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Summary record of the 1974th meeting

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

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“activities”. But he believed that the Commission should focus on “acts”, not on “activities”, and he would explain why in a future statement.

The meeting rose at 1 p.m.

1974th MEETING

Tuesday, 24 June 1986, at 10 a.m.

Chairman: Mr. Doudou THIAM

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Koroma, Mr. Laclata Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

International liability for injurious consequences arising out of acts not prohibited by international law (continued) (A/CN.4/384,¹ A/CN.4/394,² A/CN.4/402,³ A/CN.4/L.398, sect. H.1, ILC(XXXVIII)/Conf.Room Doc.5⁴)

[Agenda item 7]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. Sir Ian SINCLAIR noted that the meaning of the terms “responsibility” and “liability” had been a source of confusion in the Commission’s debates in previous years. The Special Rapporteur’s comments (A/CN.4/402, paras. 2-5) fortunately shed new light on the distinction between the two terms. He himself had been particularly struck by L. F. E. Goldie’s observation, cited in the report under consideration (*ibid.*, para. 4), that, in the context of articles VI and XII of the Convention on International Liability for Damage Caused by Space Objects⁵ and of article 235 of the 1982 United Nations Convention on the Law of the Sea:

... 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. That is,

liability connotes exposure to legal redress once responsibility has been established. ...

2. It was in that broad sense that the two concepts must be understood in the context of the present topic. Some of the recent confusion had arisen from the idea that, in traditional international law, responsibility could be attributed to a State only where it had committed an internationally wrongful act: that view formed the basis for part 1 of the draft articles on State responsibility. However, since the term “responsibility” had a broader meaning in comparative civil law, where it denoted the duties or standards which the law imposed on the performance of a function in society, it had to be asked whether similar duties or standards could not be derived from international law in relation to activities which, though not unlawful in the territory where they were being carried out, none the less had or might have injurious consequences for persons or things outside that territory. He believed that the answer to that question had to be affirmative. The notion of responsibility in that broader sense thus had to apply also to lawful activities which were carried out within a territory and caused or might cause physical transboundary harm, and the consequential notion of liability, which, according to that view, was limited to the consequences of failure to perform the duties or to fulfil the standards imposed by the law, must also apply to such activities. Responsibility in that broader and more generic sense encompassed the consequential and narrower notion of liability and was not limited to internationally wrongful acts.

3. The foregoing led to the conceptual problems discussed by the Special Rapporteur in his report under the heading “Unity of the topic” (*ibid.*, paras. 6-10). Initially, he had had some reservations about the Special Rapporteur’s analysis (*ibid.*, para. 7), but on further reflection he agreed that, in the context of the present topic, prevention and reparation fell within the domain of primary rules. Prevention certainly did, but he would submit that reparation also did, at least if certain conditions were met. He had referred to some of those conditions in earlier statements. For example, the activity must be such that the risks of its causing physical transboundary harm were known to the source State. If the source State permitted a dangerous chemical plant or nuclear reactor to be built close to its border with another State, it must be presumed to have accepted the risk that, in the event of an accident, physical transboundary harm would occur.

4. Things were, however, not always that simple and several examples had already been given of cases where, despite the most careful monitoring of the activity by the source State, the risks inherent in the pursuit of that activity had not been known, or could not have been known, to the source State at the time when it had permitted the continuation of the activity. New scientific and medical discoveries were thus constantly having an impact on the law. Should the source State be liable for the consequences—whether for all the consequences or only for those which were reasonably foreseeable—of permitting the continuation of an activity which, because of the lack of scientific or medical evidence, it had not known or could not have known to be in-

¹ Reproduced in *Yearbook ... 1985*, vol. II (Part One)/Add.1.

² Reproduced in *Yearbook ... 1985*, vol. II (Part One).

³ Reproduced in *Yearbook ... 1986*, vol. II (Part One).

⁴ The schematic outline, submitted by the previous Special Rapporteur, R. Q. Quentin-Baxter, at the Commission’s thirty-fourth session, is reproduced in *Yearbook ... 1982*, vol. II (Part Two), pp. 83-85, para. 109. The changes made to the outline in R. Q. Quentin-Baxter’s fourth report, submitted at the Commission’s thirty-fifth session, are indicated in *Yearbook ... 1983*, vol. II (Part Two), pp. 84-85, para. 294.

