"Article 16

"1. The Contracting Parties shall ensure that frontier waters are kept in good condition and shall take steps to prevent wilful damage to their banks.

"2. The position and direction of frontier watercourses must, in so far as possible, be preserved unchanged. To this end the two Parties shall, by agreement, take the necessary steps to remove any obstacles which may cause displacement of the beds of frontier rivers or streams or a change in the position of canals or which obstruct the natural flow of water.

"3. In order to prevent displacement of the beds of frontier rivers, streams or canals, their banks must be strengthened wherever this is found, by agreement, to be necessary. Such works shall be executed and their cost defrayed by the Party to which the bank belongs.

"4. Should a frontier river, stream or canal shift its bed spontaneously or as a result of some natural phenomenon, the Contracting Parties must, jointly and on the basis of equality, undertake the work of correcting the bed if that is found necessary.

"5. The manner of executing the work referred to in this article and other hydraulic works as well as the manner of apportioning the resulting costs shall be determined in conformity with special regulations drawn up by agreement between the two Parties."

[71] See footnote 61 above.

[72] See e.g. the Agreement between Yugoslavia and Romania concerning Questions of Water Control Systems and Watercourses on or intersected by the State Frontier, together with the Statute of the Yugoslav-Romanian Water Control Commission (Bucharest, 7 April 1955) (see United Nations, *Legislative Texts and Treaty Provisions concerning the Utilization of International Rivers for other Purposes than Navigation* (Sales No. 63.V.4), p. 928), art. 2, paras. 2 and 3, of which provides:

"2. ...

"With a view to improving the existing situation as regards the discharge of internal waters in the frontier district, the Mixed Commission shall examine and propose to the Governments of the Contracting States the amplification of existing water control systems and the erection of new installations and structures on water control systems and watercourses and in valleys and depressions on or intersected by the State frontier.

"The Mixed Commission shall also examine the possibilities and propose the measures required for draining of internal waters by pumping or otherwise.

"3. Where it is found necessary, in order to achieve the objects prescribed by this Agreement, that joint works should be carried out by the two Contracting States, the said States undertake, on the proposal of the Mixed Commission, to bear the expenses involved, the apportionment of which shall be determined by agreement between the Governments of the two Contracting States. The Governments of the two Contracting States shall also determine, on the proposal of the Mixed Commission, the method of carrying out the works and the method of payment."

[73] Through a series of arrangements initiated by the Government of the United States of America in 1947, provision was made, in conjunction with the Government of Mexico, for a joint campaign against foot and mouth disease in Mexico, and for the expenditure of funds provided by the two Governments for this purpose. See M. M. Whiteman, *Digest of International Law* (Washington, D.C., U.S. Government Printing Office, 1968), vol. 6, pp. 266-267.

[74] See e.g. the Agreement between Canada, Denmark, Norway, the USSR and the United States of America on the Conservation of Polar Bears (Oslo, 15 November 1973) (*United States Treaties and Other International Agreements, 1976* (Washington, D.C.), vol. 27, part 4, p. 3918).

[75] See footnote 35 above.

Canada and the Soviet Union relating to the *Cosmos 954* satellite—a Soviet space object which had crash-landed in Canada—one question at issue was whether liability under the 1972 Convention on International Liability for Damage caused by Space Objects extended to the repayment of substantial costs incurred by Canada in investigating the crash-landing.[76] The answer to that question depends upon the meaning placed on "damage"as defined in article I, paragraph (*a*) of the Convention,[77] and that definition in turn reflects the way in which the drafters of the Convention measured the range of effects upon use or enjoyment of the physical consequence of a crash-landing.

