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

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

[Agenda item 6]

DOCUMENT A/CN.4/437*

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not prohibited by international law, by Mr. Julio Barboza, Special Rapporteur**

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* Incorporating document A/CN.4/437/Corr.1.

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NOTE

Multilateral conventions cited in the present report

	<i>Source</i>
Convention on Third Party Liability in the Field of Nuclear Energy (Paris, 29 July 1960)	United Nations, <i>Treaty Series</i> , vol. 956, p. 251.
Convention on the Liability of Operators of Nuclear Ships (Brussels, 25 May 1962)	IAEA, <i>International Conventions relating to Civil Liability for Nuclear Damage</i> , Legal Series, No. 4, rev. ed., (Vienna, 1976), p. 43.
Vienna Convention on Civil Liability for Nuclear Damage (Vienna, 21 May 1963)	United Nations, <i>Treaty Series</i> , vol. 1063, p. 265.
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	Ibid., vol. 1155, p. 331.
Convention on International Liability for Damage Caused by Space Objects (London, Moscow and Washington, 29 March 1972)	Ibid., vol. 961, p. 187.
Convention on Civil Liability for Oil Pollution Damage resulting from Exploration for and Exploitation of Sea-bed Mineral Resources (London, 17 December 1976)	UNEP, <i>Selected Multilateral Treaties in the Field of the Environment</i> , Reference Series 3 (Nairobi, 1983) p. 474.
European Convention on Products Liability in Regard to Personal Injury and Death (Strasbourg, 27 January 1977)	Council of Europe, <i>European Treaty Series</i> , No. 91 (Strasbourg, 1977).
Convention on the Regulation of Antarctic Mineral Resource Activities (Wellington, 2 June 1988)	International Legal Materials, vol. XXVII (1988) p. 868.
Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel, 22 March 1989)	UNEP, <i>Selected Multilateral Treaties in the Field of the Environment</i> (Cambridge, England, 1991), vol. 2, p. 449.
Convention on Civil Liability for Damage caused during Carriage of Dangerous Goods by Road, Rail or Inland Navigation Vessels (CRTD) (Geneva, 20 October 1989)	United Nations publication, Sales No. E.90.II.E.39.
Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 25 February 1991)	E/ECE/1250.

Introduction

A. Methodology of the report

1. During the debate in the Sixth Committee of the General Assembly at its forty-fifth session on the report of the International Law Commission on the work of its forty-second session,¹ one delegation suggested that it might be worthwhile for the Commission to prepare an overall review of the current status of the topic and also to indicate the direction it intended to take in the future instead of continuing with the article-by-article analysis (A/CN.4/L.456, para. 450). In this report an attempt has been made to follow that sensible suggestion. However, in the process, the suggested method of work has undergone some modification, since it seemed that it would also be useful to dwell on those articles which had been the subject of commentaries of some significance during the debates in both the General Assembly and the Commission. In that way, attention could be drawn to the most important problems that had been raised and possible solutions and alternatives could be suggested. For, while it is true that there is no consensus on several aspects of the topic—including some of the basic premises—it appears that majority views are emerging and that they do coincide in important areas. It is not the present writer's function to arbitrate the differences or to decide that a majority or minority feels one way or another, but simply to try to offer alternatives to make negotiation viable, possibly at a later stage of development of the topic, particularly on those aspects of the draft articles which call more for progressive development than for codification of what already exists. The debates have revealed the existence of a strong demand for the Commission to take a stand on the subject, and a pronouncement should be made without too much delay, owing to the pace at which treaty norms on specific activities are being developed.

B. Nature of the instrument

2. Some delegations in the Sixth Committee had come out in favour of refraining from codifying international law on the subject at the present stage, expressing a pref-

erence for a code of conduct or mere guidelines for States. Many others, however, had supported mandatory norms. Within this latter group, some favoured considering activities involving risk separately from those with harmful effects.

3. As to whether or not the provisions resulting from the combined efforts of the Commission and the Sixth Committee on this topic should be mandatory, it is worth referring to one of the Commission's earlier sessions at which, following a suggestion by one member that "if the Commission were not concerned about drafting rules for a convention which required acceptance by States, it could more easily accept certain hypotheses and draft articles",² he had said he did not believe "that at the present stage the Commission should be concerned about the eventual form of the articles on the topic"³ nor did he think that the eventual form of the articles should affect the method of work of the Commission.

In his view, the Commission should be concerned with drafting coherent, reasonable, practical and politically acceptable articles. Factors or criteria should be scientific, identifiable and logical, with the aim of improving international law and inter-State relations. In the final analysis, the provisions on the present topic would win support and compliance because of these factors and not necessarily because of the form in which they appeared.⁴

4. That is the criterion which has been applied so far. To announce right now that the Commission will deal only with recommendations or guidelines would be to reject a current of opinion that is favoured by a large number of delegations in the Sixth Committee and by members of the Commission who have spoken of the need for a binding instrument in this field. At the end of this exercise, the Commission will decide what to recommend to the General Assembly regarding the nature of the articles to be proposed, and it is the General Assembly which ultimately will resolve the matter. It seems therefore neither possible nor desirable to anticipate the action of the Assembly.

¹ *Yearbook* . . . 1990, vol. II (Part Two).

² See *Yearbook* . . . 1987, vol. II (Part Two), para. 191.

³ *Ibid.*, para. 192.

⁴ *Ibid.*

CHAPTER I

Title of the topic

5. In English, the title seems to be more restrictive in terms of the Commission's mandate than it is in French. In fact, in English it reads as follows: "International liability for injurious consequences arising out of acts not prohibited by international law". In French, on the other hand, the word "acts" is replaced by *activités*. Whereas the English title would not, strictly speaking, allow the Commission to deal with anything but the aspects relating to reparation or compensation for those injurious consequences, the French title considerably broadens the picture. To deal with "acts" rather than "activities" would mean that prevention would have no place in the draft, first because it is expressed in primary obligations or, in other words, prohibitions, and the articles would not therefore be dealing with acts "not prohibited by international law". This has been one of the classic objections among critics of the topic in general. Furthermore, the English title speaks of liability for such injurious consequences, which means that it takes the hypothesis that the harm (injurious consequence) has already occurred. It would then be a legal development of what in Spanish is generally called *responsabilidad objetiva o causal* and in English "strict liability". Thus, notwithstanding a suggestion that has repeatedly been made in previous debates in the General Assembly and in the Commission to the effect that prevention is an indispensable chapter of this topic, according to a strict interpretation of the English title there would be no place for such prevention.

6. If, on the other hand, the focus of the topic is shifted to "activities", the picture broadens considerably. The Commission's mandate would be to try to come up with a legal regulation of certain activities the conduct of which produces, or may produce, injurious consequences. The word "responsibility" in relation to "activities" acquires two legal meanings: one relates to the consequences of deeds and the other refers to the imposition of obligations.⁵ In that case, given the injurious con-

sequences of certain activities, the aim would be to impose primary obligations of prevention, the violation of which would entail certain legal consequences (secondary obligations), and also to establish other primary obligations in which harm would be a condition for reparation, irrespective of whether there was failure to observe any obligation. The establishment of norms on prevention would be within the mandate of the General Assembly, since they would fall under the concept of responsibility, that is to say, the imposition of obligations in view of the injurious consequences of certain activities. They would primarily be the activities covered in chapter III of the draft articles. Matters relating to reparation (chap. IV) would come under the aegis of liability. Perhaps the full scope of this aspect of the topic could be expressed in English by a term which has won considerable acceptance in present-day international law: "responsibility and liability". There would be no problem whatsoever in either Spanish or French because *responsabilidad* and *responsabilité* cover the meanings expressed by these two English words.

7. This was already discussed in the Commission⁶ and the general consensus was that "activities" was preferable to "acts". This and previous reports, as well as the work of the Commission itself, have been based upon that assumption ever since. If international practice is to be taken into account in the development of this topic in the Commission, it is clear that it should opt for "activities", since nearly all conventions dealing with transboundary harm refer to the "activities" which produce such harm. At the time, however, it was agreed that discussion of the change in title should be postponed to a later stage in the development of the topic, at which time it would be possible to see clearly all the possible suggested changes that would need to be made. Perhaps that time has come.

⁵ See the discussion of the topic in the preliminary report by the previous Special Rapporteur, Mr. Quentin Baxter, *Yearbook... 1980*, vol. II (Part One), pp. 250-252, document A/CN.4/334 and Add.1-2, particularly footnote 17 which, *inter alia*, when commenting on the use of the English terms "responsibility" and "liability", in the "Informal Composite Negotiating Text/Revision 2" of the Third United Nations Conference on the Law of the Sea, gives the following examples:

"(a) Responsibility and liability = *responsabilités et obligations qui en découlent*; liability = *obligation de réparer*.

"(b) Responsibility and liability = *obligation de veiller au respect de la convention et responsabilité en cas de dommages*; States are responsible... = *il incombe aux États de veiller...*; international law relating to responsibility and liability = *droit international relatif aux obligations et à la responsabilité concernant l'évaluation et l'indemnisation des dommages*."

The second report of the present Special Rapporteur on the same topic concurs with this assessment and, quoting Goldie, states that:

"The terms 'responsibility' and 'liability' here and in articles VI and XII of the 1972 Convention on International Liability for Damage Caused by Space Objects are used with different connotations. Thus in both treaties, responsibility is taken to indicate a duty, or as denoting the standards which the legal system imposes on performing a social role, and liability is seen as designating the consequences of a failure to perform the duty, or to fulfil the standards of performance required." (*Yearbook... 1986*, vol. II (Part One), p. 145, document A/CN.4/402, para. 4).

Those, undoubtedly, were the meanings of the terms "responsibility" and "liability", at least in international practice and without venturing into the dangerous territory of the meanings of those terms in the common law system.