⁵ See 1972nd meeting, footnote 12.

herently dangerous to persons and things outside its territory? Posed in that way, the question seemed to call for a negative answer. However, where should the costs of the resulting loss or injury lie? Perhaps, under the circumstances, they should lie where they fell, precisely because the source State could not have been aware, at the time when it authorized the continuation of the activity, that physical transboundary harm would or might occur.

5. The question was much more acute when the source State was in fact aware that some physical transboundary harm might result from the continuation of the activity, but was not aware of the extent of the harm that could result. Should it be liable for all the direct consequences of the continuation of the activity, which would take the form of loss or injury to persons or things outside its territory, or only for those consequences that had been reasonably foreseeable? That was an area in which a more detailed comparative law analysis would be required.

6. The Commission had already discussed the question whether the proposed general régime, which covered the obligations of prevention and reparation, should be limited to "ultra-hazardous" activities. He remained unconvinced on that issue. Everyone was, of course, aware in general terms of what might, in the present state of human knowledge, constitute ultra-hazardous activities. The obvious examples were the construction and operation of nuclear reactors for peaceful purposes and of plants producing dangerous or toxic chemical substances. Other examples could be added, such as that of dams built near an international border. Those examples were, however, only indicative of the current state of scientific or medical knowledge. What was "ultra-hazardous" today might not be so tomorrow, and the opposite was also true. He was therefore sceptical about the possibility of drawing a clear line between "ultra-hazardous" and other activities. Such a distinction could not form the basis for a general régime, however cautious and qualified it might be.

7. The part of the report dealing with injury caused in the absence of a treaty régime was the most interesting and provocative section and he expressed admiration for the balanced approach the Special Rapporteur had adopted, particularly in regard to strict liability and the principle of State sovereignty (*ibid.*, paras. 52-53). He had been particularly struck by the observation that "sovereignty is, like the god Janus, two-faced" (*ibid.*, para. 53) and by the Special Rapporteur's exegesis of how sovereignty should be viewed in the context of the interdependence of States. That view of the concept of State sovereignty had been borne out by a recent event which was highly relevant to the Commission's consideration of the topic and to which Mr. Ushakov (1973rd meeting) had referred. The accident at Chernobyl—for which he wished to convey to Mr. Ushakov and, through him, to the Soviet people his heartfelt sympathy for the loss of life and potential long-term injury suffered—had clearly shown what great importance the problem had assumed. The effects of that accident had been felt far beyond the borders of the Soviet Union. Of course, as Mr. Ushakov had said, that lent enormous weight to the need to elaborate régimes to

prevent such accidents in future, but it also raised, in a very acute form, the question of liability for physical transboundary harm. Quite recently, the United Kingdom Government had been obliged to prohibit, for a limited period, the slaughter of young lambs in certain mountain regions precisely because there had been a fourfold increase in the levels of radiation found in those animals as a result of the Chernobyl disaster. On whom should the liability for the loss suffered as a result of that prohibition fall? It would seem wholly inequitable for it to fall on the farmers affected by the prohibition. It would seem equally inequitable for it to fall on his country's Government, which was wholly innocent of any responsibility, whether in the narrower or in the broader sense, for the events giving rise to the damage suffered.

8. The Commission was not the forum in which to argue about liability for a particular incident involving transboundary harm. Everyone was fully aware of man's imperfections. Although enormous progress had been made during the century in unravelling the secrets of nature, the more man discovered, the less he knew of the ultimate mysteries. In Shakespeare's words, man was "most ignorant of what he's most assured". But men, as inevitably transitory inhabitants of the planet, had a duty not only to their own generation, but also to succeeding generations, to conduct their activities so as not to cause damage and, if damage was caused, to provide reparation. That principle would naturally require much more refinement in the present context and, in particular, a move from the abstract to the particular. The Special Rapporteur was grappling seriously with the difficult problems that arose in that regard.