34. There is, however, a different trend in multilateral instruments, which are venturing into new areas, rather than merely responding to the circumstances in which transboundary damage is most likely to give rise to individual claims or angry remonstrances from an affected State. These instruments often display a particular concern either with circumstances in which damage affects the areas of the biosphere not within the limits of national jurisdiction,[78] or with circumstances in which damage suffered within national territory cannot be traced to particular transboundary sources.[79] Such instruments as these—including especially, but by no means exceptionally,[80] part XII of the 1982 United Nations Convention on the Law of the Sea,[81] dealing with the protection and preservation of the marine environment—are rich in their expression of the criteria of evaluation; and it is a large part of their purpose to increase knowledge and heighten awareness of the gravity of the damage caused by activities giving rise to physical consequences with harmful transboundary effects. In the international legislation adopted since the enunciation of these themes in Principles 21 and 22 of the United Nations Declaration on the Human Environment (Stockholm Declaration), adopted in 1972,[82] it has become common to place emphasis upon the obligations that States have as the counterpart of their rights, and upon the need for the development of the law.[83]

VI. The roles of international organizations

35. It is convenient to consider in reverse order the issues raised by draft articles 3, 4 and 5. The point covered in draft article 5, relating to matters not within the scope of the present articles, is a narrow one. Following the Commission's usual practice, draft article 1, on scope, deals only with relations between States; and there is little war-

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

[77] See footnote 19 above, second paragraph.

[78] See e.g. the second revised draft convention for the protection of the ozone layer (footnote 45 above). See also art. IX of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies (footnote 14 above); and art. 7, para. 1 of the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (United Nations, *Juridical Yearbook 1979* (Sales No. E.82.V.1), p. 109).

[79] See e.g. the Convention on Long-range Transboundary Air Pollution (footnote 29 above), in which "long-range transboundary air pollution" is defined as follows:

"Article 1

"...

"(*b*) 'Long-range transboundary air pollution means air pollution whose physical origin is situated wholly or in part within the area under the national jurisdiction of one State and which has adverse effects in the area under the jurisdiction of another State at such a distance that it is not generally possible to distinguish the contribution of individual emission sources or groups of sources."

[80] See also e.g. the Convention for the Protection of the Mediterranean Sea against Pollution (footnote 31 above); the Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution (footnote 66 above); the Convention on the Protection of the Marine Environment of the Baltic Sea Area (Helsinki, 22 March 1974) (*International Legal Materials* (Washington, D.C.), vol. XIII, No. 3, 1979, p. 546); the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region (Cartagena, Colombia, 24 March 1983) (*ibid.*, vol. XXII, No. 2, 1983, p. 227).

[81] See footnote 14 above, second paragraph.

[82] *"Principle 21*

"States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

"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."

(*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), part one, chap. I).

[83] See e.g. arts. 4 and 12 of the Convention for the Protection of the Mediterranean Sea against Pollution (footnote 31 above); arts. III and XIII of the Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution (footnote 66 above); arts. 3 and 17 of the Convention on the Protection of the Marine Environment of the Baltic Sea Area (footnote 80 above); arts. 4 and 14 of the Convention for the Protection and Development of the Wider Caribbean Region (footnote 80 above); and the following provisions, in particular, of the 1982 United Nations Convention on the Law of the Sea (footnote 14 above, second paragraph):

"Article 208. Pollution from sea-bed activities subject to national jurisdiction

"...

"5. States, acting especially through competent international organizations or diplomatic conference, shall establish global and regional rules, standards and recommended practices and procedures to prevent, reduce and control pollution of the marine environment referred to in paragraph 1. Such rules, standards and recommended practices and procedures shall be re-examined from time to time as necessary."

"Article 235. Responsibility and liability

"1. States are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law.

"2. States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction.

"3. With the objective of assuring prompt and adequate compensation in respect of all damage caused by pollution of the marine environment, States shall co-operate in the implementation of existing international law and the further development of international law relating to responsibility and liability for the assessment of and compensation for damage and the settlement of related disputes, as well as, where appropriate, development of criteria and procedures for payment of adequate compensation, such as compulsory insurance or compensation funds.