⁶ "A number of members supported the Special Rapporteur's proposal that, at some stage in the study of the topic, it should be suggested to the General Assembly that the word "acts", in the title of the topic, be replaced by "activities" so that all the language versions would be aligned with the French. There was no opposition to this proposal or to the basic reasoning by which the Special Rapporteur justified the change." (*Yearbook... 1986*, vol. II (Part Two), para. 216).

CHAPTER II

The first 10 articles

A. General provisions (arts. 1-5)⁷

8. These articles were transmitted to the Drafting Committee and, as explained in the sixth report, would have

⁷ Articles 1-5 read as follows:

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 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 a risk of causing, transboundary harm throughout the process."

Article 2. Use of terms

"For the purposes of the present articles:

"(a) 'Activities involving risk' means activities referred to in article 1, including those carried on directly by the State, which:

- "(i) involve the handling, storage, production, carriage, discharge or other similar operation of one or more dangerous substances;
- "(ii) use technologies that produce hazardous radiation; or
- "(iii) introduce into the environment dangerous genetically altered organisms and dangerous micro-organisms;

"(b) 'Dangerous substances' means substances which present a[n appreciable] [significant] risk of harm to persons, property [, the use or enjoyment of areas] or the environment, for example, flammable and corrosive materials, explosives, oxidants, irritants, carcinogens, mutagens and toxic, ecotoxic and radiogenic substances such as those indicated in annex... A substance may be considered dangerous only if it occurs in certain quantities or concentrations, or in relation to certain risks or situations in which it may occur, without prejudice to the provisions of subparagraph (a);

"(c) 'Dangerous genetically altered organisms' means organisms whose genetic material has been altered in a manner that does not occur naturally, by coupling or natural recombinations, creating a risk to persons, property [, the use or enjoyment of areas] or the environment, such as those indicated in annex...;

"(d) 'Dangerous micro-organisms' means micro-organisms which create a risk to persons, property [, the use or enjoyment of areas] or the environment, such as pathogens or organisms which produce toxins;

"(e) '[Appreciable] [Significant] risk' means risk which presents either the low probability of causing very considerable [disastrous] harm or the higher than normal probability of causing minor, though [appreciable] [significant], transboundary harm;

"(f) 'Activities with harmful effects' means activities referred to in article 1 which cause transboundary harm in the course of their normal operation;

"(g) 'Transboundary harm' means the harm which arises as a physical consequence of the activities referred to in article 1 and which, in the territory or in [places] [areas] under the jurisdiction or control of another State, is [appreciably] [significantly] detrimental to persons, [objects] [property] [, the use or enjoyment of areas] or the environment. In the present articles, the expression always refers to [appreciable] [significant] harm. It includes the cost of preventive measures taken to contain or minimize the harmful transboundary effects of an activity referred to in article 1, as well as any further harm to which such measures may give rise;

"(h) '[Appreciable] [Significant] harm' means harm which is greater than the mere nuisance or insignificant harm which is normally tolerated;

"(i) 'State of origin' means the State which exercises jurisdiction or control over an activity referred to in article 1;

been amended—particularly article 2⁸—had the concept of 'dangerous substances', introduced on a wholly experimental basis in that report, been accepted. Of the texts in question, at least those relating to principles should be considered by the Drafting Committee at the current session. In the most recent debate in the Sixth Committee several delegations had drawn attention "to the United Nations Conference on Environment and Development scheduled for 1992, and the hope was expressed that the work of the Commission would be, if not finished, at least brought to an advanced stage so that it could be presented at that Conference" (see A/CN.4/L.456, para. 439). Perhaps the best contribution that could be made to this extremely important international meeting would be the drafting of principles in this area, which it was suggested should be considered by the Drafting Committee at the current session.

1. SCOPE OF THE PRESENT ARTICLES (ART. 1)

9. Article 1 (Scope of the present articles) may require drafting changes on the basis of suggestions put forward during various debates but it appears to have secured majority support regarding the activities it seeks to

"(j) 'Affected State' means the State under whose jurisdiction or control the transboundary harm arises;

"(k) 'Incident' means any sudden event or continuous process, or series of events having the same origin, which causes, or creates the risk of causing, transboundary harm;

"(l) 'Restorative measures' means appropriate and reasonable measures to restore or replace the natural resources which have been damaged or destroyed;

"(m) 'Preventive measures' means the measures referred to in article 8 and includes both measures to prevent the occurrence of an incident or harm and measures intended to contain or minimize the harmful effects of an incident once it has occurred;

"(n) 'States concerned' means the State or States of origin and the affected State or States."

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

"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."

⁸ *Yearbook... 1990*, vol. II (Part One), p. 83, document A/CN.4/428 and Add.1, paras. 18-21.

cover, that is to say activities involving risk, namely those which have a higher than normal probability of causing transboundary harm, and activities with harmful effects, namely those which cause transboundary harm in the course of their normal operation.

10. As to whether the two types of activities covered by the draft should be dealt with severally or jointly, it would appear useful to deal with them jointly, on the understanding that if at the end of the exercise this method proves to have been inappropriate, the Commission could still decide to consider them separately. The reason for this is that, to date, it has not been convincingly demonstrated that the two categories of activities are in fact so different as to warrant separate treatment. It should be recalled that, initially, the present articles were intended to introduce acceptable general principles in this area, namely limits to a State's freedom of action within its territory, cooperation, non-discrimination, prevention and reparation. All these are clearly applicable to both types of activities. Thus, to focus the regime governing activities involving risk solely on prevention would be to overlook the fact that the harm normally caused by such activities must be compensated, and this requires that the principle of compensation should be explicitly set out in the articles, since it is not specified in international law, at least according to one school of thought. Furthermore, the notion of prevention is applicable to both types of activities. This notion covers two distinct concepts:

(a) In so far as unilateral measures are concerned, States have identical duties *vis-à-vis* both types of activities: the State must set down legislative and administrative measures which specify the precautions to be taken in each case by operators and it must monitor their implementation. A State's liability in the event of non-compliance would be the same irrespective of the type of activity involved, as will be seen below. If the operator, for his part, failed to comply with his obligations, he would ultimately be penalized by the domestic law of his State; if transboundary harm occurred, the matter would become first and foremost one of civil liability, to be decided by the competent court.

(b) As for procedural measures, they are obviously useful and necessary regardless of the type of activity involved. In dealing with any activity described in article 1, it is of fundamental importance that, in accordance with article 11 (Assessment, notification and information),⁹ the transboundary effects should be assessed, notification given and consultations held in all cases. The regime that is ultimately accepted may differ, depending on the specific type of activity involved, but the formal steps will be the same for all activities.

11. Although there was little discussion of the idea, one delegation suggested that the article should refer only to new activities, that is, to activities to be undertaken in the future, and not to existing, ongoing activities. While this issue is of major importance and will have to be settled, it does not call into question the two basic types of activity covered by this article.

12. There is another point of view that has nothing to do with separate or joint treatment, as it seems to accept all of the above. It would extend the draft to cover unforeseeable harm. The thrust of this view is not clear. If it refers to harm which is caused by an activity which, though inherently harmful, is conducted under circumstances that make it impossible to foresee or identify the harm at the outset, the situation would seem to be covered already by virtue of the way the articles operate. In fact, from the moment harm is caused through the normal operation of an activity or when risk is established as being inherent, the activity falls under the definition in article 1 and thus under article 3. It would be sufficient for a State to know—or to have the means of knowing—that an activity referred to in article 1 was being, or was about to be, carried out in its territory for the activity to be subject to the obligations established in the draft articles.

13. However, if the point is that any transboundary harm must be compensated, even if it is caused by an activity that is normally harmless and remains harmless after the harmful incident, the question requires further study. If an activity is not deemed to be hazardous and has no harmful effects, there is little likelihood of its actually causing transboundary harm. Such may be the case if an auxiliary cause exists, that is, a cause not related to the activity in question which interferes with the normal course of events and has an unexpected effect. Such interference may or may not be foreseeable, but it is in any event unrelated to the activity itself. Thus, in order to consider such a hypothesis attention would have to be diverted from activities, which are the crux of the matter, to harm, whatever form it may take. This would lead to a change in the approach to the draft, which would hardly seem warranted, given the small number of instances of harm occurring this way. To look at the topic exclusively from the standpoint of the harm caused would be to ignore the most pressing demand of our time, namely the establishment of legal norms to govern liability for the consequences of certain human activities. It is these norms, and not the relatively academic concern to spell out all possible forms of harm, which have become a veritable obsession today. This is not to say that damage of the type just mentioned should go uncompensated; it may be appropriate to deal with it by virtue of the general principles of international law. In the absence of any evidence to the contrary, however, the matter would not seem to be important enough to warrant a change in the approach to the articles.

2. KNOWLEDGE OR MEANS OF KNOWING (ART. 3)

14. Although some doubts were raised regarding the central idea that liability is contingent upon the fact that a State "knew or had means of knowing that an activity referred to in article 1 was being, or was about to be, carried out in its territory", they were not pursued. The presumption in the final paragraph would seem to restore a sense of balance to this provision.

3. ARTICLES 4 AND 5

15. Article 4 seeks to express the idea that where the provisions of the present articles are incompatible with

⁹ See footnote 24 below.

those of a treaty governing a specific activity between the same States parties, the provisions of the treaty shall prevail. To bring the text into line with the language of article 30, paragraph 2, of the Vienna Convention on the Law of Treaties, it might be redrafted as follows:

“In the case of States parties to the present articles which are also parties to another international agreement concerning an activity or activities referred to in article 1, the present articles shall not be considered incompatible with the provisions of that other international agreement.”