9. Mr. RIPHAGEN recalled that, more than 2,000 years earlier, Democritus had stated the theory that "everything which exists in the universe is the product of chance and necessity". That theme had been taken up by the French biologist Jacques Monod in his famous work,⁶ and a psychologist such as Freud must have been struck by the idea that human behaviour might be based on the laws of nature. For the lawyer, however, the behaviour of the free individual was the starting-point; the individual's contribution was the ultimate concern. That theme was relevant to the topic under consideration and its *a priori* limitations, namely physical activities giving rise to physical transboundary harm ("necessity"), and the element of the human contribution to risk ("chance").

10. Those two limitations were a prerequisite for the fusion of the otherwise separate questions of prevention and reparation; preventive and repressive measures, which were distinct in time; primary and secondary rules; and bilateral and multilateral situations. Even with those two limitations, however, the fusion created many problems, particularly when it came into conflict with the dogma of State sovereignty, which was the basis of international law. Such a conflict inevitably meant that account had to be taken, with the necessary adaptations, of the normal rules of State responsibility. It also tended to emphasize the need for a minimum international régime, starting with the somewhat elusive

⁶ *Le hasard et la nécessité. Essai sur la philosophie naturelle de la biologie moderne* (Paris, Editions du Seuil, 1970).

duty of States "to co-operate", which included the duty to provide information.

11. With regard to the adaptation of the normal rules of State responsibility, it seemed clear that the subjective element of "persons acting on behalf of the State" could not be transplanted to the topic under consideration because liability went further and actually covered activities and situations within the "territory or control" of the State. It therefore involved an obligation to exercise control or jurisdiction. But how far did that obligation go?

12. It followed from the two *a priori* limitations of the topic that, normally, the activities and situations referred to would, in the first place, be "hazardous" for the territory of the State within which they occurred. There was thus a fair chance that the territorial State would have established its control over such activities by means of national legislation or otherwise. The minimum international obligation would then be that, in the exercise of such control, the State would treat in-boundary effects in the same way as transboundary effects: it would thus be an obligation of non-discrimination. At present, however, some States did not act in accordance with that obligation, possibly because of the absence of reciprocity.

13. Prior to the obligation not to discriminate, there was an obligation to establish control over the activities and situations in question. It was there that the question of the "source" of the obligation or, in other words, the "objective" element of the obligation became all important. There again, it would seem that the normal rules of State responsibility could not be followed and that the vaguer concept of "shared expectations", which was usually associated with "soft law", would have to be introduced. In that connection, it was significant that the Special Rapporteur had highlighted the element of "damage", in contradistinction to the rules of State responsibility so far adopted by the Commission. Indeed, while all the obligations or quasi-obligations in question were "obligations of result", in the sense of articles 21 and 23 of part 1 of the draft articles on State responsibility,⁷ there was an obvious necessity in the present case to translate them into obligations or quasi-obligations requiring the adoption of a particular course of conduct, in the sense of article 20 of those draft articles. In the mean time, or in other words until the maxim *sic utere tuo* was translated into legally intelligible obligations or quasi-obligations, the law could not remain silent, even though it necessarily had to concentrate on the indivisibility of the physical environment, the procedural aspect of State conduct and the allocation of risks.

14. In that context, the mystical notion of territorial sovereignty would inevitably have to be replaced by, or at least adapted to, a more functional notion of divisions, which, in turn, could not entirely escape the temporal notion embodied in another maxim, *qui prior est tempore potior est jure*, which had some of the same defects as the maxim *sic utere tuo*. For example, if an obligation of prior notification was incumbent on the State which planned to change environmental condi-

tions, the slight imbalance thus created would be re-established by the fact that such a change had to be the result of an ultra-hazardous activity.

15. As experience in Europe and Africa had shown, however, shared expectations implied a modicum of shared planning. If, for example, one African country's policy of protecting endangered species led to a prohibition for peasants to shoot elephants whose passage through their land destroyed their crops, but also entitled those peasants to compensation, it would be too much to require, in the name of non-discrimination, compensation for the peasants of a neighbouring country where the shooting of elephants was not prohibited. Another example concerned Europe, where the transboundary pollution control activities of OECD had led to the adoption of a sort of saving clause in respect of uncoordinated land use policies.⁸ In yet another example, the environment seemed to be territorially divisible: France made savings by dumping the saline wastes from its potassium enterprises into the Rhine, but it cost the Netherlands a great deal of money to purify the waters of the Rhine. What would international law do about that type of situation? Sharing the financial burden was the obvious answer and that was what was provided for in the treaty concluded on that matter.⁹

16. Burden-sharing was obviously a form of compensation and it might involve compensation for the source State rather than for the affected State. In any event, the question was completely different from that of reparation in the context of State responsibility.

