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Fifth report on international liability for injurious consequences arising out of acts not prohibited by international law, by Mr. Julio Barboza, Special Rapporteur

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

[Agenda item 7]

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*Incorporating documents A/CN.4/423/Corr.1 and 2.

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I. Introduction

A. Preliminary considerations

1. The debates on the present topic at the last session of the International Law Commission¹ and in the Sixth Committee at the forty-third session of the General Assembly² were extremely fruitful. The Special Rapporteur believes that, following these two important debates, it will be possible for the Commission to move in the right direction.

B. The concept of risk

2. In the fourth report of the present Special Rapporteur,³ the concept of "risk" was proposed as a means of limiting the scope of the draft. It is logical to try to establish limits because otherwise the subject might become fragmented into a number of parts to which it would be difficult to apply a single method.

3. A legal text can, nevertheless, mix two different types of liability, provided that the limits of each are clear. This often occurs in domestic law, where two different types of liability may apply to the same conduct, depending on the legal course chosen. In the area of industrial accidents, for instance, some domestic legal systems usually provide for a kind of causal liability on the part of the employer so that, in the event of an accident, the employer must pay a certain maximum amount whether or not he is at fault. Such compensation is sometimes considerably less than the actual harm suffered by the employee, with the result that, if the latter thinks he has sufficient evidence to demonstrate that the employer is at

fault, he may opt for the usual legal course and claim larger amounts of money. In that case, he would be subject to the burden of proof under common law.

4. The limitation imposed by the concept of "risk" could establish limits which would, in particular, prevent kinds of "absolute" liability from being incurred, in which any and all transboundary harm would have to be compensated. The Special Rapporteur believed, and continues to believe, that this would require a degree of solidarity found only in societies far more integrated than the present-day community of nations.

5. Let us take a closer look at the foregoing. In the area of liability, in the final instance the law faces an inexorable choice: who is to be held responsible for the harm that has occurred? A first answer would be to find out who is to blame, in the broadest sense. That person must pay compensation. Now, if no one is to blame for the specific act which caused the harm, the person who undertook the activity of which that act forms a part must pay compensation, normally because it is he that benefits from the results of that activity, or else the person who owns the dangerous thing must provide compensation because he created the danger. This is the basis for the theory of "risk", where, as the present Special Rapporteur sees it, there is a kind of "original fault"—"original sin" he called it in one of his reports⁴—because this "fault" or "sin" is *ab initio*, in other words it lies at the origin of the activity. According to this theory, the operator assumes responsibility for compensating for accidents in which the risk he created materializes. This has been called "conditional fault" because the fault exists in theory all the time but is only triggered in practice if an accident occurs: the operator is "at fault" because he is responsible for the existence of the activity, even though he is in no way to blame for the actual episode in question.

¹ For a summary of the debate in the Commission at its fortieth session, see *Yearbook . . . 1988*, vol. II (Part Two), pp. 9 *et seq.*, paras. 21-102.

² See "Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the forty-third session of the General Assembly" (A/CN.4/L.431), sect. B.

³ *Yearbook . . . 1988*, vol. II (Part One), p. 251, document A/CN.4/413.

⁴ In order to avoid using the concept of "fault", which might complicate matters in the area of international liability. See the Special Rapporteur's third report, *Yearbook . . . 1987*, vol. II (Part One), p. 50, document A/CN.4/405, para. 16.

6. There is a third instance, however: the moment comes when the distinction between the two kinds of fault cannot be made, as would be the case with harm caused not by an activity but by an isolated act beyond the control of the perpetrator or by a thing which is not normally dangerous. In the earlier instance, fault (real or otherwise) in respect of an act is linked to an activity: here there is not even that link.

7. Some domestic legal systems, however, seek to prevent the innocent victim, the person who did absolutely nothing to deserve the harm, from suffering. One possible solution is to hold liable either the person responsible for the act, even if he acted without fault, or the owner of the thing that caused the harm, even if this thing is not normally dangerous. No matter how tenuous the distinction, and even though it might not be measurable in terms of fault, if it can be made, then liability can be attributed. It is this last kind of liability, which could be called "absolute", that the Special Rapporteur sought to avoid by introducing the concept of "activities involving risk" in his fourth report.

8. Now this kind of limitation based on risk involved an unknown quantity: did it or did it not include in the topic activities which cause appreciable transboundary harm by pollution, the effects of which are normally cumulative? The Special Rapporteur dealt with this question in his fourth report,⁵ to which the reader is referred.

9. The difficulty with these kinds of activities is that their polluting effect and thus the harm they cause is normally foreseeable: it is an inevitable consequence of the activity itself. If an industry uses certain ingredients which are known to be pollutants and if certain conditions exist that are also known, transboundary harm is bound to occur. Since the element of contingency of the harm is lacking, it is difficult to speak of risk.

10. However, in his fourth report the Special Rapporteur advocated including these kinds of activities in the scope of the topic, for if activities involving risk, or contingent harm, are included, then it is all the more logical that those which are bound to cause harm should be included. That was the logic underlying their inclusion, assisted by the broad wording of the topic ("activities not prohibited . . .") which lent itself to including them even though they might not strictly involve "risk"; it was also thought that general international law did not impose a prohibition which might exclude them from the topic.⁶

11. The Commission and the Sixth Committee were, however, reluctant to accept the concept of "risk" in the form in which it was used in the fourth report.⁷ That concept was retained for prevention, however, since, if an activity does not have dangerous characteristics, a State can hardly be asked to take precautionary measures against it.

12. The present Special Rapporteur cannot in this case disregard the important body of opinion in the Commission which prefers not to use the concept of "risk" as a

limiting factor, and believes that such thinking can be incorporated in the draft articles. He also believes that not all harm would be compensable under this draft (although it might be under another instrument), nor would the dreaded "absolute liability" be incurred if certain concepts existing in the draft articles were adhered to, for example the concept of "activity" as opposed to "act". Already in connection with the second report of the present Special Rapporteur,⁸ the Commission had shown a preference for adopting the terminology of the French version of the title of the topic and referring to "activities" instead of "acts".⁹

13. This attitude is important for limiting the scope of the draft because, in one of its meanings, liability refers to the consequences of certain conduct.¹⁰ According to this meaning, "liability" relates only to acts, to which legal consequences can be attributed, and not to activities, because causality originates in specific acts, not activities. A certain result in the physical world which amounts to harm in the legal world can be traced back along the chain of causality to a specific human act which gave rise to it.¹¹ It cannot, however, be attributed quite so

acts not prohibited by international law related to fundamentally different situations requiring different approaches. One situation had to do with hazardous activities which carried with them the risk of disastrous consequences in the event of an accident, but which, in their normal operation, did not have an adverse impact on other States or on the international community as a whole. Thus it was only in the event of an accident that the question of liability would arise. By its very nature, such liability must be absolute and strict, permitting no exceptions.

"However, the task of the Commission also related to a fundamentally different situation, namely transboundary and long-range impacts on the environment. In that case, the risk of accident was only one minor aspect of the problem. It was through their normal operation that some industrial or energy-producing activities harmed the environment of other States. Moreover, such harm was not caused by a single, identifiable source as in the case of hazardous activities. For a long time, such emissions had been generally accepted because every State was producing them and their nefarious consequences were neither well known nor obvious. The growing awareness of their harmful influence had, however, reduced the level of tolerance. In that regard, liability had two distinct functions: as with hazardous activities, it should, on the one hand, cover the risk of an accident; on the other, it must also cover, and that was its essential function, significant harm caused in the territory of other States through a normal operation. Liability for risk must thus be combined with liability for a harmful activity." (*Official Records of the General Assembly, Forty-third Session, Sixth Committee, 27th meeting, paras. 37 and 38*).

⁸ *Yearbook . . . 1986*, vol. II (Part One), p. 145, document A/CN.4/402.

⁹ *Yearbook . . . 1986*, vol. II (Part Two), p. 58, para. 216.

¹⁰ Either a breach of an obligation (wrongfulness) or fulfilment of the condition specifically triggering liability (harm in causal liability).

¹¹ In his second report, the present Special Rapporteur stated:

" . . . So we return to the complexities of the title of the topic and to the distinction between 'acts' and 'activities'. The Special Rapporteur believes, as stated earlier . . . , that the French version is the right one and that it gives the topic its real scope. According to the terms of reference given it by the General Assembly, the Commission must deal with injurious consequences arising out of activities not prohibited by international law. Activities are shaped by complex and varied components which are so interrelated that they are almost indistinguishable from one another. . . ." (Document A/CN.4/402 (see footnote 8 above), para. 68.) Within a lawful activity there are lawful acts which might give rise to harm and certain consequences, and there may also be wrongful acts which give rise to a breach of obligations, as could happen with lawful acts or activities which breach obligations of prevention. This is another story, however.

⁵ Document A/CN.4/413 (see footnote 3 above), paras. 8-15.

⁶ *Ibid.*, para. 10.

⁷ The view expressed by the representative of Austria in the Sixth Committee is illustrative of this reluctance:

" . . . It should also be borne in mind that the concept of liability for

strictly to an "activity", which consists of a series of acts, one or more successive episodes of human conduct aimed in a certain direction.

14. This reference to consequences reflects the traditional meaning of the word "liability".¹² But when one speaks of liability for activities one refers to something very different from the consequences of acts.¹³ Liability is

¹² What is more, one allegedly strict approach classifies under the heading "liability" only that chapter of the law which is concerned with the consequences of breaches of obligations, and prefers to describe as the "guarantees" given by enterprises the obligations imposed by law on their activities involving risk. The Special Rapporteur believes that this is what prompted some members of the Commission in the past to say that liability related only to wrongfulness. If this were so, however, all chapters of the domestic law of innumerable countries dealing with liability for risk, causal liability, objective liability, strict or absolute liability, etc., would be gross errors. They would not in fact be dealing with liability, despite their title, because of course there is no breach of obligation giving rise to such liability.

¹³ There is another meaning of the word "responsibility" which is vital to the present topic. In discussing its various meanings, Goldie says:

"The term responsibility thus includes the attribution of the consequences of conduct in terms of the duties of a man in society. Secondly, it can denote the role of the defendant, 'as the party responsible' for causing a harm. . . ." (Extract cited in the Special Rapporteur's second report, document A/CN.4/402 (see footnote 8 above), footnote 10.)