16. Article 5 did not require other than editorial changes, which were incorporated into the new draft.

B. Principles (arts. 6-10)¹⁰

I. THE FUNDAMENTAL PRINCIPLE (ART. 6)

17. Article 6 sets out the basic principle, inspired by the wording of Principle 21 of the Stockholm Declaration.¹¹ Although drafting changes have been suggested,

¹⁰ Articles 6-10 read as follows:

“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. *Cooperation*

“States shall cooperate 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 cooperate with the affected State in minimizing its effects. In the event of harm caused by an accident, the affected State shall, if possible, also cooperate 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 [areas] under its jurisdiction or control.”

“Article 8. *Prevention*

“States of origin shall take appropriate measures to prevent or minimize the risk of transboundary harm or, where necessary, to contain or minimize the harmful transboundary effects of the activities in question. 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.”

“Article 10. *Non-discrimination*

“States Parties shall treat the effects of an activity arising in the territory or under the jurisdiction or control of another State in the same way as effects arising in their own territory. In particular, they shall apply the provisions of the present articles and of their national laws without discrimination on grounds of the nationality, domicile or residence of persons injured by activities referred to in article 1.”

¹¹ *Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972* (United Nations publication, Sales No. E.73.II.A.14 and corrigendum), part one, chap. I.

many of which are acceptable, there is a broad consensus on the central idea.

2. COOPERATION (ART. 7)

18. Article 7 sets out the principle of international cooperation to achieve the objectives of the draft. One original aspect is the obligation of affected States to cooperate with the State of origin in containing or minimizing the harmful effects of an activity occurring in the territory of the State of origin, whenever possible and reasonable. Once again, the principle cannot be said to have elicited any substantive objections, although important suggestions were made with a view to improving it. One was to word the principle in such a way that it would cover actions by private parties. Thus, anyone exposed to the effects of an activity in the affected State could have access to information about the activity available to both the State of origin and private entities or individuals of that State. In addition, such entities or individuals ought to have access to any administrative proceedings that may take place in the State of origin to assess the transboundary impact and also to the permit, if any, authorizing the activity.

3. PREVENTION (ART. 8)

19. Although the notion of “prevention” after an incident gave rise to some misgivings, the sound international practice which establishes it is unquestionable.¹² However, the wording of this article will need to be amended if some of the suggestions put forward in recent debates are accepted. As it stands, article 18 (Failure to comply with the foregoing obligations),¹³ which eliminates any consequences for failure to comply with obligations in respect of prevention, was not well received by the Commission or the General Assembly.

20. When the commentary to article 18 is taken up, the suggested changes will be considered in greater detail; for the time being, however, one change should be made to article 8, which sets out the principle of prevention and anticipates the procedural measures contained in articles 11 to 15,¹⁴ as well as the unilateral measures set out in article 16.¹⁵ This would make it clear that those provisions confer upon States only obligations which are proper to States, that is to say, the obligation to take legislative, regulatory and administrative measures to “guarantee” or “ensure that” the activities referred to in article 1 which take place under their jurisdiction or control do not cause significant transboundary harm, if they have harmful effects; or that the risk of causing such harm is minimized, if the activities are dangerous; or that the harm is contained and minimized, if the harmful effect has already been unleashed. The last paragraph of article 8 should be deleted, since under normal conditions States appear to be able to take the necessary legis-

¹² *Yearbook... 1990*, vol. II (Part One), p. 83, document A/CN.4/428 and Add.1, para. 22.

¹³ See footnote 24 below.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

lative, administrative or police action. It will be seen from chapter III below that a different approach may be possible in the case of the procedural obligations set out in articles 11, 13 and 14 of chapter III, which are also considered obligations of "prevention"—although some believe that they can only have their basis in cooperation.

4. REPARATION (ART. 9)

21. Article 9 ought to be drafted in such a way as to reflect the interrelationship between the liability of a State and that of operators under the regime of civil liability. During the most recent debate in the Sixth Committee many delegations let it be known that they generally favoured the inclusion of norms that would clarify this interrelationship. Coming back to the notion of the innocent victim, which has been somewhat overlooked along the way, the principle could perhaps stipulate that the important thing is for the victim to obtain compensation for the injury suffered, thereby making it clear that if compensation is awarded, the State may, in cases specified in the instrument, assign liability to private parties. This would give expression to a widely held view in the Sixth Committee and the Commission that the State should have residual liability *vis-à-vis* that of the operator. Some delegations, albeit fewer in number, expressed the view that the State must have primary liability. A middle way can be sought. On the one hand, it is quite clear that many of the conventions¹⁶ governing specific activities place primary liability with the operator or another responsible party, as will be seen, and assign to the State a measure of subsidiary liability when the operator is unable to make the appropriate restitution in full. Perhaps this liability of the State should be extended to other cases in which innocent victims are unable to obtain compensation. The State, then, might be liable for reparations in cases where the injury cannot be compensated in full through private channels, either because: (a) the operator at fault or his insurer is unable to compensate the injury in full or (b) the responsible party or parties cannot be identified (long-range pollution, it is impossible to identify those responsible among multiple operators, for example, in cases where the harmful effect originates in an entire region within a State).

22. The State may of course discharge its responsibility in various ways, for instance, by establishing a fund, as provided for in the Brussels Convention on the Liability of Operators of Nuclear Ships, if the situation described in case (a) in paragraph 21 above applies, or by requiring operators or, whenever possible, multiple operators who collectively cause transboundary harm, in

the region of the country where the harmful effects originate to set up a special fund to compensate the harm or to take specific precautions to prevent the occurrence of the harmful effect. Ideally, in such cases the State of origin would participate in the consultations with the affected States referred to in articles 11 *et seq.* in order to establish a regime at the international level that would govern the activity in question. Finally, it should be noted that only in case (b) described in paragraph 21 above, or whenever a State has primary, rather than assigned, liability, can the negotiations between the State of origin and the affected State called for in articles 9 and 21¹⁷ as currently drafted take place; this is not so in the case described in (a), where private channels under the regime of civil liability would be available.

23. Some delegations in the Sixth Committee, as well as some members of the Commission, will surely maintain that the State has primary liability. This report will, of course, take an entirely neutral line on the matter, except to confirm that the number of delegations and members who have spoken in favour of "residual" responsibility of the State is considerable. In addition, the idea of primary liability on the part of the State in situations such as those described in case (b) in paragraph 21 above will surely be resisted by some States and by members of the Commission as well. The question is one that should be negotiated if the articles are one day to form the basis of a convention. It is therefore suggested to the Commission that both alternatives should be retained, namely article 9 as it stands and a new article that would reflect the aforementioned ideas.

5. NON-DISCRIMINATION (ART. 10)

24. Article 10 was generally well received, as it sets out a principle that is almost perfect in the abstract. Of the few objections raised one was that the principle can operate only between States with similar or comparable legal systems. Yet, if the regime of civil liability is to be applied, this principle is absolutely necessary and will compel States to confer upon citizens or residents of other countries treatment no less favourable than that which they accord to their own residents. The objection raised here is that some countries may treat their own residents in a manner that does not match up to what is generally considered to be the international standard. In reality, the draft articles will set an international standard once they establish the principle of prevention and reparation, as well as other principles which, precisely because of non-discrimination, must be applied by all States parties. For example, article 29, paragraph 2,¹⁸ states that "States parties shall make provision, in their domestic legal systems, for remedies that permit prompt and adequate compensation or other reparation of transboundary harm caused by activities referred to in article 1 carried out under their jurisdiction or control." It will be recalled that the phrase "prompt and adequate compensation or other reparation" in itself constitutes an international standard.

¹⁶ With the exception of the one concerning liability for space objects; however, attention has already been drawn to the special nature of this legal instrument, which was based on strict State control not only over activities conducted by the State but also over private activities carried out under its authority. As Doeker and Gehring point out, "The stipulation of liability of the controlling State corroborates its obligation continuously to supervise and control governmental, as well as private, space enterprises." (G. Doeker and T. Gehring, "Private or international liability for transnational environmental damage: The precedent of conventional liability regimes", *Journal of Environmental Law* (Oxford), vol. 2, No. 1 (1990), p. 13.)

¹⁷ See footnote 33 below.

¹⁸ See footnote 43 below.

C. Article 2

1. DANGEROUS ACTIVITIES (SUBPARAGRAPHS (a) TO (d))

25. Subparagraphs (a) to (d) of article 2 define what is involved in the concept of "dangerous activities". They were inserted simply on a trial basis to satisfy the long-standing objection that the scope of the articles should be well defined. At the same time they make it easier to apply the key concept of "significant risk", since there is the presumption that all activities involving the use of dangerous substances carry such a risk; this presumption is confirmed when borne out by other simpler assessments such as a consideration of the quantities or concentrations of the dangerous substances or the situations in which they are used (subparagraph (b) *in fine*). The subparagraphs help to define the "significance" of the risk and, at the same time, to circumscribe the scope of the articles. For a risk to fall within their scope, it must be fairly substantial. It is easy to see that so-called ultra-hazardous activities fall within the scope of this article, but moving down the scale, where should the line be drawn? How are the concepts of "significant risk", or better still, "higher than normal risk"—which is perhaps the exact idea we are trying to convey—to be defined? All human activities present some risk, as was pointed out during the earliest debates on the topic. As far as possible the Commission should identify the risk that concerns it, since it is impossible to quantify.

26. The Sixth Committee was not generally favourable to the idea of a list of dangerous substances. "Most representatives favoured a general definition and found a list of substances to be unhelpful and inappropriate" (see A/CN.4/L.456, para. 451). There were a number of objections, of which the main ones to be addressed are: (a) some substances like water are not dangerous *per se*, yet a dam forming a lake can create a serious risk of transboundary harm; (b) a list of dangerous substances is unnecessary because an activity involving the use of a dangerous substance must in every case be assessed as to the "quantities or concentrations or in relation to" the "risks or situations in which [the substance] may occur" (art. 2 (b)), and it must always be determined if it really poses a "significant risk" of transboundary harm; (c) it would be necessary to update the list frequently—a laborious task—and even then it could never really be exhaustive and so would create loopholes; and (d) it would change the nature of the draft articles, so that instead of constituting a framework agreement encompassing all activities they would become an instrument intended to regulate specific activities.