"Article 304. Responsibility and liability for damage

"The provisions of this Convention regarding responsibility and liability for damage are without prejudice to the application of existing rules and the development of further rules regarding responsibility and liability under international law."

rant for departing from that practice in the case of the present topic. Nevertheless, some existing treaties envisage that activities with transboundary effects may be conducted under the control either of States or of international organizations. The most notable of these are treaties which relate to activities in outer space or in the marine environment. In reference to such cases, draft article 5 would show that the relationships between States remain within the scope of the present articles, even though an international organization may also be involved. Furthermore, draft article 5 would negate any presumption that the relationships between States and international organizations are governed by rules in substance different from those applying in relations between States. The draft article may be compared with similar articles included in the 1969 Vienna Convention on the Law of Treaties (art. 3),[84] and in the 1978 Vienna Convention on Succession of States in respect of Treaties (art. 3).[85]

36. It may be useful to detail the course of development in the treaties dealing with outer space and with the law of the sea, not so much as a vindication of the need for draft article 5, but in order to shed some light on the increasingly rich and varied role of international organizations in the practice connected with the present topic. The 1967 Treaty on Principles governing the Activities of States in the Exploration and Use of Outer Space[86] reveals, in its article XIII, a characteristic progression. It begins with the notion that States may conduct activities jointly, and may do so within the framework of an appropriate international organization; and this leads to the consequence that other parties may address themselves either to the organization or to the States which have conducted their activities within its framework. In the 1972 Convention on International Liability for Damage caused by Space Objects,[87] eligible international organizations which declare their acceptance of the Convention are installed as potential partners of States in relation to the launching of space objects; and States parties to the Convention, which are also members of an international organization which has accepted the Convention, share jointly and severally any liability incurred by that organization (art. XXII). The State or organization which launches a space object or causes a space object to be launched shares liability for any damage caused by that object with the State from whose territory or facility the space object is launched (arts. V and XII). The 1979 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies contains comparable provisions (art. 16).[88]

37. The 1958 Geneva Convention on the High Seas,[89] after stating the general legal position that ships have the right to fly the flag of their State of registration, and are required to sail under that flag only, leaves open the possibility "of ships employed on the official service of an intergovernmental organization flying the flag of that organization" (art. 7). The 1982 United Nations Convention on the Law of the Sea[90] retains this provision in slightly modified form (art. 93). More importantly, however, the latter Convention includes a number of provisions comparable in structure with those of the 1972 Convention on International Liability for Damage caused by Space Objects, referred to in the preceding paragraph. Under these provisions, States are encouraged to work "through competent international organizations"—for example—to achieve the legislative and scientific goals of the Convention in relation to marine scientific research, to the development and transfer of marine technology, and to the protection and preservation of the marine environment.[91] As a consequence, article 263 of the Convention, dealing with "responsibility and liability" arising out of marine scientific research, applies equally to States and to international organizations; and it extends to such organizations similar obligations to those that article 235 of the Convention places on States in respect of damage caused by pollution of the marine environment.[92] As an entirely separate matter—not connected in any way with the earlier references in this paragraph to "competent international organizations"—it should be noted that the United Nations Convention on the Law of the Sea is open for signature by an international organization "constituted by States to which its member States have transferred competence over matters governed by this Convention, including the competence to enter into treaties in respect of those matters" (art. 305, para. 1 (*f*), and annex IX).

38. In short, the circumstances that draft article 5 is designed to cover have their own importance; but they are only byproducts of larger and more significant themes. The first replies to the questionnaire, prepared by the Special Rapporteur with the help of the Secretariat and addressed to selected international organizations,[93] will serve as an index to the various ways in which States work "through competent international organizations" or "within the framework of an appropriate international organization". First—and here one harks back to the earliest themes of the present report—adverse transboundary effects can by definition be resolved only through international co-operation; and whether a problem falls strictly within the scope of the present topic, or is one that States choose to treat as if it fell within the scope of the topic, international organizations are essential catalysts.[94] Secondly, they are also the main centres for data collection and dissemination.[95]

[84] Signed at Vienna, 23 May 1969 (United Nations, *Juridical Yearbook 1969* (Sales No. E.71.V.4), p. 140).

[85] Signed at Vienna, 23 August 1978 (*ibid. 1978* (Sales No. E.80.V.1), p. 106).

[86] See footnote 14 above.

[87] *Ibid.*, footnote 19, second paragraph.

[88] *Ibid.*, footnote 78.

[89] Signed at Geneva, 29 April 1958 (United Nations, *Treaty Series*, vol. 450, p. 11).

[90] See footnote 14 above, second paragraph.