17. No measure of prevention, except refraining from carrying out the potentially harmful activity in the first place, could be absolute. The element of chance might always intervene—and that raised the question of risk allocation. Normally, in the case of pure chance, the law left the loss where it fell, as Sir Ian Sinclair had pointed out. Why should there be a difference in the case of the topic under consideration? The answer was that, in the present case, the activity was ultra-hazardous in itself. As Sir Ian Sinclair and Mr. Ushakov (1973rd meeting) had noted, however, there was also the question of the meaning of the term "ultra-hazardous". Did the fact that an activity took place in all the States concerned mean that it was not in itself ultra-hazardous? Another question that arose was that of the benefits of the activity for the source State: in borderline cases, in particular, the benefits might be entirely for one State and the risks entirely for another State.

18. The notion of necessity presupposed knowledge of the laws of nature, but such knowledge was very limited and consisted mainly of hindsight. The law could never be more than the state of the art at the time it was promulgated and, by definition, was thus imperfect. In such circumstances, the law had to turn to the substitute of procedural conduct, which would consist of information and consultation in good faith. It was difficult to

⁸ Recommendation of the OECD Council of 17 May 1977 (C(77)28(Final)), annex, title A, para. 3 (c) (*OECD and the Environment* (Paris, 1979), p. 118).

⁹ Convention on the Protection of the Rhine against Pollution by Chlorides (Bonn, 3 December 1976), *International Legal Materials* (Washington, D.C.), vol. XVI, No. 2 (March 1977), p. 265.

⁷ *Yearbook ... 1980*, vol. II (Part Two), p. 32.

add to that primary obligation of information and consultation a secondary rule of State responsibility. Nevertheless, the absence of information and consultation could very well be an element of fact allowing the risk to be shifted to the source State which failed to comply with that quasi-obligation.

19. Mr. CALERO RODRIGUES, referring to the schematic outline prepared by the previous Special Rapporteur, said that the scope of the topic had been defined therein as physical activities that gave rise or might give rise to physical transboundary harm, which was understood as harm of a certain magnitude. Sir Ian Sinclair and Mr. Ushakov (1973rd meeting) had, however, drawn attention to the problems that arose when efforts were made to define the notion of harm. Should the notion relate only to catastrophic accidents or did it also apply to more gradual damage, such as that caused by acid rain? Another question was that of the lack of scientific knowledge, as indicated by the controversy over the danger to the ozone layer. Should the building of a nuclear arsenal be regarded as potentially more "catastrophic" than the construction of a nuclear plant for peaceful purposes? In his opinion, the scope of the topic should be defined much more precisely than in the schematic outline and that was a task to which the Special Rapporteur should attach priority.

20. The schematic outline referred to two types of primary obligations: responsibility to prevent damage, and liability to make reparation for damage—and everyone agreed that those two questions were closely linked. He had initially thought that liability presupposed damage, but, in view of the social aspects of the topic, he agreed that the Commission also had to study the question of prevention. The schematic outline reduced prevention to a set of procedural obligations: to provide information, to co-operate to establish fact-finding machinery and to negotiate. Mr. Ushakov had indicated some of the problems that arose in connection with those procedural obligations and, as the Special Rapporteur had rightly pointed out in his second report (A/CN.4/402, para. 11 (c)), emphasis had to be placed on the role of international organizations in that regard.

21. No matter what type of régime was established, and even if the régime was strictly observed, harm might still occur. That led to what the previous Special Rapporteur had once called the "monster" of objective liability, to which States were reluctant to submit. However, some sort of obligation to make reparation must be admitted: the main problem was to establish the extent of that reparation. The schematic outline placed limits on reparation on the basis of shared expectations, a concept about which he had some doubts, and of the preventive measures taken, the nature of which would be determined by negotiation. In his view, the idea of reparation should be dealt with more extensively in the draft. It was not sufficient to say that it would be determined by negotiation; some guidelines, however general, should be established for the negotiations.