Both these meanings are used for the word "responsibility" in article 139, paragraphs 1 and 2, of the 1982 United Nations Convention on the Law of the Sea. There, the English term "responsibility" was used in parallel with the French *responsabilité* in the expression *responsabilités et obligations qui en découlent*, while "liability" was used for *obligation de réparer*. The expression "responsibility and liability" was used in parallel with the French: *obligation de veiller au respect de la Convention et responsabilité en cas de dommages*. See the preliminary report of the previous Special Rapporteur, R. Q. Quentin-Baxter, *Yearbook* . . .

linked to the nature of the activity, and the isolated acts referred to in the third instance above (para. 6) would thus not be included in the scope of the topic. In order for the régime of the present articles to apply to certain acts, those acts must be inseparably linked to an activity which, as we shall see, has to involve risk or have harmful effects (art. 1). Harm caused by isolated acts is not covered by the draft, and the dreaded absolute liability described in the third instance is thus avoided.

15. The title of the topic, then, means: "obligations with regard to the injurious consequences of activities not prohibited by international law" and covers both meanings of the word "liability". For their continuation, such activities require that agreement be reached on a régime establishing, between States of origin and affected States, obligations and guarantees designed to strike a balance between the interests at stake. In the absence of a specific régime for a specific activity, a general régime would be required which would be that contained in the present articles, which establishes obligations to inform, notify, negotiate a régime and negotiate with a view to possible reparation, according to certain criteria, for the harm caused.

1980, vol. II (Part One), pp. 250-251, document A/CN.4/334 and Add.1 and 2, footnote 17.

The first meaning refers to all the primary obligations governing an activity. It is not surprising therefore that in the area of "causal" liability it should be preferable to take as the unit of reference the activity rather than the act, in order to endow it with regulations permitting its continuation. The latter is done by establishing primary obligations for the person carrying out the activity. These primary obligations come into play, as has been seen repeatedly, when harm is caused.

II. Revised articles proposed for chapter I (General provisions) and chapter II (Principles) of the draft

16. The Special Rapporteur therefore proposes, as an alternative to the first 10 articles referred to the Drafting Committee,¹⁴ other articles which incorporate what he believes were the most important comments made during the above-mentioned debates in the Commission and in the Sixth Committee (see para. 1).

CHAPTER I

GENERAL PROVISIONS

Article 1. Scope of the present articles

The present articles shall apply with respect to activities carried on in the territory of a State or in other places

¹⁴ See *Yearbook* . . . 1988, vol. II (Part Two), p. 9, para. 22.

under its jurisdiction as recognized by international law or, in the absence of such jurisdiction, under its control, when the physical consequences of such activities cause, or create an appreciable risk of causing, transboundary harm throughout the process.

Article 2. Use of terms

For the purposes of the present articles:

(a) (i) "Risk" means the risk occasioned by the use of things whose physical properties, considered either intrinsically or in relation to the place, environment or way in which they are used, make them likely to cause transboundary harm throughout the process, notwithstanding any precautions which might be taken in their regard;

(ii) "Appreciable risk" means the risk which may be identified through a simple examination of the activity and the things involved, in relation to the place, environment or way in which they are used, and includes both the low probability of very considerable [disastrous] transboundary harm and the high probability of minor appreciable harm;

(b) “Activities involving risk” means the activities referred to in subparagraph (a), in which harm is contingent, and “activities with harmful effects” means those causing appreciable transboundary harm throughout the process;

(c) “Transboundary harm” means the effect which arises as a physical consequence of the activities referred to in article 1 and which, in the territory or in places under the jurisdiction or control of another State, is appreciably detrimental to persons or objects, to the use or enjoyment of areas or to the environment, whether or not the States concerned have a common border. Under the régime of the present articles, “transboundary harm” always refers to “appreciable harm”;

(d) “State of origin” means the State in whose territory or in places under whose jurisdiction or control the activities referred to in article 1 take place;

(e) “Affected State” means the State in whose territory or under whose jurisdiction persons or objects, the use or enjoyment of areas, or the environment are or may be appreciably harmed.

Article 3. Assignment of obligations

1. The State of origin shall have the obligations established by the present articles provided that it knew or had means of knowing that an activity referred to in article 1 was being, or was about to be, carried on in its territory or in other places under its jurisdiction or control.

2. Unless there is evidence to the contrary, it shall be presumed that the State of origin has the knowledge or the means of knowing referred to in paragraph 1.

Article 4. Relationship between the present articles and other international agreements

Where States Parties to the present articles are also parties to another international agreement concerning activities referred to in article 1, in relations between such States the present articles shall apply subject to that other international agreement.

Article 5. Absence of effect upon other rules of international law

ALTERNATIVE A

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

ALTERNATIVE B

The present articles are without prejudice to the operation

of any other rule of international law establishing liability for transboundary harm resulting from a wrongful act.

CHAPTER II

PRINCIPLES

Article 6. Freedom of action and the limits thereto

The sovereign freedom of States to carry on or permit human activities in their territory or in other places under their jurisdiction or control must be compatible with the protection of the rights emanating from the sovereignty of other States.

Article 7. Co-operation

States shall co-operate in good faith among themselves, and request the assistance of any international organizations that might be able to help them, in trying to prevent any activities referred to in article 1 carried on in their territory or in other places under their jurisdiction or control from causing transboundary harm. If such harm occurs, the State of origin shall co-operate with the affected State in minimizing its effects. In the event of harm caused by an accident, the affected State shall, if possible, also co-operate with the State of origin with regard to any harmful effects which may have arisen in the territory of the State of origin or in other places under its jurisdiction or control.

Article 8. Prevention

States of origin shall take appropriate measures to prevent or, where necessary, minimize the risk of transboundary harm. To that end they shall, in so far as they are able, use the best practicable, available means with regard to activities referred to in article 1.

Article 9. Reparation

To the extent compatible with the present articles, the State of origin shall make reparation for appreciable harm caused by an activity referred to in article 1. Such reparation shall be decided by negotiation between the State of origin and the affected State or States and shall be guided, in principle, by the criteria set forth in the present articles, bearing in mind in particular that reparation should seek to restore the balance of interests affected by the harm.

III. Comments on the revised articles proposed for chapters I and II

17. The main purpose of the comments on the articles reproduced above is to explain the changes that have been made.

A. Article 1 (Scope of the present articles)

18. The words “in the territory of a State” indicate a

return to the concept of territory, with the addition of the concept of jurisdiction and control. This is not strictly necessary because if an activity occurs in the territory of a State it will normally be under its jurisdiction. It may, however, be useful for emphasizing that the concept of "jurisdiction" used in the articles refers also to other places outside the territory of the State.

19. The expression "jurisdiction as recognized by international law" was adopted to accommodate the position that jurisdiction in the territory is not "vested" by international law but is a result of the original sovereignty of the State. Although the view was expressed that it was unnecessary to state specifically that jurisdiction must be in conformity with international law, the Special Rapporteur prefers to retain this expression in order to make a clear distinction between this case and one in which, in the absence of lawful jurisdiction, all or part of the territory of a State is under the control of another State.

20. The word "places" has been substituted for the original word "spheres" primarily because "spheres" is not a usual expression. "Places" may be closer to the real meaning and in any case is sufficiently broad to include small areas such as a boat, aircraft or spaceship from which an activity can cause transboundary harm.

21. The word "effective" was deleted before the word "control" because it was felt that unless control was effective it was not control.

22. The words "throughout the process", which previously appeared only in article 2 (a) in connection with risk, have been introduced into this article because they are consistent with the idea of liability for activities rather than acts. In the case of activities involving risk, there is virtual certainty that some appreciable harm may occur within a given period, and in the case of activities with harmful effects, the expression used gives the desired meaning of harm which may begin at the beginning and continue, or be cumulative and arise not immediately but "throughout the process" of the activity.

23. The words "cause, or create an appreciable risk of causing, transboundary harm" represent an attempt to cover activities involving risk and activities with harmful effects. The idea of "appreciable risk", which is accepted in international practice, is retained.¹⁵ It is difficult to understand the demand for prevention if the risk is not "appreciable" as defined in article 1. Moreover, in the case of activities which normally have harmful effects, it is understood that such effects are easily foreseeable.

24. It should be pointed out that, in activities involving risk, the "appreciable risk" mentioned must be that of causing "appreciable harm" if prevention is to be demanded. While we cannot be overly strict in dealing with the question of appreciable risk and appreciable harm, the limits of which are somewhat blurred, in principle the adjective "appreciable" must be applied to both concepts.

25. The concept of "appreciable harm", the only one which has significance for this draft, is introduced as

early as article 1. It had become clear that any lesser harm was not relevant to the topic. The word "appreciable" is used to describe both risk and harm because it seems to denote an appropriate threshold of tolerance, although there can obviously be no certainty as to its exact limits. With the same proviso, the words "significant", "important" or "substantial", which give an idea of higher thresholds, might be preferred; while the Special Rapporteur feels that such higher thresholds might not be desirable, it is of course up to the Commission to choose.

26. The word "appreciable" is also used to qualify the term "harm" in the draft articles on the law of the non-navigational uses of international watercourses¹⁶ (hereinafter, "draft articles on international watercourses") and, while uniformity is not obligatory, the Special Rapporteur believes that the similarities between the two topics justify the view that the terms used should be harmonized.

B. Article 2 (Use of terms)

27. In subparagraph (a) (i), the phrase "notwithstanding any precautions which might be taken in their regard" seeks to describe the basic characteristic of liability for risk, namely the absence of fault and the irrelevance of "due diligence" in such cases. The comments made in the debates to the effect that activities with a low probability of causing disastrous injury should be included are accommodated in subparagraph (a) (ii) on "appreciable risk". The expression "minor appreciable harm" is used to indicate that harm, although minor, must also be appreciable. The Special Rapporteur has an open mind as to whether major harm should be described as "very considerable", "disastrous" or even "catastrophic", provided that the term used conveys the idea of harm of great magnitude. It should also be mentioned that there are activities, such as nuclear activities, which offer both possibilities: a high risk of ongoing harm during their normal operation and a low risk of disastrous accidents.

28. Subparagraph (b) introduces the qualification "with harmful effects" for certain activities, such as polluting activities, which cause harm. Such activities may not be totally harmful: they are permitted because their usefulness outweighs the harm they cause.

29. A number of clarifications are also required with regard to subparagraph (c).

30. "Transboundary harm" is the injury suffered by a State as a physical consequence of activities referred to in article 1. The expression "is appreciably detrimental" conveys the idea that the only harm relevant to the present topic is that exceeding the threshold of tolerance established by the word "appreciable".

31. The word "places" is used again in subparagraph (c) to indicate that transboundary harm may affect not only the territory of a State but also other areas—which may be small, as stated earlier (para. 20)—where this

¹⁵ This idea is developed somewhat more fully in the Special Rapporteur's fourth report, document A/CN.4/413 (see footnote 3 above), paras. 24-31 and footnote 9.

¹⁶ See article 8 (Obligation not to cause appreciable harm), adopted provisionally by the Commission at its fortieth session (*Yearbook . . . 1988*, vol. II (Part Two), p. 34).