[91] See, in particular, arts. 197, 199, 200, 203-206, 207 (para. 4), 208 (para. 5), 210 (para. 4), 211 (paras. 1, 5 and 6 (*a*) and (*b*)), 212 (para. 3), 217 (paras. 1 and 7), 220 (para. 7), 239, 242 (para. 1), 243, 244, 251, 266, 271, 272, 273 and 278.

[92] See footnote 83 above.

[93] See p. 129 above, document A/CN.4/378.

[94] See e.g. the contribution of the International Narcotics Control Board to the action to ensure the availability of drugs exclusively for legitimate uses (*ibid.*, sect. I, p. 132); the work of WHO to ensure that international transport facilities do not pose risks to health, and to promote the necessary co-ordination between neighbouring countries in efforts to eradicate insect-borne disease (*ibid.*, sect. II, B, p. 136); and the work of OECD, acting through its Environment Committee, on problems of transboundary water and air pollution (*ibid.*, sect. III, annex I, p. 145).

[95] See e.g. the mandate given to FAO to collect, analyse, interpret and disseminate information relating to nutrition, food and agriculture (*ibid.*,

(*Continued on next page*)

Thirdly, they provide the usual means for setting international standards, and monitoring compliance with those standards;[96] and often norms thus established have as much influence upon the conduct of States as the most authoritative codification of a rule of customary law. Fourthly, the technical assistance that international organizations can provide, especially in relation to impact assessment, is often the key to the avoidance or resolution of disputes, by reducing areas of disputed fact and suggesting ways of reconciling uses.[97] Fifthly, international organizations have often a statutory obligation to assess dangers and give warnings of them; and they may also give guidance as to remedial measures.[98] Finally—and, within the context of the present topic, this is a feature of the greatest importance—international organizations are frequently the means through which States rise above a preoccupation with immediate irritations and work together for the common interest in protecting the oceans and air space, and all the other interests that cannot be reduced to a finite equation between a given activity and a quantified and localized transboundary effect.[99]

VII. Relationship with other rules of law

39. Before leaving the treaties relating to outer space and to the marine environment, discussed under the previous heading, it is necessary to consider the frequent and consistent usage in these treaties of the terms "responsibility"[100] and "liability"[101] which, in the 1982 United Nations Convention on the Law of the Sea, are even juxtaposed as section and article headings.[102] At first glance, it might be presumed that "responsibility" would have the same meaning as the expression "State responsibility", that is, a responsibility arising from a wrongful act or omission of the State. The texts, however, make it clear that the term "responsibility" has in these treaties quite a different meaning. It refers to the content of a primary obligation, not to its breach; thus the 1982 United Nations Convention on the Law of the Sea provides:

Article 235. Responsibility and liability

1. States are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law.

...

This provision may still leave a doubt about the relationship between "responsibility" and "liability"; but article 232 of the Convention sheds some light upon the meaning of "liability":

Article 232. Liability of States arising from enforcement measures

States shall be liable for damage or loss attributable to them arising from measures taken pursuant to section 6[103] when such measures are unlawful or exceed those reasonably required in the light of available information. ...

It is therefore quite clear that "liability" may arise whether or not there has been a breach of an international obligation. "Liability", no less than "responsibility", refers in

(*Footnote 95 continued*)
sect. II, A, p. 133); the work of IAEA in fostering the exchange of scientific information in nuclear science and technology (*ibid.*, sect. II, C, p. 141); and the work of OECD in providing mutually agreed technical and economic data and in recommending mutually agreed policy options and legal principles, which were duly taken into account in the formulation and implementation of the Convention on Long-range Transboundary Air Pollution (*ibid.*, sect. III, annex I, p. 145).

[96] See e.g. the measures that may be taken by the International Narcotics Control Board, pursuant to art. 14 of the Single Convention on Narcotic Drugs, 1961, as amended, to ensure the execution of the provisions of the Convention, (*ibid.*, sect. I, p. 132); the work of IAEA in developing various safety standards for nuclear activities or installations and, more specifically, an internationally recognized minimum value of radiation detriment (*ibid.*, sect. II, C, p. 141); and the work of the Nuclear Energy Agency of OECD in encouraging the harmonization of the regulatory policies and practices of Governments in the nuclear field, with particular reference to the safety of nuclear installations, protection of man against ionizing radiation, preservation of the environment, radioactive waste management, and nuclear third party liability and insurance (*ibid.*, sect. III, annex II, p. 148).