22. As to the concept of prevention, he believed that the principle of "due care" was essential and that procedural obligations were secondary. The previous Special Rapporteur had suggested that procedural obligations should not give rise to any right of action;

but the present Special Rapporteur was proposing that they should be made hard obligations by deleting the reference to a "right of action" in section 2, paragraph 8, and section 3, paragraph 4, of the outline. He personally was not certain that it was an improvement to make hard obligations of those procedural obligations because that would not be an inducement to co-operation. Moreover, unlike the Special Rapporteur, he did not see how article 73 of the 1969 Vienna Convention on the Law of Treaties supported the idea that procedural obligations should be treated as hard obligations (*ibid.*, para. 41 (a)). Nor was he convinced by the Special Rapporteur's comment that: "If we leave the text of the outline as it is, we might be prohibiting the affected State from availing itself of this possibility given to it under general international law" (*ibid.*). That State was, first of all, only a "potentially" affected State; moreover, threats of retaliation were not the best way of promoting co-operation.

23. He was not certain that the Special Rapporteur was right in concluding that "the obligations to inform and to negotiate are sufficiently well established in international law, and any breach of these obligations thus gives rise to wrongfulness" (*ibid.*, para. 67). He did, however, agree with the Special Rapporteur's conclusion about the obligation laid down in section 2, paragraph 8, and section 3, paragraph 4, of the schematic outline (*ibid.*, para. 66, first sentence). One of the problems that arose was the relationship between reparation—if harm occurred—and prevention. "Harm" was at the centre of both institutions and the purpose of any internationally agreed régime would be to establish measures of prevention in order to avoid or minimize the risks of harm. The same result could be achieved by unilateral action of the source State, which did, after all, have to consider its own interests. In that connection, he was not quite sure what the Special Rapporteur meant by "prevention after the event" (*ibid.*, para. 46).

24. There was still much work to be done in defining the scope of the topic under consideration. Some clarifications would probably be provided when the Commission began to deal with the draft articles. In conclusion, he urged members not to attach too much importance to the procedural aspects of the question of prevention.

25. Mr. FLITAN said that he would make two general comments before turning to the content of the Special Rapporteur's second report (A/CN.4/402). First, as the Special Rapporteur had pointed out in his preliminary report, "the duty to make reparation is somewhat lost among the procedures established in section 4 of the schematic outline" (A/CN.4/394, para. 16 (d)). That defect would have to be remedied in the draft articles, during the consideration of which the Commission would be better able to define the content of the topic.

26. Secondly, the topic under consideration was not a political one: it related to the question of development. In other words, it was less an East-West problem than a North-South problem. Although every State could theoretically cause or suffer harm, in practice those that caused it were usually developed countries and those that suffered it developing countries. The draft articles

to be submitted by the Special Rapporteur would show how he intended to take account of the interests of developing countries, as he had undertaken to do in his preliminary report (*ibid.*, para. 17).

27. In chapter I of his second report, which dealt with the use of terms, the unity of the topic and the scope of the topic, the Special Rapporteur rightly emphasized that the distinction made in Anglo-Saxon law between "liability" and "responsibility" was not simply a problem of terminology (A/CN.4/402, para. 2). In that connection, he himself shared the view expressed by the previous Special Rapporteur in his fifth report that:

The phrase "responsibility and liability", as used in the United Nations Convention on the Law of the Sea, ... corresponds closely to the twin themes of prevention and reparation, which form the basis of the present topic.¹⁰

28. He agreed with the conclusions reached by the Special Rapporteur on the basis of the distinction between "liability" and "responsibility", the counterpart of which was the distinction between the obligation of prevention and the obligation of reparation. The first conclusion was that some individuals had to fulfil certain specific obligations even before the occurrence of an event giving rise to injurious consequences. The second was that the State was thus liable for the injurious consequences of certain activities carried out within its territory or control. The term "control" was preferable to the term "jurisdiction", which would, because of all the examples that would be possible, be too restrictive. The third was that the State also had an obligation of prevention; it thus had to do everything in its power to prevent or minimize injurious consequences.