State exercises jurisdiction as recognized by international law. In the exclusive economic zone, for instance, a rig or artificial island or the actual vessels of the coastal State could be damaged as a result of an activity carried out by vessels of another State or from land (from the territory of another State, of course) or from an aircraft registered in another State, etc. One apparently tenuous but none the less valid case of transboundary harm would be that of a vessel of one State whose activity causes harm to the vessel of another State while the two vessels are on the high seas. The important element here is the "interjurisdictional" one.

32. The case of the place or territory "under the control" of another State presents certain difficulties. One initial reaction would be to deny the status of affected State to the State that is exercising control over that territory in violation of international law, in order to prevent such control from being equated with legal jurisdiction. The result, however, would be to leave the inhabitants of the territory without international protection in the event of harm to their health, their heritage, the use and enjoyment of certain regions, or their environment. Two courses are possible here: either to accord the status of affected State to the State exercising control over the territory only in so far as it is responsible for fulfilling certain international duties towards the population, for instance protecting their human rights, or to accord this status to the entity which has legal jurisdiction over the territory—either the State lawfully entitled to the territory or the body appointed to represent it, as with the United Nations Council for Namibia in the case of the former Territory of South West Africa.

33. A reference to "the environment" has been added after the "persons or objects" and "the use or enjoyment of areas" to which harm may be caused. Although it could be considered covered by the earlier definition, it is felt that the environment has become such a major concern that it must be included in the definition of harm in order to leave no room for doubt that the draft seeks also to protect the environment.

34. Subparagraph (d) attributes liability not only to the State of the territory but also to the State exercising jurisdiction or, in its absence, control over another place. This is only natural since the State which is at fault cannot, by very reason of its fault, be excluded from liability.

C. Article 3 (Assignment of obligations)

35. The title of article 3 has been changed from "Attribution" to "Assignment of obligations". It was observed that to use the word "attribution" here would be to equate it with the attribution made in the draft articles on State responsibility, and that a distinction must be made between the two.

36. The observation may be correct. The word "attribution" is used in part 1 of the draft articles on State responsibility¹⁷ to refer to the attribution of an act to a

State. In part 2, where the protagonist is the affected State and it is to that State that certain rights and powers are attributed, the word "attribution" is not used. That being so and since "attribution" simply means "imputation of acts", it would be inappropriate to use the term in the present topic because it is not exactly an activity, much less an act, that is being imputed or attributed to a State, but rather certain obligations deriving from the fact that a given activity is being carried on in its territory or in places under its jurisdiction or control. Moreover, these obligations are primary, unlike the secondary obligations in part 1 of the draft on State responsibility.

37. Paragraph 2 provides for the presumption that a State has knowledge or means of knowing that an activity referred to in article 1 is being carried on in its territory or in places under its jurisdiction or control, and that the burden of proof to the contrary rests with that State. Although in procedural law it is very difficult to prove that a certain act did not take place or that a certain thing or quality does not exist, in this case it is not so difficult: a State has only to show, for instance, how many and what kind of vessels and aircraft it has in relation to the areas which it must monitor in order for one to judge whether these are sufficient to disprove the presumption to the contrary. It must not be forgotten, after all, that attributing to a State knowledge of everything that goes on in its territory is itself only a presumption.

D. Article 4 (Relationship between the present articles and other international agreements)

38. Article 4 is one of the original five articles drawn up by the previous Special Rapporteur, the late R. Q. Quentin-Baxter.¹⁸ It aroused no major objections and refers to the relationship between the framework convention under consideration and conventions regulating specific activities, which are governed by principles very similar to those on which the present articles are based. The formulation "subject to that other international agreement" is based on paragraph 2 of article 30 of the 1969 Vienna Convention on the Law of Treaties,¹⁹ concerning the application of successive treaties relating to the same subject-matter.

E. Article 5 (Absence of effect upon other rules of international law)

I. PRELIMINARY CONSIDERATIONS

39. Article 5, which was also drawn up by the previous Special Rapporteur, has elicited no major comment. However, the wording suggested by a member of the Commission at the fortieth session²⁰ would seem to

¹⁸ *Yearbook . . . 1984*, vol. II (Part Two), p. 77, para. 237.

¹⁹ United Nations, *Treaty Series*, vol. 1155, p. 331.

²⁰ *Yearbook . . . 1988*, vol. I, p. 33, 2048th meeting, para. 8 (Mr. Eiriksson).

¹⁷ *Yearbook . . . 1980*, vol. II (Part Two), pp. 30 *et seq.*

express the same idea more clearly and the Special Rapporteur thought it appropriate to submit that text, as alternative B of article 5, to the Commission for consideration. In any event, the relationship between causal liability and responsibility for wrongful acts warrants closer consideration, especially in the light of the interesting debate that took place in 1988 on international watercourses, referred to below (para. 41).

2. APPLICABILITY OF THE TWO RÉGIMES OF CAUSAL LIABILITY AND RESPONSIBILITY FOR WRONGFULNESS

40. It has already been shown that the coexistence of a régime of responsibility for wrongfulness with one of causal liability within one and the same system is perfectly conceivable. Aside from the example of industrial accidents already referred to (para. 3), mention may be made of the *Trail Smelter* case,²¹ in which the arbitral tribunal imposed on Canada a twofold régime of responsibility and liability. On the one hand, the tribunal established certain preventive measures which the Smelter must take and which the tribunal presumed would be sufficient to prevent further injury caused by fumes in the State of Washington; on the other, it determined that, should appreciable injury occur even though Canada took such measures, Canada would have to provide compensation.

41. During its consideration at the fortieth session of the draft articles on international watercourses, the Commission discussed at length article 16 [17] on pollution.²² Paragraph 2 of that article read:

2. Watercourse States shall not cause or permit the pollution of an international watercourse [system] in such a manner or to such an extent as to cause appreciable harm to other watercourse States or to the ecology of the international watercourse [system].

This wording prompted a debate on the question whether what was involved was in fact causal, or strict, liability and the comment that in any case the dividing line in law between the two régimes was not clearly defined.²³

42. The Special Rapporteur does not agree. Although the dividing line between the two régimes is sometimes a fine one, it is still clearly distinguishable: one has simply to consider the concepts underlying the two régimes, which are clearly different. In the present case, there is an obligation to prevent a given event as defined in article 23 of part 1 of the draft articles on State responsibility.²⁴ According to the same article, there is a breach of that obligation only "if, by the conduct adopted, the State does not achieve that result". Of course, if the event (namely, appreciable harm as a result of pollution of a watercourse) does not occur, no one will go and check whether the means used to prevent it were or were not

adequate. If the result (prevention of the event in question) is achieved, there is no breach of the obligation and thus no review of the means used or the conduct adopted.

43. If the event is not prevented and appreciable harm is caused, however, what happens? And here we have the fine but firm dividing line between the two régimes. In this case—and according to the commentary to article 23 referred to above—in order to be able to determine whether there has been a breach of the obligation and thus a wrongful act, the means used to prevent the event in question will have to be considered. If it is found that the State, had it acted differently, could have prevented the event, then there is a breach of the obligation. Otherwise, there is not. According to the Commission,

... The State can obviously be required only to act in such a way that the possibility of the event is obstructed, i.e. to frustrate the occurrence of the event as far as lies within its power. ...²⁵

44. This is fundamental, and it is here that the difference between responsibility for wrongful acts and causal liability lies: under the latter régime, no matter what the degree of diligence used, even maximum diligence, compensation is the inevitable consequence of the harm caused. That is why Anglo-Saxon law calls it "strict" or "absolute" liability (although there are, of course, subtle differences between these two terms). And even though it is very dangerous to talk of "fault" in this field, domestic legal systems also tend to call this régime of liability "no fault" (*lato sensu*) liability. In other words, the attribution of liability is the same whether or not the party liable acted in accordance with the rules of prevention.

45. What would happen if there were watercourse States which were parties to the corresponding convention and also parties to the present articles? If harm occurred, then it would be necessary to see whether the means normally covered by the term "due diligence" had been used. If such means had not been used, there would have been a breach of the obligation and thus a wrongful act. Reparation would therefore be required.

46. On the other hand, if the best means available to the State were used, there is no breach of obligation and thus no wrongful act. Causal liability might then apply and, since under that régime compensation depends on the nature of the cost-allocation rather than on *restitutio in integrum*, the amount payable would have to be reduced bearing in mind, in particular, the cost incurred. In the present draft, these matters can be decided by negotiation, the mechanism provided for such situations.

47. In fact, in normal cases of pollution the defence of "due diligence" is virtually unthinkable; it would be very rare for a result that was clearly attributable to a given activity whose existence was known to the State of origin to occur as a result of ignorance of the causes giving rise to the harm. Normally, we know that certain elements used in certain ways cause pollution. As a result, two possibilities would exist in practice in cases such as these involving watercourses: either (a) the due diligence that would keep the polluting effects of an activity below the

²¹ United Nations, *Reports of International Arbitral Awards*, vol. III (Sales No. 1949.V.2), p. 1905.

²² This article was referred to the Drafting Committee in 1988; for the text, see *Yearbook . . . 1988*, vol. II (Part Two), p. 26, footnote 73.

²³ *Ibid.*, p. 29, para. 160.

²⁴ For the text of article 23 (Breach of an international obligation to prevent a given event) and the commentary thereto, see *Yearbook . . . 1978*, vol. II (Part Two), pp. 81 *et seq.*

²⁵ *Ibid.*, pp. 82-83, para. (6) of the commentary to article 23.

threshold of tolerance is not used (appreciable harm), in which case there would be a breach of the obligation and thus wrongfulness; or (b) all advisable means are used to prevent harm but an accident, and hence appreciable harm detrimental to an affected State or States on the watercourse [system], nevertheless occurs, in which case there would be causal liability and the corresponding compensation.

48. This may be illustrative of what would happen with the proposed convention on the present topic, in the absence of another convention imposing responsibility for wrongfulness in certain cases, depending on the form given to the obligation of prevention under article 8. If the obligation is one of result, the effect would be similar to that of the existence of two conventions, except that the two régimes (one of responsibility for wrongfulness and the other of causal liability) would coexist in the same instrument. The result would be that, if harm occurred as a result of a breach of obligations of prevention, responsibility for wrongfulness, with all that this involves, would apply, while if those obligations were fulfilled and harm nevertheless occurred, causal liability, also with all its attendant laws, would apply.

49. It was pointed out that there was an inconsistency here with the Commission's mandate of dealing with liability for acts "not prohibited". Aside from the indifference shown by many members to this apparent contradiction, it can be argued that this reasoning is applicable to a topic which deals with "acts", not "activities"; the mandate involves dealing with the consequences of certain wrongful acts which are inextricably linked to an activity which is not prohibited. The activity would continue to be allowed and only the injurious "act" would have to cease.