[97] See e.g. the work of FAO in conducting research on the impact on the environment, within or outside the limits of national jurisdiction, of irrigation, of tropical forest exploitation, of pest management, of trypanosomiasis control, of pesticide use, of the pulp and paper industry, and of the hides, skins and leather industry (*ibid.*, sect. II, A, p. 133); and the work of IAEA in providing assistance in data collection, studies and assessments at the request of a member State that considers undertaking a project (*ibid.*, sect. II, C, p. 141).

[98] See e.g. the role of WHO as the channel through which a warning is to be given to the international community of the outbreak of certain infectious diseases (*ibid.*, sect. II, B, p. 136). See also the work of IAEA in facilitating co-operation among member States for preventing and limiting injurious effects in cases where a nuclear accident may have significant radiological impact in other States (*ibid.*, sect. II, C, p. 141).

[99] See e.g. the work of FAO in regard to research, data collection and the compilation of statistics on fisheries in the high seas and in the Antarctic, and on remote sensing technology (*ibid.*, sect. II, A, p. 133); and the duty of IAEA under the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter, and under the 1976 Barcelona Convention for the Protection of the Mediterranean Sea against Pollution, to define high-level radioactive wastes and other such matter unsuitable for dumping at sea, and to make recommendations to be fully taken into account by the contracting parties in issuing permits for the dumping at sea of radioactive matter not prohibited under the relevant Convention (*ibid.*, sect. II, C, p. 141).

[100] Art. VI of the Treaty on Principles governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (see footnote 14 above); art. 14, para. 1, of the Agreement governing the Activities of States on the Moon and Other Celestial Bodies (see footnote 78 above); art. 17 of the Convention on the Protection of the Marine Environment of the Baltic Sea Area (see footnote 80 above); art. 139, para. 1, and arts. 235, 263 and 304; annex III, art. 4, para. 4, and art. 22; annex IX, art. 6, of the 1982 United Nations Convention on the Law of the Sea (see footnote 14 above, second paragraph).

[101] Art. VII of the Treaty on Principles governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (see footnote 14 above); the title, preamble and art. 2 of the Convention on International Responsibility for Damage caused by Space Objects (see footnote 19 above, second paragraph); art. 14, para. 2, of the Agreement governing the Activities of States on the Moon and Other Celestial Bodies (see footnote 78 above); art. 12 of the Convention for the Protection of the Mediterranean Sea against Pollution (see footnote 31 above); art. XIII of the Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution (see footnote 66 above); art. 17 of the Convention on the Protection of the Baltic Sea Area (see footnote 80 above); art. 14 of the Convention for the Protection and Development of the Wider Caribbean Region (see footnote 80 above); art. 139, para. 2, and arts. 232, 235, 263, 304; annex III, art. 4, para. 4, and art. 22; annex IV, art. 2, para. 3, and art. 3; annex IX, art. 6, of the 1982 United Nations Convention on the Law of the Sea (see footnote 14 above, second paragraph).

[102] Part XII, sect. 9 and art. 235; part XIII, sect. 5 and art. 263; see also arts. 139 and 304.

[103] Section 6 of part XII of the Convention deals with enforcement measures relating to the protection and preservation of the marine environment.

this Convention to the content of a primary obligation; and that obligation is to regulate activities within the territory or under the control of the State, so as to avoid or repair transboundary loss or injury:

Article 235. Responsibility and liability

...

2. States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction.

...

40. The phrase "responsibility and liability", as used in the United Nations Convention on the Law of the Sea, therefore corresponds closely to the twin themes of prevention and reparation, which form the basis of the present topic. To illustrate this, it is not necessary to resort to a close textual analysis of provisions that were hammered out on the anvil of consensus. In the earliest of these treaties—the 1967 Treaty on Principles governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies,[104] the usage is already crystal clear:

Article VI

States Parties to the Treaty shall bear international responsibility for national activities in outer space, including the moon and other celestial bodies, whether such activities are carried on by governmental agencies or by non-governmental entities, and for assuring that national activities are carried out in conformity with the provisions set forth in the present Treaty. ...