29. At least in the case of some categories of activities, prevention was the basis for the prevention-reparation continuum. It would, however, probably be necessary to draw a more clear-cut distinction between the activities in question, because the same procedure could not be established for all of them: some activities might cause harm occasionally, while others gave rise to minor injurious consequences all the time. In the case of some activities, moreover, prevention could be ruled out and account could be taken only of reparation.

30. The Special Rapporteur had rightly proposed that the unifying link between prevention and reparation should be injury, which also made it possible to distinguish between the topic under consideration and that of State responsibility. That point would, however, require further clarification, because, although strict liability could not exist without injury, State responsibility for a wrongful act did not depend on the existence of injury.

31. With regard to the scope of the topic, the Special Rapporteur had recalled that the key element of the schematic outline was the duty of the source State to avoid, minimize or repair any physical transboundary loss or injury when it was possible to foresee a risk of such loss or injury associated with a specific dangerous activity. In order to create a focus, an obligation of prevention could be established in such cases; but there

were other cases where risk could not be foreseen. That was further proof that the schematic outline did not make a sufficiently clear distinction between the various categories of activities.

32. Although the type of harm to which reference was being made was "physical transboundary harm", it must be borne in mind that activities which States conducted outside their borders—on the high seas, for example—could also cause harm. That case should also be covered in the draft articles.

33. A detailed study should also be made of the role to be played by international organizations. It was all very well to say that there was a duty to co-operate through the intermediary of such organizations, but it might be necessary to go even further and say that States had an obligation to inform the competent international organizations and that such organizations had an obligation to co-operate in good faith in establishing an appropriate régime. Consideration might even be given to the possibility of making the obligation of reparation applicable to such organizations in some cases, although that would, of course, be without prejudice to the obligation of reparation incumbent on the State which caused the harm.

34. There had been strong objections to the idea of a régime of collective liability, but, as the Special Rapporteur pointed out (*ibid.*, paras. 52-53), the obligation of reparation was based on the principle of sovereignty. There was no reason why some States should have to bear the injurious consequences of activities carried out by other States. The principle that the latter had to make reparation for the harm caused by the activities they carried out was thus entirely equitable.

35. In his view, the Special Rapporteur should give further thought to the question of the sharing of costs. Since activities that might give rise to injurious consequences benefited the State which carried out those activities, was it not quite natural that that State should bear the consequences thereof? In determining whether harm had occurred, the Special Rapporteur might draw inspiration from the international conventions that governed certain activities.

36. Mr. OGISO said that the Special Rapporteur's very comprehensive second report (A/CN.4/402) constituted a valuable basis for discussion of the topic. Several previous speakers, especially Sir Ian Sinclair and Mr. Riphagen, had raised the question whether reference should be made to "physical" transboundary harm. The Special Rapporteur himself specifically referred to "physical transboundary harm" in the part of his report relating to the scope of the topic (*ibid.*, para. 11 (a)). Thereafter, however, the Special Rapporteur referred to "transboundary injury" (*ibid.*, paras. 23 and 30), without specifying that the injury had to be "physical". He recalled that the previous Special Rapporteur had discussed that point and had dealt in his fifth report with the "element of a physical consequence".¹¹ The Commission itself, in its report on its thirty-sixth session, had noted that "the topic as now delineated hinges upon the element of a physical conse-

¹⁰ Yearbook ... 1984, vol. II (Part One), p. 171, document A/CN.4/383 and Add.1, para. 40.

¹¹ *Ibid.*, pp. 160 *et seq.*, paras. 17 *et seq.*

quence producing transboundary effects".¹² The physical element was thus one of the basic components of the topic under consideration. He did not believe that the omission of that element in chapters II and III of the Special Rapporteur's report was in any way intentional. He nevertheless urged the Special Rapporteur not to fail, in his further work, to use the adjective "physical" in connection with transboundary consequences or transboundary harm. The transboundary element and the physical element were equally essential.

37. The general feeling in the Commission appeared to be that the source State had a duty to provide information on any activity that might give rise to physical transboundary harm; such information had to be supplied at the request of the affected State. He himself agreed with the idea that that was the first duty of the source State, but, in referring to that duty, the Special Rapporteur had failed to draw attention to an important exception: the State concerned was not obliged to provide information relating to State secrets or commercial secrets. That problem was covered in section 2, paragraph 3, of the schematic outline.