27. Some additional comments on this question of dangerous substances may perhaps help to gain acceptance for an alternative that would satisfy everyone to some degree, although not satisfy anyone entirely. A first point to be borne in mind is the importance of the precedent established by the Council of Europe draft rules on compensation for damage caused to the environment¹⁹

¹⁹ Draft prepared by the Committee of Experts on Compensation for Damage caused to the Environment. See Council of Europe, Secretariat memorandum prepared by the Directorate of Legal Affairs (CDCJ (89) 60), Strasbourg, 8 September 1989.

which, if they eventually become a convention, will be the only instrument similar to the draft on which the Commission has been working. Indeed, all the existing conventions on liability for transboundary harm refer to a specific activity. The Council of Europe draft rules instead deal with any dangerous activity; they would constitute a general convention just as the Commission's draft articles are intended to be. The approach taken by that draft is accordingly the most appropriate model for the Commission's own work.

28. Some lists of dangerous substances already exist. The one contained in appendix I to European Community Directive 67/548 includes 1,200 substances. Whether we adopt this list or adapt it to the needs of a global convention, it is obvious that it covers an extremely broad spectrum. Add to this the fact that subparagraph (ii) broadens that scope to all activities which use technologies that produce hazardous radiation and that subparagraph (iii) includes activities which introduce into the environment genetically altered organisms and micro-organisms, both of which may be dangerous, and the spectrum becomes still broader. Furthermore, a list that is exhaustive, a *sine qua non* for some delegations in the Sixth Committee and some colleagues in the Commission, is an impossibility: (a) because there are close to 60,000 chemical substances in existence and the technical experts believe that their effects cannot be known with certainty, especially in view of the lengthy experimentation period often required²⁰ and (b) because any activity involving the use of one or more of the substances or technologies contained in the list must be assessed by the authorities to determine, as already mentioned, the presence of the other circumstances that constitute the "significant risk of transboundary harm" required for including the activity within the scope of the present draft articles. So much for the purported "exhaustive" nature of any list, especially if it is borne in mind that there are substances that cannot be included in the list—water, for instance—which nevertheless can be dangerous in some cases.

29. The objection based on substances like water also goes against the idea of an exhaustive list: it is obvious that the European draft Rules are directed towards substances handled by industry or stored, transported, and so on. Although the statement at the end of the Commission's article 2 (b)—that a substance may be considered dangerous if it occurs in certain quantities or in relation to certain risks or situations in which it may occur—could, if taken to the extreme, be applied to water, it seems clear that this was not the drafters' intention and it would be very strange to see water heading any list. In view of this, and in order to ensure that the draft articles²¹ do not become an instrument limited to certain

²⁰ See document CJ-EN (90) 11 (Committee of Experts on Compensation for Damage caused to the Environment. Report on the work of the meeting of the Working Party), p. 5.

²¹ This must be done because, in addition to the reasons given, it is technically almost impossible to specify in the abstract the quantities or concentrations required to classify a substance as harmful. That was the conclusion of the technical experts who worked on the Council of Europe draft Rules in question (*ibid.*, p. 6, para. (d)). This supports the contention that it is impossible to draw up a list of substances whereby the procedure for classifying an activity as dangerous would become automatic.

specific activities instead of the framework convention originally envisaged, any such list should be merely illustrative and form an annex to a general, yet as far as possible complete, definition of dangerous activities. Such a list would not serve the purpose of automatically indicating activities that were dangerous for the purposes of the draft articles, but it could serve as a useful illustration, in that any activity involving the use of one or more of the substances listed would have to be examined to assess the potential for transboundary harm and thus the nature of the risk posed. This, then, is the alternative referred to earlier.

2. TRANSBOUNDARY HARM (SUBPARAGRAPH (g))

30. Subparagraph (g) deals with the essential concept of transboundary harm. It has been suggested that it is too important to form part of an article on the use of terms; that, however, is the approach taken in various major instruments.²² It could also appear separately under the heading of "Transboundary harm and compensa-

²² The Council of Europe draft Rules (see footnote 19 above) include it among the definitions in article 1, as do the Convention on Civil Liability for Damage caused during Carriage of Dangerous Goods by Road, Rail or Inland Navigation Vessels, the Convention on Civil Liability for Oil Pollution Damage resulting from Exploration for and Exploitation of Sea-bed Mineral Resources (art. 1, para. 6), the Convention on the Regulation of Antarctic Mineral Resource Activities (art. 1, para. 15), the Convention on International Liability for Damage Caused by Space Objects (art. 1 (a)), and the Vienna Convention on Civil Liability for Nuclear Damage (art. 1 (k)), among others.

tion" and include the concepts in article 24.²³ In any case, the various concepts of harm should appear in separate subparagraphs. Compensation for harm to the environment should, according to comments received repeatedly, encompass only the cost of reasonable measures actually taken to restore the *status quo ante*.

3. "APPRECIABLE" [SIGNIFICANT] HARM (SUBPARAGRAPH (h))

31. The reaction to subparagraph (h) indicates that difficulties still exist with regard to the definition of "appreciable" or "significant" harm, although it was not the intention that that subparagraph should give a definition in the strict sense but only that it should give a certain idea of what was involved. For the time being, opinion seems to be leaning towards the concept of "significant" harm, because it conveys something rather more substantial or of greater magnitude than does the word "appreciable". One criticism of the definition has been directed at the use of the word "nuisance" in the English version, because naturally that expression has a different technical meaning in the common law system. Actually, the word used in the original Spanish version was *molestia*, which means a slight disturbance. At any rate, it may perhaps be preferable not to define something that is so difficult to define in such a general framework. In the watercourse regime, the Commission also refrained from defining that same concept.

²³ See footnote 33 below.

CHAPTER III

Prevention²⁴

A. Procedure

1. ARTICLES 11 (PARA. 1), AND 13-14

32. The substantive articles relating to procedure are articles 11 (para. 1), and 13-14. Paragraph 2 of article 11 deals with a particular case arising under paragraph 1

²⁴ Chapter III (Prevention) of the draft consists of articles 11-20, reading as follows:

"Article 11. Assessment, notification and information

"1. If a State has reason to believe that an activity referred to in article 1 is being, or is about to be, carried on under its jurisdiction or control, it shall 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, it shall notify the State or States likely to be affected as soon as possible, providing them with available technical information in support of its finding. It may also inform them of the measures which it is attempting to take to prevent or minimize the risk of transboundary harm.

and articles 12 and 15 deal with related subjects, that is, the participation of international organizations (or bodies) and the protection of national security or industrial secrets. Basically, the procedure is that the State of origin is to assess the transboundary impact of any activity

"2. If the transboundary effect may extend to more than one State, or if the State of origin is unable to determine precisely which States will be affected as a result of the activity, an international organization with competence in that area shall also be notified, on the terms stated in paragraph 1."

"Article 12. Participation by the international organization

"Any international organization which intervenes shall participate in the manner stipulated in the relevant provisions of its statutes or rules, if the matter is regulated therein. If it is not, the organization shall use its good offices to foster cooperation between the parties, arrange joint or separate meetings with the State of origin and the affected States and respond to any requests which the parties may make of it to facilitate a solution of the issues that may arise. If it is in a position to do so, it shall provide technical assistance to any State which requests such assistance in relation to the matter which prompted its intervention."

suspected of coming under article 1 that is about to be [or is being] carried out under its jurisdiction or control. If it is indeed an activity involving risk or with harmful effects, the State of origin shall notify the States pre-

"Article 13. Initiative by the presumed affected State

"If a State has serious reason to believe that an activity under the jurisdiction or control of another State is causing it harm within the meaning of article 2, subparagraph (g), or creating a[n appreciable] [significant] risk of causing it such harm, it may ask that State to comply with the provisions of article 11. The request shall be accompanied by a technical, documented explanation setting forth the reasons for such belief. If the activity is indeed found to be one of those referred to in article 1, the State of origin shall bear the costs incurred by the affected State."

"Article 14. Consultations

"The States concerned shall consult among themselves, in good faith and in a spirit of cooperation, in an attempt to establish a regime for the activity in question which takes into account the interests of all parties. At the initiative of any of those States, consultations may be held by means of joint meetings among all the States concerned."

"Article 15. Protection of national security or industrial secrets

"The State of origin shall not be bound by the provisions of article 11 to provide data and information which are vital to its national security or to the protection of its industrial secrets. Nevertheless, the State of origin shall cooperate in good faith with the other States concerned in providing any information which it is able to provide, depending on the circumstances."

"Article 16. Unilateral preventive measures

"If the activity in question proves to be an activity referred to in article 1, and until such time as agreement is reached on a legal regime for that activity among the States concerned, the State of origin shall take appropriate preventive measures as indicated in article 8, in particular appropriate legislative and administrative measures, including requiring prior authorization for the conduct of the activity and encouraging the adoption of compulsory insurance or other financial safeguards to cover transboundary harm, as well as the application of the best available technology to ensure that the activity is conducted safely. If necessary, it shall take government action to counteract the effects of an incident which has already occurred and which presents an imminent and grave risk of causing transboundary harm."