Article VII

Each State Party to the Treaty that launches or procures the launching of an object into outer space, including the moon and other celestial bodies, and each State Party from whose territory or facility an object is launched, is internationally liable for damage to another State Party to the Treaty or to its natural or juridical persons by such object ... .

Equally, the United Nations Convention on the Law of the Sea—especially in the provisions dealing with research and with the protection and preservation of the marine environment—does not content itself with a statement of what is forbidden. Its emphasis, in article after article, is upon prescribing a course of conduct which, if followed in good faith, will ensure that transboundary loss or injury is avoided or repaired.[105] In these provisions, the Convention leaves multiple elements to the discretion of States, but furnishes them with guidelines and enjoins their co-operation. Unless a State's whole course of action is refractory, the application of these provisions may not disclose a point of intersection of harm and wrong.[106] If there is a modicum of co-operation, the duties of prevention and reparation can be discharged, without establishing the exact location of that much disputed point.

41. If the principles of the present topic could be reduced to a mathematical formula, "*x*" would always represent the unascertained point of intersection of harm and wrong. Sometimes the point can be precisely ascertained, because transboundary loss or injury has arisen from a wrongful act of the source State—for example, from a frontier transgression that constitutes a violation of sovereignty, or from the breach of a rule contained in a treaty régime, made in pursuance of the present topic. Often, however, "*x*" remains at large, because it is the product of complex variables, and because the parties do not agree whether the conduct giving rise to transboundary loss or injury has passed the point of wrongfulness. It is then that the rules and guidelines of the present topic are set in motion, not to decide whether the loss or injury arose from a wrongful act of the source State, but to articulate the duties of prevention and reparation. Draft article 4, as proposed by the Special Rapporteur, is therefore much more than a drafting precaution: it adverts to an essential relationship, which cannot be reduced to a fixed measurement, between the duty to prevent and repair transboundary loss or injury and the unresolved question whether the loss or injury arose from a wrongful act of the source State. Conversely, in making a régime or settling a claim pursuant to the present topic, States will give great weight to their own perceptions as to where the extreme limits of lawfulness may lie.

42. Some of the imponderables described in the preceding paragraph loom darkly in the 1954 Convention between Yugoslavia and Austria concerning Water Economy Questions relating to the Drava.[107] Both parties used their national sections of the river for the generation of electric power. Austria's use had resulted in a decreased minimum flow of water to Yugoslavia, while Yugoslavia's damming of the river had caused a back-up of water in Austrian territory (arts. 1 and 3). As is so often the case, the solution to the problem took into account interests other than those initially involved. Austria agreed, *inter alia*, to restrict the use of its power stations to ensure the maintenance of a minimum flow, to press no claims in respect of the existing back-up of water into its territory, and to purchase surplus summer power from Yugoslavia. Yugoslavia undertook not to increase the water back-up in Austrian territory, and to accept Austrian power-station equipment in payment for Austria's purchase of summer power (arts. 1, 2 and 3).[108] There would be consultation before Yugoslavia took any step to add to power development on its section of the river, and before Austria acted upon any plan to divert more water from the Drava basin. A Joint Drava Commission was established to ensure consultation and exchange of information (art. 1 (*c*) and arts. 4-5). The parties also agreed that, as long as the conventional régime was observed, they would not press their respective claims for interference with the flow of the river or for the backing-up of water (art. 3). The Convention gives no indication whether those claims, if revived, would allege wrongfulness, or would be formulated as claims to reparation within the rubric of the present topic.

43. There is of course an extreme disparity between the tolerance that States are apt to demand of each other in relation to exposure to transboundary effects and their

[104] See footnote 14 above.

[105] See in particular arts. 194-197, 204, 206-212, 234, 240, 242, 246 and 249.

[106] See the Special Rapporteur's second report, *Yearbook ... 1981*, vol. II (Part One), p. 103, document A/CN.4/346 and Add.1 and 2, para. 59.