50. Paradoxically, the least harsh solution for the State of origin would be the existence of a single régime: that of causal or strict liability. Such a régime would function as follows: prevention would not be required as a separate obligation but would simply arise from the deterrent effect of reparation under the régime of strict liability. Article 8 would simply be an appendix to the obligation to co-operate and would be without consequences in the event of a breach (except that, if harm occurred, compliance with obligations of prevention would entitle the State of origin to pay reduced compensation). It would also offer the following advantages: (a) State conduct would not be qualified as wrongful; (b) an easy mechanism for assigning obligations would be established; (c) reparation would be required which sought only to restore the balance of interests, instead of being guided by the principle of total restitution; and (d) lastly, the act would not have to cease, although its effects would be the subject of reparation, and this could sometimes produce a more flexible solution.

51. Although this last advantage might appear to give the State of origin licence to continue to cause injury in return for the payment of a certain amount of money, it must be borne in mind, first, that the obligation to compensate is going to impose certain restrictions on the State and, secondly, that the present articles also provide for a system of consultations and the creation of a specific régime for the activity in question which may

eventually lead to prohibition of the activity based on the balance-of-interests test.

52. If, instead of an obligation of "due diligence", which seems to be what is envisaged in article 16 [17] of the draft articles on international watercourses (see para. 41 above), an obligation of conduct had been imposed, it is conceivable that accepted international standards would have been required, if such standards existed, or that the introduction of certain toxic elements, for example through industrial waste, into a watercourse system would have been regulated, as happens with other issues in a number of international instruments.²⁶

53. Although practice might point to a different situation with regard to consequences, in theory at least the breach of that obligation of conduct would entail, even before harm was caused, all the consequences of wrongfulness and, therefore, cessation of the act giving rise to it, elimination of its consequences, restoration of the situation existing prior to the event and, lastly, all the conditions required by article 6 of part 2 of the draft articles on State responsibility.²⁷

54. It is also possible that affected States might use certain measures to force compliance with the obligation of conduct—before, of course, any material harm is caused. Nor would the imposition of such a régime be incompatible with one of strict liability, which could be applicable if accidents occurred despite compliance with accepted international standards.

F. Article 6 (Freedom of action and the limits thereto)

55. A way was sought of simply referring in article 6 to the freedom of the State to permit the activities mentioned in the article rather than actually enunciating that freedom, since some members thought that that would be stating the obvious. The reference only to territory in the previous draft article has been expanded to include "places" under the jurisdiction or control of the State, although in the fourth report this understanding was implicit in the drafting of such a general principle. The second part of the article remains unchanged.

56. Article 6 is based on Principle 21 of the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration),²⁸ except that a broader form was sought which was not tied to the concept of the exploitation of natural resources. Basically, Principle 21 enunciates a certain freedom and its limits. Article 6 does the same and thus gives expression to the two sides of sovereignty: on the one hand, the freedom of a State to do as it wishes within its own territory; and, on the other, the inviolability of its territory with regard to effects originating outside it. The key

²⁶ For example, the Montreal Protocol on Substances that Deplete the Ozone Layer, of 16 September 1987 (Nairobi, UNEP, 1987).

²⁷ *Yearbook* . . . 1985, vol. II (Part Two), p. 20, footnote 66.

²⁸ See *Report of the United Nations Conference on the Human Environment, Stockholm, 5-6 June 1972* (United Nations publication, Sales No. E.73.II.A.14 and corrigendum), part one, chap. I.

element here is that the two must be compatible. In other words, there is neither absolute freedom nor absolute inviolability: the two must be balanced and compatible.

57. This is the basis for the minimum threshold below which harm must be tolerated; it represents a concession to States' freedom of action within their territory, at the expense of the inviolability of that territory, but this freedom must not exceed the limit fixed by the nature of a mere nuisance or insignificant harm. This is one way of making these concepts compatible.

58. The obligations imposed on the State of origin are another way of making the same elements compatible: the freedom to carry on or permit activities in the territory must be balanced by certain obligations of prevention and reparation.

59. It is also understood that the rights emanating from the sovereignty of States include those of the integrity of persons and objects, the use or enjoyment of areas, and the environment of the territory.

G. Article 7 (Co-operation)

60. Article 7 seeks to enunciate, in a more specific manner than the text proposed in the fourth report, the obligations emanating from the principle of co-operation: there is an obligation to co-operate in preventing harmful effects and in controlling and minimizing such effects once they have occurred. There is no mention of the obligation to make reparation, because this does not arise from the obligation to co-operate but from the obligation to restore the balance of interests that has been upset.

61. Article 7 refers to both types of activities referred to in article 1. In the case of activities involving risk, co-operation must be aimed at minimizing the risk in order to try to prevent the accident which would give rise to harm. In the case of activities with harmful effects, co-operation must be aimed at keeping those effects below the threshold of appreciable harm. A text enunciating the principle of co-operation would be incomplete without a reference to international organizations, whose main purpose is to promote co-operation among States for the purposes for which they were established. It is well known that a number of such organizations, or programmes within them, would be particularly well equipped to assist States on matters within their sphere of competence. There are many organizations, such as IMO, IAEA, WHO, WMO and UNEP within the United Nations system and others, such as OECD, whose co-operation it should be compulsory for the source State to request. Of course, such an obligation would not be automatic in all cases, but only in those that required it. That is why the Special Rapporteur preferred to introduce this reference into a broad principle such as co-operation rather than into more specific obligations.

62. In short, a State of origin could not be considered to have complied with its obligation to co-operate in seeking to prevent the occurrence of appreciable harm if, in a particular case in which the assistance of a given organization might have been useful, it did not request

such assistance. Co-operation will also have to be aimed at mitigating the effects of appreciable harm once it has occurred. Wherever possible, such co-operation will have to be extended by the State of origin to the affected State and vice versa. This means that if the affected State has the means to do so, for instance if it has more advanced technology, it will also have to help the State of origin to mitigate the harmful effects in its territory. It is understood that, as indicated in the fourth report,²⁹ such co-operation will not necessarily be provided free of charge. The important thing is not to deny the State of origin, simply because it is the State of origin, the means to remedy or minimize the harm caused by the accident in its own territory. Of course, such co-operation also means not using the occasion to seek political advantage or to air rivalries of any kind.

63. The first part of the article lays the basis for the obligations to inform, notify and consult the affected State. As stated earlier, these obligations serve the purpose of prevention, for the participation of the affected State will mean that the two parties will co-ordinate their efforts to that effect. However, they also, and perhaps more so, serve the purpose of creating a possible régime for the activity in question. Informing and notifying means involving the presumed affected State in a joint assessment of the nature of the activity and its effects. This in turn will make it possible to determine whether a régime is needed to restore the balance of interests. These are obligations "towards" a régime, should such a régime be needed to prevent one party from being harmed and the other from benefiting from the transfer (externalization) of the "internal" costs of an enterprise, i.e. the cost of preventing harm.

H. Article 8 (Prevention)

64. Article 8 (formerly article 9) enunciates the principle of prevention.³⁰ The previous version said that States must take "all reasonable preventive measures to prevent or minimize injury . . .". The present wording requires the State to take "appropriate measures to prevent or, where necessary, minimize the risk of transboundary harm".

65. This duty is not absolute, for the next sentence reads: "To that end they shall, in so far as they are able, use the best practicable, available means . . .". Those who will have to use the best available means are those carrying on the activity, whether they are private individuals or the State. This sentence replaces the phrase "reasonable preventive measures", which was considered vague or not sufficiently demanding.

²⁹ Document A/CN.4/413 (see footnote 3 above), para. 100.

³⁰ Similar language is used in article 194, paragraph 1, of the 1982 United Nations Convention on the Law of the Sea (*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); in article 2, paragraph 1, of the 1985 Vienna Convention for the Protection of the Ozone Layer (Nairobi, UNEP, 1985); and in article 3 of the draft Aix-les-Bains Convention on Transboundary Pollution, drawn up in May 1988 by the Institut international de gestion et de génie de l'environnement (mimeographed).

66. States will also have to enact the necessary laws and administrative regulations to incorporate this obligation into their domestic law, and will have to enforce those domestic norms. In other words, if an activity is carried on by the State or one of its agencies or enterprises, it is the State or its enterprises that will have to take the corresponding preventive measures. If these activities are carried on by private individuals or corporations, however, it is not the State but those private individuals or corporations that will have to institute the actual means of prevention, and the State will have to impose and enforce the corresponding obligation under its domestic law.

67. Last, but not least, account must be taken of the special situation of developing countries, who so far have suffered most from and contributed least to the global pollution of the planet. That is why, in referring to the means to be used, the article says that States shall use them "in so far as they are able" and that such means must be "available" to those States.

68. As indicated above in connection with article 5, the draft offers three possibilities with regard to prevention. If an approach based exclusively on strict liability is adopted, obligations of prevention will be subsumed in those of reparation. In that case, article 8 would have to remain as a form of co-operation, without a breach of such obligations implying any right of jurisdictional protection.

I. Article 9 (Reparation)

69. Article 9 reproduces the content of the previous article 10. Though the meaning has not been altered, the statement that "injury . . . must not affect the innocent victim alone" has been dropped. The appropriateness of this phrase was questioned, since it gave the impression that the innocent victim must bear the major burden of the harm. Of course, that was not what it meant. What

it sought to convey was the notion that reparation did not strictly follow the principle of *restitutio in integrum* which applies in responsibility for wrongfulness, or at least did not follow it with regard to harm considered in isolation in each case.

70. This is because, first of all, harm is not the result of a wrongful act but the expected result of a lawful activity, the assessment of which involves complex criteria. One such criterion is the benefit which the affected State itself may derive from this activity in particular or in general. Another criterion is the interdependence of the modern world which makes us all victims and perpetrators. Yet another criterion is the cost of prevention which the State of origin may have incurred. Lastly, we have all the factors enumerated, although not exhaustively, in section 6 of the schematic outline,³¹ which might perhaps require further elaboration. In these articles, reparation appears to be governed by the nature of the "costs allocation" designed to prevent a State from benefiting unduly by "externalizing" the cost of an activity of which it is the main beneficiary and making that cost fall on the innocent victim.

71. Reparation will have to be the subject of negotiation in which all these factors are weighed and agreement is then reached on the sum of money that the State of origin is to pay the affected State or the measures that it is to take for the latter's benefit. It may be found that it is correct to say that reparation should "seek to restore the balance of interests affected by the harm", because this may be the most accurate definition of harm in the present topic: a certain effect which, being inordinately detrimental to the affected State, upsets the balance of interests involved in the activity which caused it, with the result that reparation, without necessarily being equivalent to all the harm considered in isolation in each case, must be such as to restore the balance of interests involved.