"Article 17. Balance of interests

"In order to achieve an equitable balance of interests among the States concerned in relation to an activity referred to in article 1, those States may, in their consultations or negotiations, take into account the following factors:

"(a) the degree of probability of transboundary harm and its possible gravity and extent, and the likely incidence of cumulative effects of the activity in the affected States;

"(b) the existence of means of preventing such harm, taking into account the highest technical standards for engaging in the activity;

"(c) the possibility of carrying on the activity in other places or by other means, or the availability of alternative activities;

"(d) the importance of the activity for the State of origin, taking into account economic, social, safety, health and other similar factors;

"(e) the economic viability of the activity in relation to possible means of prevention;

"(f) the physical and technological possibilities of the State of origin in relation to its capacity to take preventive measures, to restore pre-existing environmental conditions, to compensate for the harm caused or to undertake alternative activities;

"(g) the standards of protection which the affected State applies to the same or comparable activities, and the standards applied in regional or international practice;

"(h) the benefits which the State of origin or the affected State derive from the activity;

"(i) the extent to which the harmful effects stem from a natural resource or affect the use of a shared resource;

sumed to be affected, providing them with whatever information is available. If the affected States deem it necessary, consultations may be held under article 14 which could lead to the establishment of a regime for the activity that would make it tolerable and take into account the interests of all States parties. It would essentially be an international regime, since it would be based on an accord between the participating States, but it would, of course, also encompass aspects of their internal law, in particular that of the State of origin. The agreement may cover such things as cooperative measures to prevent the transboundary harm or to reduce the risk thereof to an acceptable level; safety measures to be required by the State of origin when authorizing the activity; identification of the private parties responsible; participation by individuals affected in the administrative procedures of the State of origin; establishment of a compensation system for those injured; decision whether or not to have an insurance scheme; possible limitation of the responsibility of the operators; the degree of responsibility attaching to the State of origin and the cases in which that would apply. This will all be easier to determine and will proceed more smoothly if the negotiations focus on one activity in particular.

33. One objection was raised to the idea of establishing a procedure such as that described above, namely that a State cannot be burdened with obligations such as those mentioned above under a legal regime as general as that provided for in these articles. However, the obligations to assess the environmental impact—and accordingly, any transboundary impact—of any activity under the jurisdiction or control of the State, to notify those concerned, to provide them with all the necessary information, as well as to carry out the necessary consultations,

"(j) the willingness of the affected State to contribute to the costs of prevention or reparation of the harm;

"(k) the extent to which the interests of the State of origin and the affected States are compatible with the general interests of the community as a whole;

"(l) the extent to which assistance from international organizations is available to the State of origin;

"(m) the applicability of relevant principles and norms of international law."

"Article 18. Failure to comply with the foregoing obligations

"Failure on the part of the State of origin to comply with the foregoing obligations shall not constitute grounds for affected States to institute proceedings unless that is provided for in other international agreements in effect between the parties. If, in those circumstances, the activity causes [appreciable] [significant] transboundary harm which can be causally attributed to it, the State of origin may not invoke in its favour the provisions of article 23."

"Article 19. Absence of reply to the notification under article 11

"In the cases referred to in article 11, if the notifying State has provided information concerning the measures referred to therein, any State that does not reply to the notification within a period of six months shall be presumed to consider the measures satisfactory. This period may be extended, at the request of the State concerned, [for a reasonable period] [for a further six months]. States likely to be affected may ask for advice from any international organization that is able to give it."

"Article 20. Prohibition of the activity

"If an assessment of the activity shows that transboundary harm cannot be avoided or cannot be adequately compensated for, the State of origin shall refuse authorization for the activity unless the operator proposes less harmful alternatives."

are fairly well established in international law.²⁵ The justification for this is that individuals affected cannot interfere in what is happening in a foreign jurisdiction and thus they have no control over the authorization or development of activities that may affect them. The responsibility of the State of origin arises naturally from its exclusive and exclusionary territorial jurisdiction.²⁶ The list of dangerous substances, if accepted, will facilitate the operation considerably, since any activity using them must be reviewed to assess its degree of risk. Furthermore, it must be borne in mind that, when dealing with this type of activity, all States as a rule insist on prior authorization so as to protect their own people, and ask for information from the applicant for that purpose. It is, therefore, entirely logical for the State of origin to brief the States presumed affected on the possible conduct under its jurisdiction or control of activities that are likely to have transboundary effects.

34. This does not mean that the State must make that assessment itself; naturally, it may require the operator to do so as a condition of granting the authorization. But it does mean that the State in question must review and check the accuracy of the assessment, since in a way it would be engaging its own responsibility *ad exteros*.

35. In any case, because of the above-mentioned objection an attempt was made to simplify the procedure as far as possible. This desire for simplification should not,

²⁵ See the Convention on Environmental Impact Assessment in a Transboundary Context, which sets forth the obligation of the State of origin to assess the environmental impact of any activity before authorizing it (art. 2); to notify promptly States it thinks may be affected (art. 3); and to consult on measures to mitigate the transboundary effects, other forms of possible mutual assistance to reduce transboundary impacts from the planned activities, and any other appropriate subject relating to the above-mentioned activity (art. 7).

²⁶ These concepts were well established in the *Island of Palmas* case:

“Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. The development of the national organisation of States during the last few centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations.” (United Nations, *Reports of International Arbitral Awards*, vol. II, p. 838.)

To this sovereign right corresponds an obligation that the arbitrator Max Huber points out a little further on:

“Territorial sovereignty, as has already been said, involves the exclusive right to display the activities of a State. This right has, as corollary, a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and war, together with the rights which each State may claim for its nationals in foreign territory. Without manifesting its territorial sovereignty in a manner corresponding to circumstances, the State cannot fulfil this duty. Territorial sovereignty cannot limit itself to its negative side, i.e. to excluding the activities of other States; for it serves to divide between nations the space upon which human activities are employed, in order to assure them at all points the minimum of protection of which international law is the guardian.” (Ibid., p. 839.)

In one of the debates on this matter in the Commission it was said that if a State is responsible for the harm that activities in its territory may cause to foreigners within that territory, *a fortiori* it must be responsible for harm caused to persons who reside in the territory of the affected State. Something similar may be said of expeditions organized within the territory of one State against the Government, or the public order, of another State.

however, as was pointed out by some delegations in the debate in the Sixth Committee, exclude the obligation of the State of origin to permit access by private legal entities and individuals of the affected States to its administrative procedures for authorization of the activity concerned. Such access would give any possible victims the best guarantee that their interests would be defended.

36. During that same debate, it was also observed that the proposal makes no mention of whether authorization for development of an activity coming under article 1 would be subject to the outcome of the consultations mentioned in article 14. Of course, the idea is not to give those affected a veto over development of an activity in States of origin, nor even to mandate a delay that may not be justified. That, too, was clearly brought out in the Commission and in the Sixth Committee. One option would be the one adopted in the draft article, namely that if the State of origin considers it appropriate on the basis of the studies carried out, it would authorize the commencement of the activity in question, always provided that: (a) if the activity produces transboundary harm, the State must assume liability for the whole of the compensation and (b) it may be obliged to take measures that will involve costly changes to existing investments and facilities, particularly if, owing to the conditions mentioned in article 20, the authorization granted has to be withdrawn. If these two conditions, which are implicit in the wording, were to be made explicit, the objections may perhaps be withdrawn.

37. Another conceivable option in this area is that the State of origin may not authorize new activities under article 1 until the international obligations were entirely discharged. Although the Commission has so far agreed with him in preferring the previous solution, that does not mean that it cannot be reconsidered if development of the topic reaches the stage of negotiation of the terms.

38. As for article 14, it simply confirms the obligation of the State of origin to consult with those affected. The previous article 16,²⁷ which it replaced, went further, since it spoke of the obligation to negotiate a regime for the activity for which the procedure was being instituted. That obligation to negotiate was to be understood as it exists in international law, particularly following the *North Sea Continental Shelf*,²⁸ *Fisheries Jurisdiction (United Kingdom v. Iceland)*,²⁹ and *Lake Lanoux*³⁰ cases, and particularly the paragraph of the advisory opinion of PCIJ in the case of *Railway Traffic between Lithuania and Poland* which states that the obligation to negotiate is an obligation not only to listen to the other party, “not only to enter into negotiations, but also to pursue them as far as possible, with a view to concluding agreements”.³¹ In other words, with the old article 16, the

²⁷ See *Yearbook . . . 1989*, vol. II (Part Two), para. 322.

²⁸ *Federal Republic of Germany v. Denmark, and Federal Republic of Germany v. Netherlands*, judgment of 20 February 1969, *I.C.J. Reports 1969*, p. 3.

²⁹ Judgment of 25 July 1974, *I.C.J. Reports 1974*, p. 3.

³⁰ United Nations, *Reports of International Arbitral Awards*, vol. XII (Sales No. 63.V.3), p. 281; partial translations in *International Law Reports, 1957* (London), vol. 24 (1961), p. 101; and *Yearbook . . . 1974*, vol. II (Part Two), pp. 194 *et seq.*, document A/5409, paras. 1055-1068.

³¹ *P.C.I.J., Series A/B, No. 42*, p. 108.

State of origin was, of course, under no obligation to succeed, by any means possible, in working out some regime for the activity in question with the affected State. It simply had to comply in good faith with the obligation to try to do so; as ICJ stated concerning the *North Sea Continental Shelf* case:

“The parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement; they 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”.³²

39. Some opposition to that idea was voiced in the Commission, on the grounds that it was excessive, and hence the level of the obligation has been lowered to one of mere consultation. This accounts for the permissive atmosphere surrounding initiation of activities and the prior obligations of the State of origin to inform and consult, but naturally the responsibility would lie with that State should any harm occur.

40. The foregoing takes into account articles 11 and 14. Article 13 simply transfers the initiative to the affected State and would come into play in the event that the State of origin failed to fulfil its obligation under article 11. What happens if the State of origin, even after being warned, still does not fulfil the obligation? Here, too, there would be alternatives. One option would be to grant to the affected State access to all the means offered by general international law when an international obligation is violated. Another would be to allow the State of origin to pursue the activity at issue under its own responsibility, and only in the event of transboundary harm occurring would the process indicated in paragraph 33 take effect. That is the course followed hitherto by the draft articles.