[107] Signed at Geneva, 25 May 1954 (United Nations, *Treaty Series*, vol. 227, p. 111).

[108] There is perhaps an element of reparation in some of these provisions.

meticulous respect in other contexts for the rights of territorial sovereignty. For example, in the Drava Convention, Austria and Yugoslavia avoided the need to characterize the conduct of the source State in matters as serious as the flooding of an area of national territory, and diversion of the flow of a much utilized river. By contrast, the building of the Salzburg airport, on Austria's frontier with the Federal Republic of Germany, would not have been conceivable without the Federal Republic's full and prior agreement to establish the required safety zone on German territory, although at Austria's expense.[109] The latter case might therefore be regarded as barely falling within the scope of the present topic, because the true transboundary effects were limited to increased noise levels and other minor consequences of the positioning of the flight path. Yet it is appropriate to emphasize that the solutions to many problems involving prospective transboundary loss or injury entail changes in a boundary régime. Just as there is certainly no right to subject neighbouring territory to unlimited adverse transboundary effects, so there may be a duty to accept, on equitable terms, some encroachments upon the use or enjoyment of territory.

VIII. Relationship with other agreements

44. The ostensible contrast between rules made pursuant to the present topic, and those that "specify circumstances in which the occurrence of transboundary loss or injury arises from a wrongful act or omission", has been considered under the previous heading. It can be seen that the two kinds of rules are mutually supporting. If States have not settled for themselves the points at which harm and wrong intersect, and if no general rule of law has settled the matter for them, their usual and preferred course of action will be to develop a new context, in which the boundary line between what is permitted and what is forbidden can be drawn more or less to the satisfaction of all interests. The stimulus to agreement may be mutual advantage—in terms either of the particular subject-matter or of the more generalized benefits that flow from good neighbourliness;[110] and there may be willingness to modify rights as a means of achieving a balance of interests. In the worst circumstance, when mutuality of interest and goodwill are lacking, the principles that underlie the present topic are still a spur to the taking of initiatives and the making of concessions in a search for agreement. Except as has been otherwise agreed, the onus must remain with the source State to show that it has taken every reasonable step to save others from exposure to adverse transboundary effects, and to provide for reparation should such effects occur.

45. There are two main ways in which rules and guidelines, developed in pursuance of the present topic, can help source States and affected States to reach agreements that strike a proper balance between freedom of activity and freedom from adverse transboundary effects. One way is by developing a pattern of procedures to facilitate fact-finding and negotiation, as indicated in sections 2, 3 and 4 of the schematic outline. The other way is by consolidating applicable principles and methods, as foreshadowed in sections 5, 6 and 7 of the schematic outline. In both these respects, State practice can provide a revolving fund. Agreements made within the context of the present topic will furnish the parties to those agreements with more definite rules to regulate particular kinds of transboundary danger, or with more precise criteria for future decision-making in relation to such dangers. And, in so far as these new agreements reveal consistent patterns of State practice, they in turn will contribute to the development of customary law, and will augment the reservoir of applicable principles and factors. Therefore draft article 3, dealing with the relationship between the present draft articles and other international agreements, subordinates the present articles to all international agreements, present or future, to the extent that they deal with the same subject-matter. It remains to assess this rule of self-effacement, and its relationship to draft article 1, on scope.

46. The strength of the proposed articles lies, first, in their affirmation that a source State is never without a legal responsibility in relation to things done, within its territory or under its control, which give rise or may give rise to a physical consequence affecting the use or enjoyment of areas beyond the limits of that State's jurisdiction. Secondly, subject to any rules of prohibition of customary law—which lie outside the scope of the present articles—the normal way for the source State to discharge its responsibility is by reaching agreement with affected States upon measures to prevent, or minimize and repair, the actual or prospective adverse transboundary effects. Failing the possibility of such agreement, the source State remains accountable for the adequacy of its own efforts to take and implement measures which pay due regard to the interests of other States. Thirdly, these rules are supported by the whole range of treaty and claims practice examined in the Secretariat's extremely valuable analytical study.[111] That practice also provides rich precedents on which the present draft articles could draw in elaborating the procedures for fact-finding and negotiation, and in assembling the principles and factors which are the building-blocks of treaty régimes. Finally, against the background of rules and precepts already mentioned, there is enormous strength in the theme of voluntarism. The compulsion to regulate dangers is provided by facts, not by law. If law seeks to assert a compulsion of its own, divorced from fact, the impetus to legal development is lost in empty disputation whether States act freely in their own domain, or are constrained by need for prior agreement.