³¹ *Yearbook . . . 1982*, vol. II (Part Two), pp. 83 *et seq.*, para. 109.

IV. Articles 10 to 12 proposed for chapter III (notification, information and warning by the affected State) of the draft

First stage of the procedure towards prevention and the formulation of a régime

72. The Special Rapporteur proposes the following as the first three articles of chapter III:

CHAPTER III

NOTIFICATION, INFORMATION AND WARNING BY THE AFFECTED STATE

Article 10. Assessment, notification and information

If a State has reason to believe that an activity referred to in article 1 is being, or is about to be, carried on in its

territory or in other places under its jurisdiction or control, it shall:

(a) review that activity to assess its potential transboundary effects and, if it finds that the activity may cause, or create the risk of causing, transboundary harm, determine the nature of the harm or risk to which it gives rise;

(b) give the affected State or States timely notification of the conclusions of the aforesaid review;

(c) accompany such notification by available technical data and information in order to enable the notified States to assess the potential effects of the activity in question;

(d) inform them of the measures which it is attempting to take to comply with article 8 and, if it deems it appropriate, those which might serve as a basis for a legal régime between the parties governing such activity.

Article 11. Procedure for protecting national security or industrial secrets

If the State of origin invokes reasons of national security or the protection of industrial secrets in order not to reveal some information which it would otherwise have had to transmit to the affected State:

(a) it shall inform the affected State that it is withholding some information and shall indicate which of the two reasons mentioned above it is invoking for that purpose;

(b) if possible, it shall transmit to the affected State any information which does not affect the areas of reservation invoked, especially information on the type of risk or harm it considers foreseeable and the measures it proposes for establishing a régime to govern the activity in question.

Article 12. Warning by the presumed affected State

If a State has serious reason to believe that it is, or may be, affected by an activity referred to in article 1 and that that activity is being carried on in the territory or in other places under the jurisdiction or control of another State, it may request that State to apply the provisions of article 10. The request shall be accompanied by a documented technical explanation setting forth the reasons for such belief.

V. General comments on articles 10 to 12 of chapter III

A. General considerations

73. It is clear that the kind of procedure under consideration here involves three functions that are closely linked, no one of which can be divorced from the other two. They are assessment, notification and information concerning an activity referred to in article 1. In some cases, one of the functions is implicitly assumed. How, for example, can a State be notified of certain risks or the harmful effects of an activity unless the State of origin has first made an assessment of the activity's potential effects in other jurisdictions? How can information on the activity be provided without at the same time notifying or without having previously notified the affected State about what is involved? How can one notify someone of certain dangers without providing any information which one may have about them?

74. Furthermore, consultation with affected States is also linked to these three functions. What is the use of assessment, notification and information if the opinion of the affected State is not to be consulted? As already noted, there are limits to the freedom which a State of origin has with respect to activities referred to in article 1, and the limit is to be found at the point where appreciable harm occurs to the rights emanating from the sovereignty of other States, specifically affected States. To the extent that those rights are, or may be, infringed, affected States have some say in respect of activities such as those referred to in article 1. Moreover, what consultations would be possible unless the preceding steps were taken first?

75. Similar considerations apply to negotiation, which is frequently confused with consultations. The case law, treaty provisions, resolutions of international organizations, etc., which are cited as a basis for the obligation to negotiate also confirm the obligations to assess, notify, inform and consult. This point should be taken into account in assessing to what extent the proposed articles have a basis in practice.

76. It would seem from the foregoing that one of the basic principles, perhaps the most important, on which the obligations in question rest is the obligation to co-operate laid down in article 7, especially in relation to participation. From the duty to co-operate flows, in the first place, a duty for the State to ascertain whether an activity which appears to have features that may involve risks or produce harmful effects actually causes such risks or effects. This means that the activity must be subjected to sufficiently close scrutiny to allow for definite conclusions to be reached. If, on the other hand, the activity does not appear to be of such a nature, or if, judging from appearances, there is no "appreciable" risk that the activity may cause transboundary harm and no warnings to that effect are received from other States, and—needless to say—it is not known from any other source that such risk may exist, then the activity would be below the threshold at which the provisions of the draft with regard to prevention come into play.

77. The Special Rapporteur considers that notification flows from the general obligation to co-operate because in some cases there is a need for joint action by both the State of origin and the affected State if prevention is to be effective. Perhaps some measures taken from the territory of the affected State can provide protection and prevent effects produced in the State of origin from being transmitted to its own territory. Or perhaps the co-operation of the other State is helpful for the exchange of information that may take place between the parties, especially if the other State possesses technology that is relevant to the problem at hand. Perhaps it is because a joint investigation is usually more productive than individual efforts. What this means then is that the participation of the affected State is necessary if prevention is to be genuine and effective and, consequently, it may be argued that the obligations of the State of origin, according to which it must accept such participation, have the same purpose.

78. The duty to co-operate is one basic principle,

therefore; the other is expressed in the general rule emerging from the international case law frequently cited in this connection, namely that the conscious use by a State of its territory to cause harm to another State is impermissible under international law. It may be recalled, first, that in the *Trail Smelter* case the arbitral tribunal stated:

... no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein ...³²

And in the *Corfu Channel* case (Merits), the ICJ referred to "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States".³³

B. International practice

79. It would take up too much space to list here the many multilateral and bilateral agreements which, in circumstances similar to those obtaining in connection with the topic under consideration, lay down the obligations of assessment, notification and information established in article 10. A number of specific precedents may be cited in this connection.

80. With regard to assessment, the 1978 Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution³⁴ provides in article XI:

Article XI. Environmental assessment

(a) Each Contracting State shall endeavour to include an assessment of the potential environmental effects in any planning activity entailing projects within its territory, particularly in the coastal areas, which may cause significant risks of pollution in the Sea Area.

81. The 1979 Convention on Long-Range Transboundary Air Pollution,³⁵ in article 8, provides that:

Article 8

The Contracting Parties, within the framework of the Executive Body referred to in article 10 and bilaterally, shall, in their common interests, exchange available information on:

(b) Major changes in national policies and in general industrial development, and their potential impact, which would be likely to cause significant changes in long-range transboundary air pollution;

82. The 1982 United Nations Convention on the Law of the Sea³⁶ provides in article 200:

Article 200. Studies, research programmes and exchange of information and data

States ... shall endeavour to participate actively in regional and global programmes to acquire knowledge for the assessment of the

nature and extent of pollution, exposure to it, and its pathways, risks and remedies.

83. The 1983 Agreement between the United States of America and Mexico on co-operation for the protection and improvement of the environment in the border area³⁷ states, in article 7:

Article 7

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.

84. As regards notification and information, it should be pointed out that there are numerous instruments embodying the obligations of notification, information and consultation concerning new uses of international watercourses which are applicable, *mutatis mutandis*, to the present topic; some of these are referred to in Mr. McCaffrey's third report on international watercourses.³⁸ Attention should be drawn to two cases mentioned in that report which do not relate specifically to watercourses but are broader in scope.

85. Particularly noteworthy is recommendation C(74)224 of the OECD Council,³⁹ the annex to which contains a "Principle of information and consultation" reading as follows:

6. Prior to the initiation in a country of works or undertakings which might create a significant risk of transfrontier pollution, this country should provide early information to other countries which are or may be affected. It should provide these countries with relevant information and data, the transmission of which is not prohibited by legislative provisions or prescriptions or applicable international conventions, and should invite their comments.

7. Countries should enter into consultation on an existing or foreseeable transfrontier pollution problem at the request of a country which is or may be directly affected and should diligently pursue such consultations on this particular problem over a reasonable period of time.

8. Countries should refrain from carrying out projects or activities which might create a significant risk of transfrontier pollution without first informing the countries which are or may be affected and, except in cases of extreme urgency, providing a reasonable amount of time in the light of circumstances for diligent consultation. Such consultations held in the best spirit of co-operation and good neighbourliness should not enable a country to unreasonably delay or to impede the activities or projects on which consultations are taking place.

86. The reference to "significant risk" in paragraphs 6 and 8 of the above principle, which supports the Special Rapporteur's use of the similar concept of "appreciable risk", should also be noted in passing.

87. The other case of special interest is that of the "Draft principles of conduct in the field of the environment for the guidance of States in the conservation and harmonious utilization of natural resources shared by two or more States" drawn up in 1978 by the Intergovernmental Working Group of Experts on Natural

³² United Nations, *Reports of International Arbitral Awards*, vol. III, (Sales No. 1949.V.2), p. 1965.

³³ *I.C.J. Reports 1949*, p. 22.

³⁴ United Nations, *Treaty Series*, vol. 1140, p. 133.

³⁵ E/ECE/1010. Will appear in United Nations, *Treaty Series*, as No. 21823.

³⁶ See footnote 30 above.

³⁷ *International Legal Materials* (Washington, D.C.), vol. XXII, No. 5 (1983), p. 1025.

³⁸ *Yearbook ... 1987*, vol. II (Part One), pp. 23 *et seq.*, document A/CN.4/406 and Add.1 and 2, chap. III.

³⁹ Recommendation on "Principles concerning transfrontier pollution", adopted by the Council of OECD on 14 November 1974 (*ibid.*, para. 79).

Resources Shared by Two or More States.⁴⁰ As Mr. McCaffrey recalls in his report, the draft principles were approved by the Governing Council of UNEP, which referred them to the General Assembly for adoption. They were then submitted by the Secretary-General to Member States for comment, after which they were discussed in the Second Committee. In its resolution 34/186, adopted without a vote on 18 December 1979, the General Assembly took note of the report of the Intergovernmental Working Group of Experts and of the draft principles and requested all States to use the principles as guidelines and recommendations in the formulation of bilateral or multilateral conventions regarding natural resources shared by two or more States, on the basis of the principle of good faith and in the spirit of good neighbourliness.

88. Principle 6 is especially relevant:

Principle 6

1. It is necessary for every State sharing a natural resource with one or more other States:

(a) to notify in advance the other State or States of the pertinent details of plans to initiate, or make a change in, the conservation or utilization of the resource which can reasonably be expected to affect significantly the environment of the other State or States; and

(b) upon request of the other State or States, to enter into consultations concerning the above-mentioned plans; and

(c) to provide, upon request to that effect by the other State or States, specific additional pertinent information concerning such plans; and

(d) if there has been no advance notification as envisaged in subparagraph (a) above, to enter into consultations about such plans upon request of the other State or States.

2. In cases where the transmission of certain information is prevented by national legislation or international conventions, the State or States withholding such information shall nevertheless, on the basis, in particular, of the principle of good faith and in the spirit of good-neighbourliness, co-operate with the other interested State or States with the aim of finding a satisfactory solution.