2. ARTICLES 11 (PARA. 2), 12 AND 15

41. Article 11, paragraph 2, is meant to facilitate identification of States presumed to be affected by an activity in the State of origin, since it is probable that an international organization or body would be in a better position than an individual State to make such a determination. UNEP, for instance, has a Global Environmental Monitoring System (GEMS), which receives information from all over the world to help individual States determine the magnitude of a given transboundary impact. Even though the principle of participation of international organizations was warmly received at first, some scepticism has been expressed in the Commission. Those which have general competence in the area may not have competence under their statutes to take action on questions such as these. Some Commission members have also wondered what would happen in the case of non-member States or who ultimately would meet the costs incurred. Such obstacles can be overcome. Article 11, paragraph 2, involves a service that an organization such as UNEP, at any rate, whose competence in this area it would be difficult to question, is perfectly able to

provide—not to mention other regional organizations that may have similar information capabilities. There would seem to be no reason why the statutes of such organizations would in any way prohibit the provision of such a service, in the final analysis, as long as the funding is assured. Even if a non-member State is among those presumed to be affected, the costs could, in principle, be defrayed by the State of origin and be the subject of a prior agreement between the organization concerned and that State. In some cases, it may be possible to increase the budget of an organization that has shown by experience that it can provide assistance in such circumstances.

42. That is the essence of the participation of an international organization called for in article 11, paragraph 2, and it would be as well to make that explicit, so as to avoid confusing this action with that of article 12, which is completely different in nature. It is no longer simply a matter of detecting transboundary effects of a given activity. The aim is also to bring the parties together, facilitate their consultations, clarify any technical points that may arise during the talks, and so forth. Needless to say, if the international body in question refuses to participate as requested under article 12, it is under no obligation to comply, but it is part of the general mandate of international organizations to foster cooperation between their members, and possibly between them and non-member States. That is what they were created for, and few international organizations are likely to refuse to take the action authorized in article 12, as long as the costs are defrayed. There may be difficulties dealing with States in other regions if the organization concerned is a regional body, but such situations would normally be few and far between. If they did arise, it would be better to have recourse to an organization with a worldwide mandate.

3. BALANCE OF INTERESTS (ART. 17)

43. Article 17 sets out some useful guidelines for the possible negotiation of a regime to govern the activity. Although it was generally well received, some thought that the provision should be placed in an annex, since in fact it does not reflect a mandatory legal norm.

4. THRESHOLD FOR PROHIBITION (ART. 20)

44. With respect to article 20, some delegations in the Sixth Committee expressed concern as to the *threshold* of harm or risk that would trigger the obligation (see A/CN.4/L.456, para. 459). This question is similar to that of *significant* harm or risk; unfortunately, such thresholds are not *a priori* quantifiable. It is clear, however, that no State can be compelled to tolerate either significant harm or significant risk of harm originating from activities conducted under the jurisdiction of another State, unless these are accompanied by acceptable compensation to the State affected. If negotiations with respect to the *threshold* of the harm or the risk fail because the parties cannot agree on what constitutes an adequate threshold for the specific case, they will have to resolve the difference in the only way open to them under international law, a good indication of which is to be found in Article 33 of the Charter of the United Na-

³² I.C.J. Reports 1969, p. 47, para. 85 (a).

tions. Certainly it was no easy task arriving at treaties like the nuclear test-ban treaty, or those prohibiting the emplacement of weapons of mass destruction in certain areas of the seabed or the use of environmental modification techniques for military or other hostile purposes, but such difficulties are inherent to international relations, where there are no courts having compulsory jurisdiction, nor police, nor any centralized power.

B. Nature of the preventive measures

1. ARTICLE 16

45. In both the Commission and the Sixth Committee many were of the opinion that the unilateral measures provided for in article 16 should be compulsory. The violation of this article would therefore incur the consequences arising under general international law, or those established by a convention on State responsibility for wrongful acts, as the case may be. This seems logical: once it has been established that a given activity causes or may cause transboundary harm, the State of origin shall be obliged to take measures to ensure the maximum safety conditions recommended in accordance with the best available technology, or what it may be preferred to call *reasonable* safety measures. Accordingly, the State shall exercise "due diligence" in that regard. The obligations imposed by this article are typically those of a State: enacting appropriate legislation, adopt-

ing the administrative and police measures necessary to enforce compliance with such legislation, and so on. During the debate in the Sixth Committee, it was quite rightly pointed out that what the article said concerning compulsory insurance for the operators or other financial safeguards to cover transboundary harm would more appropriately come under the chapter on reparation than under prevention.

2. ARTICLE 18

46. The substance of article 18 has been considered earlier. However, there would appear to be a difference between the obligations arising under articles 11, 12 and 14, which are the backbone of the procedure, and the unilateral obligations arising under article 16. With regard to the procedural obligations, there would be several possibilities: (a) the obligations arising under article 11 would be either mandatory (in view of the fact that they are fairly well established in general international law), not mandatory, or compulsory only if article 13 was applied (namely if a presumed affected State sets the procedure in motion); (b) the obligation arising under article 14 could simply be an obligation on the part of the States concerned to consult with each other, or it could be converted into an obligation to negotiate a regime within the meaning of paragraph 35. In any case, the most practical solution would be to delete article 18 and to draft the provisions of the other articles in such a way as to ensure that they have the effects stated above.

CHAPTER IV

Liability

A. State liability³³

1. THE TITLE

47. If it is agreed that State liability under this topic is of a residual nature, then chapter IV could be entitled "State liability", and could be inserted after the chapter on civil liability.

³³ Chapter IV (Liability) of the draft consists of articles 21-27, reading as follows:

"Article 21. Obligation to negotiate"

"If transboundary harm arises as a consequence of an activity referred to in article 1, the State or States of origin shall be bound to negotiate with the affected State or States to determine the legal consequences of the harm, bearing in mind that the harm must, in principle, be fully compensated for."

"Article 22. Plurality of affected States"

"Where more than one State is affected, an international organization with competence in the matter may intervene, if requested to do so by any of the States concerned, for the sole purpose of assisting the parties and fostering their cooperation. If the consultations referred to in article 14 have been held and if an international organization has participated in them, the same or-

2. ARTICLE 21

(a) *The obligation to negotiate*

48. Since liability was originally envisaged in these draft articles in terms of the State's strict liability, article 21 sought to mitigate a situation which was both Draconian and lacking in precedents. Indeed, the extensive

organization shall also participate in the present instance, if the harm occurs before agreement has been reached on a regime for the activity that caused the harm."

"Article 23. Reduction of compensation payable by the State of origin"

"For claims made through the diplomatic channel, the affected State may agree, if that is reasonable, to a reduction in the payments for which the State of origin is liable if, owing to the nature of the activity and the circumstances of the case, it appears equitable to share certain costs among the States concerned [for example if the State of origin has taken precautionary measures solely for the purpose of preventing transboundary harm and the activity is being carried on in both States, or if the State of origin can demonstrate that the affected State is benefiting without charge from the activity that caused the harm]."

discussions during the general debate on the topic in both the Commission and the Sixth Committee revealed the conviction on the part of some members that there was no specific norm of general international law which imposed upon States a type of liability which would arise irrespective of whether there had been a failure to comply with an obligation; accordingly, those members were not prepared to accept an instrument which imposed such liability. Hence, the way to attenuate the harshness of a State's strict liability was to ensure that it did not arise automatically, but was negotiated on a case-by-case basis.

49. Accordingly, the obligation to negotiate derived from the premise that whoever causes harm should repair it in some way. Negotiation is the primary method of resolving international disputes and it is the method prescribed in this article for establishing the mode of

"Article 24. Harm to the environment and resulting harm to persons or property

"1. If the transboundary harm proves detrimental to the environment of the affected State, the State of origin shall bear the costs of any reasonable operation to restore, as far as possible, the conditions that existed prior to the occurrence of the harm. If it is impossible to restore those conditions in full, agreement may be reached on compensation, monetary or otherwise, by the State of origin for the deterioration suffered.

"2. If, as a consequence of the harm to the environment referred to in paragraph 1, there is also harm to persons or property in the affected State, payments by the State of origin shall also include compensation for such harm.

"3. In the cases referred to in paragraphs 1 and 2, the provisions of article 23 may apply, provided that the claim is made through the diplomatic channel. In the case of claims brought through the domestic channel, the national law shall apply."

"Article 25. Plurality of States of origin

"In the cases referred to in articles 23 and 24, if there is more than one state of origin,

ALTERNATIVE A

they shall be jointly and severally liable for the resulting harm, without prejudice to any claims which they may bring among themselves for their proportionate share of liability.

ALTERNATIVE B

they shall be liable *vis-à-vis* the affected State in proportion to the harm which each one of them caused."

"Article 26. Exceptions

"1. There shall be no liability on the part of the State of origin or the operator, as the case may be:

"(a) if the harm was directly due to an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character; or

"(b) if the harm was caused wholly by an act or omission of a third party done with intent to cause harm.

"2. If the State of origin or the operator, as the case may be, proves that the harm resulted wholly or partially either from an act or omission done with intent to cause harm by the person who suffered the harm or from the negligence of that person, they may be exonerated wholly or partially from their liability to such person."

"Article 27. Limitation

"Proceedings in respect of liability under the present articles shall lapse after a period of [three] [five] years from the date on which the affected party learned, or could reasonably be expected to have learned, of the harm and of the identity of the State of origin or the operator, as the case may be. In no event shall proceedings be instituted once thirty years have elapsed since the date of the accident that caused the harm. If the accident consisted of a series of occurrences, the thirty years shall start from the date of the last occurrence."

reparation. The text states that the harm must "in principle" be fully compensated, that is to say in accordance with principles such as that of *sic utere tuo*, and others which are part of international jurisprudence as a result of cases such as the *Corfu Channel* case,³⁴ the *Island of Palmas* case,³⁵ the *Lake Lanoux* case,³⁶ and, especially, the *Trail Smelter* case.³⁷ Hence, the point was not for the parties to commence negotiations in order to determine whether or not compensation should be paid, but rather to decide what type of reparation would be appropriate, bearing in mind that there should be full compensation, according to the principles laid down in this area. Obviously, if negotiation did not yield a solution to the predictable differences between the parties, they could resort to all the other means afforded by general international law and by Article 33 of the Charter of the United Nations. The Commission might find that this method of negotiation is still possible in those cases—if any—in which compensation is negotiated directly between Governments, as contemplated in paragraph 52 below.