38. With regard to the duty to negotiate, the Special Rapporteur referred to "fact-finding machinery" (*ibid.*, para. 38). Although he himself had no doubts about the need for such machinery, he thought that the relevant duty should be formulated in more general terms. The previous Special Rapporteur had expressed the view that the source State should have some freedom of choice in that regard. If the provisions on the negotiation procedure were too specific, the result might be that such freedom of choice would be restricted. The present Special Rapporteur basically concurred with that view (*ibid.*, para. 40). In that connection, he himself agreed with Mr. Calero Rodrigues about the Special Rapporteur's proposal to delete the first sentence of section 2, paragraph 8, and of section 3, paragraph 4, of the schematic outline (*ibid.*, para. 41 (c)).

39. As to strict liability, the Special Rapporteur appeared to take a somewhat different approach from that of his predecessor by referring in his report to instances where liability was "less strict" and to others where "strict liability" was interpreted as meaning the reversal of the burden of proof.

40. In his own view, the régime to be applied was one of less strict liability. In that connection, he noted that the report contained the following significant passage:

... according to the régime established in the schematic outline, this is injury for which the source State would in principle be liable, because the innocent victim, also in principle, should not be left to bear it. (*Ibid.*, para. 35.)

That passage seemed to indicate that a strict liability régime was in principle applicable. That approach represented a significant departure from the previous Special Rapporteur's position, which had been that, although the strict liability régime was applicable under specific treaties governing such hazardous situations as nuclear accidents and pollution by oil tankers, it would be too great a leap to try to apply the strict liability régime outside areas governed by particular international agreements. It was precisely as a substitute for

such a régime that the previous Special Rapporteur had put forward the concept of the balance of interests between the source State and the affected State and had provided for the duty to negotiate on the basis of that concept. He therefore urged the present Special Rapporteur to give careful consideration to the balance-of-interests concept before reaching a conclusion on the application of the strict liability régime to the topic under consideration.

41. In that connection, it was significant that, in several of his reports, the previous Special Rapporteur had usually referred to the "duty", rather than to the "obligation", to provide information and to negotiate. In his own view, the concept of "duty" was slightly broader than the concept of "legal obligation". The concept of duty could be associated with that of good faith and good-neighbourliness and was, moreover, in keeping with Principle 21 of the 1972 Stockholm Declaration.¹³

42. He regarded the previous Special Rapporteur's efforts as an attempt to solve the problem of reparation without immediately resorting to the strict liability régime: hence the use of the balance-of-interests concept. The question of how to achieve that balance could be more appropriately dealt with at a later stage.

43. Lastly, he said that he fully agreed with the Special Rapporteur's observations on the role that might be played by international organizations (*ibid.*, para. 11 (c)).

44. Mr. BARBOZA (Special Rapporteur) said that, although his intention was not, as Mr. Ogiso seemed to think, to depart significantly from the previous Special Rapporteur's concept of strict liability, he saw no other solution, at the current stage in the consideration of the topic, than the application of strict liability combined with the mechanisms proposed by his predecessor. Strict liability would, in any event, not operate automatically; at the current stage in the development of international law, it would, moreover, be difficult to establish such a régime. The draft thus had to take account of the idea on which the earlier reports had been based and which was that the effects of strict liability had to be mitigated. In that connection, he would submit several proposals to the Commission; he was, for example, considering the possibility of a régime of exceptions that had not been envisaged in the earlier reports, which were quite sketchy.

45. Mr. USHAKOV, referring to section 1, paragraph 2 (d) (ii), of the schematic outline, asked which States would be informed of a dangerous activity carried out on ships or aircraft within the control of a State and with which States that State would have to negotiate.

46. Mr. BARBOZA (Special Rapporteur) said that he was unable to provide satisfactory answers to Mr. Ushakov's questions because he still had not gone far enough in his study of the topic. He was, in fact, only at the outline stage. The previous Special Rapporteur himself had, moreover, not dealt with such problems.

The meeting rose at 12.45 p.m.

¹² *Yearbook ... 1984*, vol. II (Part Two), p. 74, para. 225.

¹³ See 1972nd meeting, footnote 8.