89. Principle 7 relates to timeliness in complying with principle 6 and the spirit in which it should be fulfilled. It reads as follows:

Principle 7

Exchange of information, notification, consultations and other forms of co-operation regarding shared natural resources are carried out on the basis of the principle of good faith and in the spirit of good-neighbourliness and in such a way as to avoid any unreasonable delays either in the forms of co-operation or in carrying out development or conservation projects.

90. Apart from these precedents cited by Mr. McCaffrey in his third report, there are others relating to the obligation to consult, which obviously implies some form of notification and information, without which there can be no consultation.

91. One of these precedents is article 5 of the 1979 Convention on Long-Range Transboundary Air Pollution,⁴¹ which provides:

Article 5

Consultations shall be held, upon request, at an early stage between, on the one hand, Contracting Parties which are actually affected by or exposed to a significant risk of long-range transboundary air pollution and, on the other hand, Contracting Parties within which and subject to whose jurisdiction a significant contribution to long-range transboundary air pollution originates, or could originate, in connection with activities carried on or contemplated therein.

It may be noted that this text, too, uses the concept of "significant risk", which is in line with the "appreciable risk" used by the Special Rapporteur in other articles.

92. Another precedent is article 9, paragraph 1, of the 1974 Convention for the Prevention of Marine Pollution from Land-based Sources,⁴² which reads as follows:

Article 9

1. When pollution from land-based sources originating from the territory of a Contracting Party by substances not listed in Part I of Annex A of the present Convention is likely to prejudice the interests of one or more of the other Parties to the present Convention, the Contracting Parties concerned undertake to enter into consultation, at the request of any one of them, with a view to negotiating a co-operation agreement.

93. Article 142, paragraph 2, of the 1982 United Nations Convention on the Law of the Sea,⁴³ which relates to the exploitation by a State of mineral deposits of the sea-bed across limits of national jurisdiction of a coastal State, and to that State's obligations *vis-à-vis* the coastal State, provides:

Article 142. Rights and legitimate interests of coastal States

2. Consultations, including a system of prior notification, shall be maintained with the State concerned, with a view to avoiding infringement of such rights and interests. In cases where activities in the Area may result in the exploitation of resources lying within national jurisdiction, the prior consent of the coastal State concerned shall be required.

94. Also worthy of note is article III of the 1969 International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties,⁴⁴ which reads as follows:

Article III

When a coastal State is exercising the right to take measures in accordance with article I, the following provisions shall apply:

(a) before taking any measures, a coastal State shall proceed to consultations with other States affected by the maritime casualty, particularly with the flag State or States;

(b) the coastal State shall notify without delay the proposed measures to any persons physical or corporate known to the coastal State, or made known to it during the consultations, to have interests which can reasonably be expected to be affected by those measures. The coastal State shall take into account any views they may submit.

95. Mention may also be made of articles IV and V of the 1975 Agreement between the United States of America and Canada relating to the exchange of infor-

⁴⁰ *Ibid.*, para. 87. The final text of these principles appears in UNEP, *Environmental Law: Guidelines and Principles*, No. 2, *Shared Natural Resources* (Nairobi, 1978).

⁴¹ See footnote 35 above.

⁴² UNEP, *Selected Multilateral Treaties in the Field of the Environment*, UNEP Reference Series 3 (Nairobi, 1982), p. 431.

⁴³ See footnote 30 above.

⁴⁴ United Nations, *Treaty Series*, vol. 970, p. 211.

mation on weather modification activities,⁴⁵ which read as follows:

Article IV

In addition to the exchange of information pursuant to article II of this Agreement, each Party agrees to notify and to fully inform the other concerning any weather modification activities of mutual interest conducted by it prior to the commencement of such activities. Every

⁴⁵ *Ibid.*, vol. 977, p. 385.

effort shall be made to provide such notice as far in advance of such activities as may be possible, bearing in mind the provisions of article V of this Agreement.

Article V

The Parties agree to consult, at the request of either Party, regarding particular weather modification activities of mutual interest. Such consultations shall be initiated promptly on the request of a Party, and in cases of urgency may be undertaken through telephonic or other rapid means of communication. Consultations shall be carried out in light of the Parties' laws, regulations, and administrative practices regarding weather modification.

VI. Specific comments on articles 10 to 12 of chapter III

A. Article 10 (Assessment, notification and information)

96. Article 10 deals with the case of a State which realizes that an activity referred to in article 1 is about to be carried on in its territory or in other areas under its jurisdiction or control.

1. SUBPARAGRAPHS (a), (b) AND (c)

97. As stated earlier, there is hardly any need to establish the basis for the obligation of a presumed State of origin to review such an activity. This is because States normally scrutinize such activities as a precaution for the protection of their own inhabitants, and, as a rule, activities of the kind under consideration require authorization.

98. Where, as a result of its review of the activity, the State of origin comes to the conclusion that the activity may give rise to transboundary harm, the obligation to notify the affected State or States of this circumstance and the obligation to accompany such notification by any information which it may have on the activity involving risk follow from the basic principles to which reference was made earlier (co-operation, and the requirement that a State refrain from knowingly causing injury to another State from its own territory). It will be noted that the words "available technical data and information" are used, the intention being to indicate that the State of origin will not be required to conduct any further investigation or make a more thorough review than it has already done in assessing the effects of the activity in question.

2. SUBPARAGRAPH (d)

99. As already noted, the obligation of notification also serves other purposes, such as to invite a potentially affected State to participate in working out a régime for the activity in question. The expression "legal régime" should not be taken to mean that this will be a complex legal instrument in every case. When the situation is straightforward, it may be enough for the State of origin to propose certain measures which either minimize the risk (in the case of activities involving risk) or reduce the

transboundary harm to below the level of "appreciable harm". The State of origin may, of course, also propose some legal measures, for instance the principle that it is prepared to compensate for any harm which may be caused. Such proposed measures and their acceptance by the affected State may give shape to a legal régime between the parties to govern the activity in question.

100. The first step towards a régime has been taken, therefore, with notification and the proposal of the measures to which reference has just been made. The participation of the affected State in this process is also desirable from the standpoint of the State of origin, which presumably has an interest in finding a legal régime to govern an activity involving risk or harmful transboundary effects for which it is responsible. In any event, the State of origin would have such an interest if the current uncertainty of general international law were to give way to the certainty that any transboundary harm that occurs must be compensated for.

101. The purpose of the régime towards which we are moving with the obligation of notification would be not only to prevent accidents but also to strike a balance between the interests of the parties by introducing order into a whole array of factors. For example, a decision could be taken on preventive measures which weighed their cost against the cost of accidents and the benefits of the activity, the magnitude of the risks involved in the activity, the economic and social importance of the activity, possible sharing by each of the States of the cost of the operations (where there is agreement that certain expenses are to be shared), the objections that might be raised to these obligations, etc.

B. Article 11 (Procedure for protecting national security or industrial secrets)

102. Provision should be made for cases where, for reasons of national security or the protection of industrial secrets, transmitting all the information it has to the affected State would create a situation detrimental to the State of origin. This is a problem of balance of interests typical of this subject-matter. It does not seem fair to force a State to divulge industrial processes which may have cost it a great deal to acquire so that the com-

petition can benefit from them free of charge. In other cases, national security may dictate that some information not be provided. But how far can one go in affording legal protection to such interests? The answer, no doubt, is: up to the point where upholding those interests causes harm to third States. Where such harm occurs, it will be necessary to restore the balance by taking a weight from one side of the scale and putting it on the other.

103. Another question is how to prevent the pretext of industrial secrecy or national security from being used as a cover for bad faith or some expedient other than national security or industrial secrecy, or simply for the desire to avoid the participation of the affected State in the control which that entails.

104. Therefore, while respecting the right of the State of origin in such cases not to provide all the information that it normally should, the duty of that State to provide the affected State with any information not affecting its national security or the industrial secrets involved must be maintained.

105. In cases where, owing to lack of information about the source of the harm, it is difficult to trace the causes of the harm that has occurred, the affected State should be allowed to draw on presumptions and circumstantial evidence to show that the harm was caused by the activity in question. This rule is based, moreover, on grounds similar to those of the judgment in the *Corfu Channel* case,⁴⁶ where the affected State was allowed to resort to

⁴⁶ *I.C.J. Reports 1949*, p. 18.

such procedures to demonstrate that the State of origin knew what was going on in its territory that caused injury to the affected State.

C. Article 12 (Warning by the presumed affected State)

106. Article 12 contains provisions that complement the situation covered by article 10. It is possible that a State may not have realized that, in the circumstances envisaged in article 1, an activity involving risk or with harmful effects is being carried on. It is also possible that when it began the State of origin may have underestimated these characteristics of the activity. Whatever the reason, if a State becomes aware of the danger posed to its own territory by a given activity in another State, it has the right to alert that State, accompanying such warning by a detailed technical explanation setting forth the reasons on which it is based. In short, the provision in question gives the affected State the right to request the State of origin to comply with the obligations set out in article 10, i.e. that it (a) review the activity to assess its effects; (b) transmit its conclusions to the affected State; and (c) furnish the relevant technical data. Likewise, if the State of origin finds that the activity is indeed an activity covered by article 1, it must inform the affected State of any unilateral measures it plans to take in pursuance of article 8 and, where appropriate, of any measures which might serve as a basis for a legal régime between the parties to govern the activity in question.

VII. Articles 13 to 17 proposed for chapter III of the draft

Steps following notification

107. The Special Rapporteur proposes the following five further articles for chapter III:

Article 13. Period for reply to notification. Obligation of the State of origin

Unless otherwise agreed, the notifying State shall allow the notified State or States a period of six months within which to study and evaluate the potential effects of the activity and to communicate their findings to it. During such period, the notifying State shall co-operate with the notified State or States by providing them, on request, with any additional data and information that is available and necessary for a better evaluation of the effects of the activity.

Article 14. Reply to notification

The State which has been notified shall communicate its findings to the notifying State as early as possible, informing the notifying State whether it accepts the measures proposed by that State and transmitting to that State any measures which it might itself propose in order to supplement or replace such proposed measures, together with a documented technical explanation setting forth the reasons for such findings.

Article 15. Absence of reply to notification

1. If, within the period referred to in article 13, the notifying State receives no communication under article 14, it may consider that the preventive measures and, where appropriate, the legal régime which it proposed at the time of the notification are acceptable for the activity in question.

2. If the notifying State did not propose any measure for the establishment of a legal régime, the régime laid down in the present articles shall apply.