(b) *Changes to article 21*

50. In the light of the alternatives presented in previous chapters, and considering that liability may fall exclusively on private operators, article 21 requires to be amended significantly. In the first place, it should establish that civil liability is primary and specify the cases in which it would fall to the State to respond, either by supplementing the liability of individual operators (or any other party responsible) when they or their insurers are unable fully to cover the harm caused or by substituting for them when they cannot be identified or located. The State would then assume responsibility for reparation.

51. In the first case, the competent court which heard the claim against the liable private party may also hear the case against the State for the residual liability or the case against a fund which the latter may have constituted for that purpose.

(c) *Unidentifiable authors*

52. The second case, namely that of transboundary harm the authors of which cannot be identified, is somewhat more complicated. This situation may arise, for example, if the damage is caused by a large number of sources the cumulative effect of which causes the harm in question. In such cases, under the provisions of article 13³⁸—if the affected State has not been notified, and all the more so if it has—negotiations may be initiated between the States concerned with a view to reaching agreement on a regime appropriate to the activity which causes the harm. This may be the time to consider compensation for harm which may already have been caused,

³⁴ *J.C.J. Reports* 1949, p. 4.

³⁵ See footnote 26 above.

³⁶ See footnote 30 above.

³⁷ United Nations, *Reports of International Arbitral Awards*, vol. III (Sales No. 1949.V.2), pp. 1905 *et seq.*

³⁸ See footnote 24 above.

together with any appropriate means to reduce the harm. Thus, one of the two possible channels would be State-to-State negotiations to consider compensation for the harm caused and potential ways of reducing it. In addition, it should always be borne in mind that private parties who have suffered the harm and who have a right of action—for example, those who have suffered injury to their persons or property as a result of the activity in question—may wish to pursue the domestic channel in the hope of obtaining greater compensation.

53. The other channel would be proceedings before the courts of the State of origin or the affected State, as the case may be, if either of the States concerned refuses to negotiate compensation. The injured parties—including the affected State, if applicable—would be allowed to lodge a claim against the State of origin under the terms of article 29, paragraph 3, as currently worded.³⁹ Alternatively, the two possibilities may coexist, meaning that the affected State could either initiate negotiations for compensation or lodge a claim for compensation in the courts of the affected State, and individuals could await the results of their State's negotiations or initiate the claim directly. Individuals, in accordance with article 29, paragraph 3, would have a choice between the courts of the State of origin and those of the affected State.

54. In cases of harm to the environment of the affected State, only the State could institute proceedings before the competent courts, since private parties would have no right of action in such cases unless the damage to the environment had caused harm to their persons or property, in which case the normal channel would be open to them. In a recent draft report on elements which might be included in a protocol on liability to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, the following provisions are made in point X (Claims procedures):

Claims for damage should primarily be made through domestic courts.

For the assessment of clean-up and remedial action costs, *as well as for a valuation of environmental damage**, an internationalized approach should be considered, e.g.:

(a) Domestic courts, assisted by an international technical advisory body to be consulted on an optional or a mandatory basis;

...

(d) An international Commission with exclusive jurisdiction.⁴⁰

55. In other words, when dealing with issues such as those raised by the environment, which could go beyond the usual ability of ordinary courts, there would be the possibility of intervention—optional or mandatory—by an international technical assistance body. Point X of the draft cited in the preceding paragraph includes the possibility of a specific jurisdiction for the environment, an international commission or tribunal, along the lines of the proposal made by the Intersessional Working Group

³⁹ See footnote 43 below.

⁴⁰ Report of the Ad Hoc Working Group of Legal and Technical Experts to develop elements which might be included in a Protocol on Liability and Compensation for Damage resulting from the Transboundary Movement and Disposal of Hazardous Wastes and other Wastes, second session, Nairobi, 6-9 March 1991, UNEP/CHW/WG.1/2/3, paras. 27-28.

of Experts of the Standing Committee on Civil Liability for Nuclear Damage in its report of 15 February 1991 (annex VI) for a new article XI A to amend the Vienna Convention on Civil Liability for Nuclear Damage. This international tribunal would have competence if the parties concerned gave their agreement after an incident occurred, and there would be various alternatives (certain majority or unanimity of the parties); these will be considered by the future conference to amend the Conventions of Vienna and Paris.⁴¹ Individuals and States could litigate before this commission or tribunal without constraint.

56. In such circumstances, article 21 should adopt language reflecting the alternatives described, which would remain subject to any subsequent negotiations. This, of course, is on the understanding that the norm set forth in this article is based on strict liability, which means that if there is no doubt about the causal relationship between the activity and the transboundary harm in question compensation should, in principle, be paid. Negotiations would start from that premise and would focus more on the "quantum" of the compensation; if the method chosen is the tribunal, strict liability would be applicable there too.

3. PARTICIPATION OF INTERNATIONAL ORGANIZATIONS (ART. 22)

57. Article 22 would remain essentially the same, taking into account, however, some drafting changes proposed during the debate in the Sixth Committee. For example, instead of "an international organization [body] may intervene" it should say that such an organization [body] "shall take action".

4. REDUCTION OF COMPENSATION (ART. 23)

58. Notwithstanding its definite heterodoxy, article 23 did not give rise to any fundamental objections. Here, too, changes should be considered regarding the parties responsible for reparation, and it should be limited to cases of State liability. The phrase between square brackets would be moved to the commentary, as was quite correctly observed in the latest debate.

5. HARM TO THE ENVIRONMENT (ART. 24)

59. Article 24 could be moved to form one or more subparagraphs of the article on harm in general. In this provision, account should be taken of several objections that were raised to the last part of paragraph 1 since compensation would be limited to reasonable measures of restoration actually taken or to be taken, and to loss of earnings.

⁴¹ Convention on Third Party Liability in the Field of Nuclear Energy.

6. JOINT LIABILITY (ART. 25)

60. In recent debates on article 25 preference was expressed for alternative B. This article, unlike articles 26 and 27 which apply indiscriminately to the State or to the operator found to be liable, could be divided into two parts to include joint and several liability in the case of private operators. In such cases, most conventions on liability for transboundary harm assign joint and several liability to operators.⁴²

7. EXCEPTIONS AND LIMITATIONS (ARTS. 26-27)

61. Articles 26 and 27 should form part of a separate chapter, since they apply to any type of liability, whether of the operator or the State.

B. Civil liability⁴³

1. INTERRELATIONSHIP BETWEEN CIVIL LIABILITY AND STATE LIABILITY

62. During the discussions that took place in 1990, to which this report has already repeatedly referred, the

⁴² The Council of Europe draft rules (see footnote 19 above) envisage the possibility of incidents arising in various installations or sites where dangerous activities are taking place, and establish the principle of joint and several liability, except when an operator can prove that only a part of the harm could have been caused by the incident at his installation or site.

⁴³ Chapter V (Civil liability) of the draft consists of articles 28-33, reading as follows:

“Article 28. Domestic channel

“1. It is not necessary for all local legal remedies available to the affected State or to individuals or legal entities represented by that State to be exhausted prior to submitting a claim under the present articles to the State of origin for liability in the event of transboundary harm.

“2. There is nothing in the present articles to prevent a State, or any individual or legal entity represented by that State that considers that it has been injured as a consequence of an activity referred to in article 1, from submitting a claim to the courts of the State of origin [and, in the case of article 29, paragraph 3, of the affected State]. In that case, however, the affected State may not use the diplomatic channel to claim for the same harm for which such claim has been made.”

“Article 29. Jurisdiction of national courts

“1. States Parties to the present articles shall, through their national legislation, give their courts jurisdiction to deal with the claims referred to in article 28 and shall also give affected States or individuals or legal entities access to their courts.

“2. States Parties shall make provision in their domestic legal systems for remedies which permit prompt and adequate compensation or other reparation for transboundary harm caused by activities referred to in article 1 carried on under their jurisdiction or control.

“[3. Except for the affected state, the other persons referred to in article 28 who consider that they have been injured may elect to institute proceedings either in the courts of the affected State or in those of the State of origin.]”

“Article 30. Application of national law

“The court shall apply its national law in all matters of substance or procedure not specifically regulated by the present articles. The present articles and also the national law and legislation shall be applied without any discrimination whatsoever based on nationality, domicile or residence.”

need was stressed for the relationship between civil liability and the State's liability to be clarified. In our view, there are two such relationships: one between the two types of liability as such, and the other between the channels used to assert them. Three possibilities emerge in this area:

(a) The first possibility is the approach taken up to and including the fifth report, namely not to deal with civil liability in the draft articles. This means that the proposed instrument would have addressed only the State's responsibility and the diplomatic channel, with negotiation between States being the means of asserting it. On the other hand, by not prohibiting the use of the domestic channel—which was meant to assert the liability of individuals and also conceivably of the State—it left open the possibility that the aggrieved parties would use that channel, while of course remaining subject to whatever was established by internal legislation in regard to civil liability, access to domestic courts, law enforcement, and so on. The introduction, in this context, of the principle of non-discrimination contained in article 10⁴⁴ would naturally help avoid the possibility of access being denied in some legislations, thus preventing victims in the States concerned from using the domestic channel in the relevant States of origin. However, if the draft articles do not make specific reference to civil liability, that principle may lose some of its efficacy in this field.