47. A commitment to voluntarism cannot be half-

[109] Arts. 1, 4 and 5 of the Agreement between the Federal Republic of Germany and Austria concerning the Effects on the Territory of the Federal Republic of Germany of Construction and Operation of the Salzburg Airport (see footnote 13 above).

[110] See e.g. some of the considerations that weighed with the parties to the Treaty of La Plata River and its Maritime Limits (footnote 60 above, second paragraph).

> "The Governments of the Republic of Argentina and the Republic of Uruguay, ... motivated by a common goal for the elimination of potential difficulties that may arise out of a legally undefined situation relevant to the exercise of equal rights in the La Plata River, and out of the lack of any delimitation of a boundary between their respective maritime jurisdictions; ... have resolved to conclude a Treaty that will envisage a final solution to such problems, consistent with the special characteristics of the involved fluvial and maritime territories and the technical requirements for their overall utilization and exploitation, all within a framework of respect for sovereignty and for the respective rights and interests of the two States."

[111] ST/LEG/15.

hearted. The first requirement is to provide conditions that encourage communication between interested parties, leading them to pursue the promise of a fair solution, and not to fear entrapment. It is for this reason that the schematic outline attaches no dire legal consequence to a failure to engage in fact-finding, or to a refusal to establish a régime of prevention and reparation. The sanction is inherent in the circumstances of the source State: it must bear its own unliquidated liability, until there can be a fair distribution of costs and benefits, negotiated freely with affected States—which may themselves also be source States. It is for the same reason that the proposed scope article is widely drawn, speaking of "effects", not "adverse effects", and referring to "situations", as well as to "activities". An affected State is entitled to be the judge of its own interests, and its evaluation of effects upon use or enjoyment will not always coincide with that of the source State. Similarly, if these articles provide no formal sanction to compel the source State to provide information or to undertake negotiation, they must, as far as possible, place the affected State in an equally advantageous position: the affected State may take the initiative by requesting information, and by seeking an abatement, in relation to any actual or suspected source of transboundary damage, without the need to establish a connection with an activity (see paras. 31-32 above). As the rules progress, their focus should narrow and deepen: "effects" will reduce to "adverse effects", and ultimately to "loss or injury"; and "activities and situations" will become "activities" alone. Moreover, the shades of qualification which are, and should be, absent from draft article 1, on scope, will begin to make their appearance in the following sections: for instance, in section 2, reasonable limits, supported by State practice, must be set for the duty to notify affected States of their actual or possible exposure to physical consequences with transboundary effects.

48. It would, finally, be a mistake to assume too readily that the proposed draft articles will be drained of content in relation to every activity and situation to which other international agreements apply. The multilateral treaties which contain the most copious indications of criteria and procedures for evaluating transboundary effects are also those which call for the development of international law—or which assert the absence of rules as to liability and, as it were, reserve a place for them.[112] In bilateral negotiations, States make even more use of their right to tailor their agreements to immediate requirements, leaving it to the general law to fill in gaps. Articles developed in pursuance of the present topic cannot take the place of the more specific agreements which it is their main objective to promote. They can, however, offer a wealth of precedent to facilitate the conclusion of such agreements, and testimony that the duty to avoid and repair adverse transboundary effects is a principle of general application.

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[112] See para. 34 and footnote 83 above. See also the Convention on Long-range Transboundary Air Pollution (footnote 29 above), art. 8 (*f*) of which provides for the exchange of information among the contracting parties on, *inter alia*, "the extent of the damage which . . . can be attributed to long-range transboundary air pollution". A footnote to the word "damage" states: "The present Convention does not contain a rule on State liability as to damage."