Article 16. Obligation to negotiate

1. If the notifying State and the notified State or States disagree on:
 - (a) the nature of the activity or its effects; or
 - (b) the legal régime for such activity,

ALTERNATIVE A

they shall hold consultations without delay with a view to establishing the facts with certainty in the case of (a) above, and with a view to reaching agreement on the matter in question in the case of (b) above.

ALTERNATIVE B

they shall, unless otherwise agreed, establish fact-finding machinery, in accordance with the provisions laid down in the annex to the present articles, to determine the likely transboundary effects of the activity. The report of the fact-finding machinery shall be of an advisory nature

and shall not be binding on the States concerned. Once the report has been completed, the States concerned shall hold consultations with a view to negotiating a suitable legal régime for the activity.

2. Such consultations and negotiations shall be conducted on the basis of the principle of good faith and the principle that each State must show reasonable regard for the rights and legitimate interests of the other State or States.

Article 17. Absence of reply to the notification under article 12

If the State notified under the provisions of article 12 does not give any reply within six months of receiving the warning, the presumed affected State may consider that the activity referred to in the notification has the characteristics attributed to it therein, in which case the activity shall be subject to the régime laid down in the present articles.

VIII. General comments on articles 13 to 17 of chapter III

A. General considerations

108. So far, the draft articles have been dealing with a clear-cut situation, with considerable support from legal theory and international practice. The problems start at this point, and there are essentially two of them:

(a) Should the State of origin postpone initiation of the activity until a satisfactory agreement has been reached with the affected State or States?

(b) What is the situation regarding activities that have already been in existence for some time? What would the situation be regarding certain types of industrial waste, the use of certain fertilizers in agriculture, exhaust emissions from motor vehicles, domestic heating, etc., which have harmful effects but have so far been tolerated?

B. Postponement or non-postponement of the initiation of the new activity

109. As to the postponement or non-postponement of the activity, first of all a comparison may be drawn with the similar, but not always identical, situation of planned new works dealt with in articles 11 *et seq.* of the draft on international watercourses.⁴⁷

110. There are some similarities between the present topic and that of watercourses. An activity may call for considerable investment, as usually happens in the case of planned works involving watercourses. It is only natural to have to await the corresponding authorization before embarking upon works that are often on quite a large scale, since it might be necessary to make changes in the plans or in other major, costly technical aspects of a given project. The same would be true, in the context of the present topic, of a new production technique requiring, for example, the adaptation of existing plant, the construction of new plant, or changes in production processes. Once the expenditure in question has been made, it is more difficult to prohibit the initiation of an activity or to prescribe methods for it that could have been adopted with fewer problems if they had been foreseen from the outset. Likewise, if any harm may be caused by the execution of the new works or by the carrying on of the new activity, in principle it is better to wait until the affected State's consent is obtained before starting.

⁴⁷ See articles 11-21 of part III (Planned measures) of that draft and the commentary thereto, in *Yearbook . . . 1988*, vol. II (Part Two), pp. 45 *et seq.*

111. However, the similarity becomes somewhat less obvious when account is taken of the fact that, although there is a variety of activities that can involve watercourses, there is not an infinite variety, and such activities are well defined. A riparian State may accept the restriction in question without its freedom of action in its own territory being unduly affected. It is an entirely different matter, however, to subject the changing and complex flow of human activities to the Procrustean bed of an international authorization, to say nothing of the fact that, as already indicated, in most cases the transboundary effect will begin to have an impact on the population of the State of origin, and that activities involving risk or having harmful effects must normally be scrutinized before being authorized by the national authorities.⁴⁸

112. It would therefore appear to be necessary to consider the matter in greater depth before proposing a solution such as the one provisionally adopted in the case of watercourses, namely postponement of the initiation of the planned new works. In short, it is a question of bringing to bear in a balanced fashion the principle laid down in article 6, concerning a State's freedom of action in its own territory and the limits to such freedom.

113. The postponement of the activity would be based on an interpretation of article 6 which emphasized limitation; the activity does not begin until the restriction constituted by the rights emanating from the sovereignty of the affected State is lifted. The advantage of this interpretation is that it creates an ideal situation where an activity involving risk or harmful effects is not carried out until agreement has been reached on all aspects relating to the balance of the interests at stake, or until the maximum preventive measures have been taken, which, as we have seen, will occur only if the affected State participates.

114. The other solution, namely to start the activity without waiting for the affected State's consent, gives priority to freedom of action. Obviously, in this case the State of origin would have to assume responsibility immediately for any harm that it might cause. In short, the articles would represent an interim régime under which

⁴⁸ On the other hand, it could be argued that a potentially affected State is not obliged to rely on another State's assessment of risks for and harm to its own population, since each State may take a different attitude towards the treatment of its own nationals, as is proved by the variety of attitudes towards the applicability and implementation of human rights, for example. In any event, the argument is not without weight and must be considered on its merits.

the activity could continue; freedom and responsibility would go hand in hand, as in other spheres of life.

115. This solution sanctions the *ex post facto* effects. If the State of origin had good reason to believe that it was in the right and if there are no appreciable effects on the other State, the States concerned will be able to negotiate the most appropriate régime at their leisure. If, on the other hand, the State of origin was wrong, it would pay for its error, which would prompt it to be cautious and not to stand in the way of the early formulation of a specific régime for the activity. All these factors will be considered, then, when the chapter on reparation is examined.

116. The Special Rapporteur believes that, if initiation of the activity in question were permitted, the process of determining the period within which the procedure must be completed might prove less vexing, since it would be in the interest of both States to seek a negotiated solution as soon as possible.

C. Existing activities

117. It is obvious that there are certain activities that have harmful effects and are none the less tolerated at present. This situation is perhaps attributable, for example, to the fact that the harm caused by such activities is common to all States, that the precise origin of the harmful effects cannot be identified, or that the effects have increased gradually and were only noticed when it was already very difficult suddenly to impose a direct ban on them.

118. It is also clear that most of the activities in question are scrutinized and reviewed and are the subject of international negotiations aimed at mitigating their effects, finding substitutes for some particularly injurious

materials used therein and, ultimately, progressively freeing the world of their deleterious effects. This may be the major concern of the present day, and it seems somewhat redundant to discuss it in great detail here.

119. The current draft, including the general guidelines given in the schematic outline for the parts that have yet to be developed, would appear to be appropriate for a transitional period, if due account is taken of the fact that its chief advantage is that it lays down an obligation to negotiate: to negotiate an appropriate régime for activities that call for it, and to negotiate reparation in the event of injury. At a later stage in its consideration of this delicate subject, the Commission may decide that some minor changes should be made in the procedure laid down in these articles so as to cover activities long in existence; the Special Rapporteur has therefore deemed it appropriate to include this paragraph in the present report, in the hope that the members of the Commission will express views on the matter that may be useful.

120. It also seems reasonable that if, as a result of scientific and technological progress, substitute materials and techniques become available for use in certain activities, affected States should be entitled to inform States of origin accordingly and to summon them to the negotiating table in order to agree on possible ways of introducing such materials and techniques so that a balance can be maintained among the interests at stake. Naturally, in that entire process account should be taken of the special situation of the developing countries, which so far have contributed least by their activities to the exacerbation of the problem and yet have suffered most from its consequences.

121. The Special Rapporteur hopes to be able to tackle this difficult problem at a later stage, but he would be particularly grateful to the members of the Commission for any views they might express on the subject with a view to facilitating his task.

IX. Specific comments on articles 13 to 17 of chapter III

A. Article 13 (Period for reply to notification. Obligation of the State of origin)

122. Article 13 is based *mutatis mutandis* on articles 13 and 14 of the draft on international watercourses.⁴⁹ It should be pointed out here also that preference was given to a specific period of time rather than a "reasonable" period, since certainty as to the period would be advantageous both for the notifying State and for the notified State. As in the case of article 13 of the draft on watercourses, the expression "Unless otherwise agreed" indicates that States can and must grant, in each specific case, a period appropriate to the situation. The six-

month period is therefore of a suppletory nature. In most cases, it might be desirable for both parties to expedite the procedure, since a specific régime is better suited to the particular circumstances of the activity that is the subject of negotiation than a general régime intended to be only of a suppletory and interim nature.

123. The second sentence of article 13 is based on article 14 of the draft on watercourses and lays down an obligation for the State of origin to co-operate, namely to provide, at the notified State's request, any information that it has on the new activity. The State of origin is not required to conduct subsequent investigations but, rather, to supplement the information already provided with any information "that is available" and necessary for a better evaluation of the effects of the planned activity.

⁴⁹ See footnote 47 above.

B. Article 14 (Reply to notification)

124. The notified State must reply "as early as possible". In other words, if it reaches its conclusions on the content of the notification before the six-month period is up, it must inform the notifying State accordingly. Although in this case there is not the same urgency as in the equivalent case under the watercourses topic, since the presumed State of origin has already begun the activity, the proposed wording is advisable since, for reasons of general expediency, these measures should be completed within a short period. Of course, if the notified State disagrees with the notifying State's assessment of the nature of the activity or its effects and does not accept the measures proposed for giving it a legal framework, it must provide an adequate technical explanation of its position.

C. Article 15 (Absence of reply to notification)

125. Article 15 deals with the case of the absence of a reply within the period of time envisaged, if, of course, the period in question has not been extended. The absence of a reply is an indication of agreement, and the notifying State is authorized to take it as such since the notified State had an obligation to give a reply, whether positive or negative, concerning the content of the notification and what is being proposed to it. The notifying State may then proceed with the activity, provided that it implements the proposed measures for preventing harm and risk. If there are lacunae and omissions in the proposals put forward by the State of origin, the provisions of the present articles will be applied on a supplementary basis. If no legal régime has been proposed, the present articles will directly govern the relationship between the parties.

D. Article 16 (Obligation to negotiate)

126. As has been seen, the first step under the procedure was to assess the nature and the effects of an activity and the second step was to notify and inform (as a duty to prevent and minimize harm and also as a duty to cooperate). At this point, if the affected State agrees with the assessment of the nature and effects of the activity made by the State of origin and accepts the corresponding proposals put forward by that State, agreement has been reached on the régime that is to govern the activity. In this case, the two States should formalize their consensus in an agreement.

127. Another possibility is that the presumed affected State notifies the State of origin that an activity that can be described as an activity referred to in article 1 is being carried on in its territory. In this case, one of two things may happen: either the State of origin accepts this assessment and makes the corresponding proposals, or it does not accept the assessment and therefore does not put forward any proposals.

128. If the State of origin accepts the assessment and makes the corresponding proposals, the affected State may accept the proposals or it may consider them in-

adequate. In short, if the parties fail to agree, either on the characteristics and effects of the activity or on the proposals put forward with a view to providing the activity with a legal framework, the first disagreement arises.