(b) The draft articles would regulate only the interrelationship between State liability and civil liability; they would in no way regulate any aspect of the latter. In this case, the Commission would only establish the priority to be assigned to the different types of liability, as well as determining in which cases the diplomatic channel should be used and in which recourse may be had to do-

“Article 31. Immunity from jurisdiction

“States may not claim immunity from jurisdiction under national legislation or international law in respect of proceedings instituted under the preceding articles, except in respect of enforcement measures.”

“Article 32. Enforceability of the judgement

“1. When a final judgement made by the competent court is enforceable under the laws applied by that court, it shall be recognized in the territory of any other Contracting Party, unless:

“(a) the judgement has been obtained fraudulently;

“(b) the respondent has not been given reasonable advance notice and an opportunity to present his case in fair conditions;

“(c) the judgement is contrary to the public policy of the State in which recognition is being sought, or is not in keeping with the basic norms of justice.

“2. A judgement which is recognized to be in accordance with paragraph 1 shall be enforceable in any of the States Parties as soon as the formalities required by the Contracting Party in which enforcement is being sought have been met. No further review of the substance of the matter shall be permitted.”

“Article 33. Remittances

“States Parties shall take the steps necessary to ensure that any monies due to the applicant in connection with proceedings in their courts arising from the preceding articles, and any monies he may receive in respect of insurance or reinsurance or other funds designed to cover the harm in question, may be freely remitted to him in the currency of the affected State or in that of the State of his habitual residence.”

⁴⁴ See footnote 10 above.

mestic courts of law. It should be added that the victims' situation as described under (a) above would be the same in this case.

(c) The third possibility is that proposed for the draft articles in the sixth report, namely that in addition to regulating the interrelationship between State and civil liability, they should also include some provisions on civil liability designed to establish within the treaty regime regulations that will ensure the application of the principle of non-discrimination (equal access), enforcement of national law in accordance with certain standards, and other minimum guarantees regarding the utilization of the domestic channel.

63. In the sixth report, article 28 basically provided for the simple coexistence of both channels, so that if the affected State decided to represent the individuals injured, it could do so without waiting for them to initiate, much less exhaust, the local remedies which in fact were available under the domestic legislation of many countries in the international community (para. 1). There was nothing in the articles, as was indicated in the second part (para. 2) of the same provision, to prevent the State or the individual affected from submitting a claim for compensation in the courts of the State of origin, or, where individuals were concerned, in the affected State as well. In any case, a single claim could not be pursued simultaneously through both channels, diplomatic and domestic. In that part of the present report dealing with State liability, it has been suggested that the relationship between the two kinds of liability should be such that the liability of the private party responsible should be invoked initially and that of the State only residually. The channel to be selected will depend on the circumstances. If it was impossible to identify the parties responsible, negotiations could be opened, although normally the matter would be handled by the domestic courts (or the international tribunal if that concept is accepted in cases of environmental damage). Moreover, it should always be kept in mind that the State may make a claim in case of a denial of justice; accordingly, it should be established that the State must, except in the cases of negotiation mentioned above, wait until local remedies have been exhausted before seeking diplomatic protection.

64. According to this logic, chapter V should be placed after the present chapter IV, and article 28 should be amended to distinguish in its present paragraph 1 between cases where a denial of justice is claimed and those in which the State initiates a claim on the basis of these articles. The article would then be placed under State liability, although if one State litigates in the courts of another State, the domestic remedy is in fact being used.

2. CHANNELLING OF LIABILITY

65. During the debates it was said that those bearing responsibility must be identified. Why should liability not be "channelled", as it is in most of the existing agreements on civil liability for transboundary harm? Thus, it was suggested that the operator would be the most appropriate person to bear liability. However, various instruments assign liability to various persons. For example, under the proposed protocol on liability to the

Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, liability would be assigned, some maintained, to the generator, with subsidiary (but joint and several) liability of the person disposing of the waste in some cases.⁴⁵ Others held that liability should fall on whoever was responsible for the transboundary movement or the disposal of the waste, or arranged those operations (perhaps also with joint and several liability). According to this approach, the persons responsible would be the generator(s), exporter(s), middlemen, importer(s) and disposer(s).⁴⁶ Article 2 (b) of the European Convention on Products Liability in Regard to Personal Injury and Death places the responsibility on the producer. However, later in article 3, paragraph 2, it extends the concept of producer to those who have imported a product with a view to distributing it in the course of business, and to any person that has presented it as his own product by putting his name, trademark or other distinguishing marks on it. In other cases, if there is no producer, the supplier is responsible. The Vienna Convention on Civil Liability for Nuclear Damage channels liability toward the operator (art. II, para. 1), but in certain cases (art. II, para. 2) a carrier of nuclear material or a person handling radioactive waste may be considered an operator and so liable. Also, under the International Convention on Civil Liability for Oil Pollution Damage the owner of the vessel at the time of the incident (or of the first incident if there is a series of them) is liable for all pollution damage. Article 5 of the Convention on Civil Liability for Damage During Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels assigns liability to the carrier at the time of the incident. In article 4 of the draft Convention on Civil Liability for Damage caused by Small Craft,⁴⁷ it is assigned to the owner and user. When dealing with articles having such general application as these, use could be made of the technique employed in a proposal of the Committee of Experts on Compensation for Damage to the Environment of the Council of Europe, article 6, paragraph 1, of which states: "Except as provided for in article 8 and in article 9, the operator in respect of a dangerous activity mentioned under article 2, paragraph 1, subparagraphs (a) to (d) shall be liable for the damage caused by the activity as a result of incidents at the time or during the period when he is in control of that activity."⁴⁸ In turn, article 1, paragraph 6, which defines the "operator" as "... the person who exercises the actual control of a dangerous activity" appears between square brackets pending a decision.⁴⁹

⁴⁵ See Report of the Ad Hoc Working Group of Legal and Technical Experts to develop elements which might be included in a Protocol on Liability and Compensation for Damage resulting from the Transboundary Movement and Disposal of Hazardous Wastes and other Wastes, first session, Geneva, 2-6 July 1990 (UNEP/CHW/WG.1/3, chap. IV, paras. 13-15).

⁴⁶ Ibid.

⁴⁷ International Institute for the Unification of Private Law, *Uniform Law Review* (Rome), 1981, vol. I, p. 71.

⁴⁸ CJ-EN (91) 1, p. 23.

⁴⁹ The commentary to article 2, paragraph 6 (ibid., p. 8, paras. 31-32) states that:

"The CJ-EN noted that the Working Party, after considering possible definitions (e.g., person in charge of a dangerous activity, person who is in overall control), decided that this matter should be examined in greater detail and invited experts to send written comments and proposals for a new text.

Lastly, the ECE draft Code of Conduct on Accidental Pollution of Transboundary Inland Waters,⁵⁰ provides, in article XV, that:

In order to ensure prompt and adequate compensation in respect of all damage caused by accidental pollution of transboundary inland waters, countries should in accordance with their national legal system provide for the identification of the physical or legal person or persons liable for damage resulting from hazardous activities. Unless otherwise provided, the operator should be considered liable; and where more than one organization or person is liable such liability should be joint and several.

66. The solution chosen in the sixth report was not to become involved in identifying the persons responsible, but to leave that to be decided by the judge in the case in accordance with the principles of national law. Under the present article 30, the applicable law is the national law of the competent court, which, therefore, should govern such cases. Our choice should be between leaving that formula in and introducing some extra criterion to help the court decide, for instance "channelling" liability towards whoever had control of the activity at the moment the incident occurred, unless the national law clearly assigns liability—depending on the activity in question—to certain other persons. In that way, there would be a certain latitude and there should be some flexibility so as not to hinder the action of the court.

3. MISCELLANEOUS

67. This section should also provide for the case of more than one operator (all operators being jointly and severally liable, as was recommended in the Code of Conduct mentioned in paragraph 65 above and as is the rule in many other conventions and drafts on civil liability).

"The CJ-EN decided to keep this provision between brackets and examine the question in the light of any written comments or proposals from the Working Party."

⁵⁰ Adopted by ECE by its decision C (45) of 27 April 1990. For the text, see *Code of Conduct on Accidental Pollution of Transboundary Inland Waters* (United Nations publication, Sales No. E.90.II.E.28).

ity). The reasons for exemption from liability, which would be those of the present article 26,⁵¹ could also be spelled out in articles that would cover civil liability as well as State liability, as suggested above. The limitation established in article 27⁵² could apply both to the State and to the individuals liable. It might also be worth considering the possibility of authorizing a limit on the amount of compensation under national law.⁵³

68. Articles 29 and 30 appear necessary and appropriate for the reasons given above. It is suggested that article 31 should be harmonized with the corresponding provisions of the draft on jurisdictional immunity being considered by the Commission.⁵⁴ Articles 32 and 33 have not been commented on. In any event, their usefulness consists in improving the application of the other articles and in making possible the "prompt and adequate compensation" that the draft seeks to provide.

⁵¹ See footnote 33 above.

⁵² Ibid.

⁵³ "ALTERNATIVE I

"Provisions of national law may limit the liability of the operator to a maximum amount [provided that such maximum is not fixed at a level lower than what can reasonably be covered by insurance or a similar financial security]."

"ALTERNATIVE II

"1. The liability of the operator for claims arising from any one incident may be limited by provisions of national law. However, this limit shall not be less than:

"(a) With respect to claims for death or personal injury . . .

"(b) With respect to claims for any other damage. . .

"2. The operator shall not be entitled to limit his liability under this Convention if it is proved that the damage resulted from his personal act or omission or an act or omission of his servants or agents, committed with the intent to cause the damage or recklessly and without knowledge that such damage would probably result, provided that, in the case of such act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment."

⁵⁴ *Yearbook . . . 1990*, vol. II (Part Two), paras. 217-228 and footnote 121.