129. This, then, is where the obligation to negotiate arises in its pure state for the first time, because although notification and information are essential steps prior to negotiation, they do not represent negotiation proper. Much has been said about this obligation in the Commission, in the Sixth Committee and in innumerable academic forums. The subject has been considered under the present topic, but the obligation to negotiate was considered earlier and in depth under the topic of international watercourses.⁵⁰

130. The present Special Rapporteur believes that the task before the Commission here is not to attempt to approach the subject *ex novo*, which would involve a pointless duplication of effort, but rather to consider whether the many precedents that exist concerning the obligation to negotiate apply to the field under consideration, in other words whether the rules applicable in such cases as the *Railway Traffic between Lithuania and Poland*, *Lake Lanoux*⁵¹ and *North Sea Continental Shelf* cases and the *Fisheries Jurisdiction* case between the United Kingdom and Iceland are applicable to the topic of injurious consequences arising out of acts not prohibited by international law.

131. However, although there is a wide variety of international practice in this connection, judicial and arbitral settlements, multilateral and bilateral agreements laying down the obligation to negotiate in cases similar to those dealt with in such settlements, and all the resolutions of international organizations and all the recommendations of scientific institutions have a lowest common denominator: they all refer to situations where there is a clash of interests.

132. In short, negotiation is the first way of tackling any international dispute. It may be useful to recall the oft-cited paragraph of the judgment delivered by the ICJ on 20 February 1969 in the *North Sea Continental Shelf* cases:

... the Court would recall ... that the obligation to negotiate ... merely constitutes a special application of a principle which underlies all international relations, and which is moreover recognized in Article 33 of the Charter of the United Nations as one of the methods for the peaceful settlement of international disputes. There is no need to insist upon the fundamental character of this method of settlement, except to point out that it is emphasized by the observable fact that judicial or arbitral settlement is not universally accepted.⁵²

133. It is true that Article 33 of the Charter of the United Nations refers to disputes likely to endanger international peace and security, but the Charter does not provide an adequate basis for establishing an obligation to negotiate only in connection with such disputes. To start with, the principle of the sovereign equality of

⁵⁰ See the commentary to article 3 adopted by the Commission at its thirty-second session (*Yearbook ... 1980*, vol. II (Part Two), pp. 114 *et seq.*, paras. (17)-(35)).

⁵¹ United Nations, *Reports of International Arbitral Awards*, vol. XII (Sales No. 63.V.3), p. 281.

⁵² *I.C.J. Reports 1969*, p. 47, para. 86.

States, upon which the Organization is based (Article 2, paragraph 1), requires that if a State considers that its rights have been violated, or if its interests have been harmed as a result of action taken by another State, the latter must heed its complaints and seek in good faith a way of restoring equality, if equality has genuinely been impaired. Moreover, the principle laid down in Article 2, paragraph 3, of the Charter establishes the obligation to settle international disputes in such a manner that not only international peace and security but also justice are not endangered.

134. This obligation to negotiate, which thus seems applicable to any clash of interests, is particularly applicable to injurious consequences arising out of acts not prohibited by international law, if account is taken of the views expressed by the ICJ in the *Fisheries Jurisdiction* cases.⁵³ The Court states the following:

... Neither right is an absolute one: the preferential rights of a coastal State are limited ... by its obligation to take account of the rights of other States and the needs of conservation; the established rights of other fishing States are in turn limited by reason of the coastal State's special dependence on the fisheries and its own obligation to take account of the rights of other States, including the coastal State, and of the needs of conservation.⁵⁴

And a little further on:

The obligation to negotiate thus flows from the very nature of the respective rights of the Parties; to direct them to negotiate is therefore a proper exercise of the judicial function in this case. This also corresponds to the principles and provisions of the Charter of the United Nations concerning peaceful settlement of disputes. ...⁵⁵

The Court then quotes the paragraph of its judgment in the *North Sea Continental Shelf* cases reproduced above (see para. 132).

135. This description given by the Court in the *Fisheries Jurisdiction* cases seems applicable, almost word for word, to the situations arising in connection with the present topic. The obligation to negotiate emanates from the very nature of the parties' respective rights: on the one hand, the right of the State of origin—derived from its territorial sovereignty—freely to use its territory; on the other hand, the affected State's right, also based on its territorial sovereignty, to use and enjoy its territory without impairment.

136. Since, in the past, technological applications were such that they resulted in transboundary harm only in very exceptional circumstances, there was no need for any regulation; this was so in the case of fisheries until fishing activities were intensified. However, once scientific progress placed at our disposal techniques that did have the potential to cause transboundary harm, a situation of interdependence developed which calls for certain restrictions to be placed on the rights of all States. Thus, as the Court indicates, there is now an "obligation to take account of the rights of other States and the needs of conservation". The phrase concerning conservation is admirably suited to all obligations concerning the environment. However, it should be borne in mind that not

all obligations under the present draft articles concern the environment, even though a great number of them do.

137. In order not to run the risk of being misinterpreted, the Special Rapporteur wishes to make it clear that he by no means believes that rights of territorial sovereignty are "preferential rights". They are not, but neither are they absolute rights, as is demonstrated by the very existence of international law, whose application would be impossible—as any form of civilized coexistence would be—if States were to attempt to put the concept of absolute sovereignty into practice. It is in the topic under consideration, let it be stated once again, that the rights of territorial sovereignty of the State of origin clash with the rights emanating from the territorial sovereignty of the affected State, which have equal status.

138. It would perhaps be helpful, in order to gain a better understanding of the nature of the obligation to negotiate, to digress briefly in order to describe what appear to be two of its obvious limits. It is clear that the obligation to negotiate does indeed have limits, and they seem to be good faith and reasonableness. They are the two major guides in the area in question, and—as is usually the case where they are concerned—we all know what they are but it is very difficult to describe or quantify them as they occur in practice.

139. Does State A have an obligation to negotiate if State B suddenly, after many years, interprets a border agreement between them in a capricious manner, with the result that a region that has always been recognized as belonging to State B is suddenly claimed as belonging to State A? The Special Rapporteur thinks not, because that situation would be based neither on reasonableness nor, probably, on good faith. This is so because the obligation to negotiate is not only an obligation to heed the other party; it is not only an obligation "to enter into negotiations, but also to pursue them as far as possible, with a view to concluding agreements", as indicated in the advisory opinion of 15 October 1931 of the PCIJ in the *Railway Traffic between Lithuania and Poland* case.⁵⁶ Nobody can be obliged to pursue negotiations if the other party's position is not reasonable and is not based on good faith.

140. A perfect example of the above is provided by the judgment of the ICJ in the *North Sea Continental Shelf* cases.⁵⁷ There were two sets of negotiations held between the same parties—the first in 1965 and 1966 and the second following the instruction to hold negotiations given in the judgment.

141. In the Court's view, the first negotiations were not genuine negotiations, since Denmark and the Netherlands acted in the conviction that "the equidistance principle alone was applicable, in consequence of a rule binding upon the Federal Republic".⁵⁸ The countries in

⁵³ United Kingdom v. Iceland and Federal Republic of Germany v. Iceland, judgments of 25 July 1974 (*I.C.J. Reports 1974*, p. 3 and p. 175).

⁵⁴ *Ibid.*, p. 31, para. 73, and p. 200, para. 63.

⁵⁵ *Ibid.*, p. 32, para. 75, and p. 201, para. 67.

⁵⁶ *P.C.I.J., Series A/B*, No. 42, p. 108; see also p. 116.

⁵⁷ Which, in passing, in this respect follows the advisory opinion just quoted, since it indicates that the parties "are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it" (*I.C.J. Reports, 1969*, p. 47, para. 85(a)).

⁵⁸ *Ibid.*, p. 48, para. 87.

question certainly saw no reason to depart from the rule of equidistance. It is therefore possible to believe that they entered into the talks with the Federal Republic of Germany without deeply committing themselves to genuine negotiations, owing to their belief that the content of the complaint was unreasonable as it was not in accordance with the law.

142. On the other hand, the second set of negotiations was genuine. Once the Court had clarified the relevant point of law and determined that under international law equidistance was not the only method of determining borders such as the ones in question, the parties engaged in genuine negotiations until they reached a settlement.

143. The Special Rapporteur does not believe that it is of any importance for the purposes of his analysis that the Court provided some elements as a guide for negotiation, such as the reference to the principles of equity and the unity of the deposit. That is part of the particular nature of the case in question; the genuinely general aspects of the case are the basis for and the limits to the obligation to negotiate.

144. The Special Rapporteur is therefore of the view that there is in the field under consideration an obligation to negotiate, because there is here a clash of various interests that must be reconciled if they are essentially reasonable, and that paragraph 2 of article 16 takes account of the two important parameters to which reference is made, namely reasonableness and good faith.

145. There may be disagreement on two different aspects: on the nature of the activity or its effects, and on the measures that are to make up the legal régime for the activity.

146. In the first instance, there is a disagreement on facts, which would best be resolved by establishing a fact-finding body of experts. The other possibility offered (alternative A) is that the facts should be established by means of negotiation between the parties, without experts being involved, since experience has revealed a clear reluctance on the part of States to accept the involvement of third parties in their disputes. Perhaps it would be easier to accept fact-finding machinery—the appointment of whose members and other details would

be dealt with in a possible annex—if the opinion of such a body were not binding on the parties. That is the solution suggested by the previous Special Rapporteur in the schematic outline⁵⁹ (sect. 2, para. 6). According to the outline, the obligation to negotiate would arise only if (a) it does not prove possible within a reasonable time to agree upon the establishment and terms of reference of fact-finding machinery; (b) any State concerned is not satisfied with the findings, or believes that other matters should be taken into consideration; and (c) the report of the fact-finding machinery so recommends.

147. The solution put forward in the schematic outline is actually a rational one, since it is first of all necessary for the parties to hold the same view on the nature and effects of the activity in order to be able to agree on the necessary preventive measures and the legal régime that would be most applicable. Moreover, although it is easier to begin by holding a round of consultations than to set about appointing a body of experts and wait until the experts reach agreement, account should be taken of the fact that, on the one hand, the presumed State of origin can begin the activity without awaiting the outcome of the deliberations in question and, on the other hand, the temporary liability régime laid down in the articles gives the presumed affected State a certain amount of assurance that compensation will be given for any harm. In principle, there would be no vexing haste.

E. Article 17 (Absence of reply to the notification under article 12)

148. Under article 17, the notified State's silence may militate against it, since that State has a duty to express its views in accordance with the obligation to negotiate, which means that if the presumed State of origin has not given any reply within six months of having been warned, the conclusion will be that it accepts the nature attributed to the activity in question by the other State, and the activity will thus be subject to the régime laid down in the present articles, as if it were an activity referred to in article 1.

⁵⁹ See footnote 31 above.