Document:-
A/CN.4/SR.2112

Summary record of the 2112th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1989, vol. I

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of the activities covered by article 1, and had rightly stressed that reparation would have to be the subject of negotiation between States.

62. In draft article 10, which dealt with the bulk of the obligations of the State of origin, the reference to existing activities or activities "being . . . carried on" should be placed between square brackets or deleted until the Commission had established a procedure for such activities.

63. Draft article 11 provided for a procedure for protecting national security or industrial secrets. It was a traditional provision, of the kind adopted by the Commission in the draft articles on the law of the non-navigational uses of international watercourses,[16] and similar provisions were to be found in such instruments as the 1982 United Nations Convention on the Law of the Sea and the annex to the 1974 OECD recommendation to which he had already referred (para. 52 above). It would be useful to follow those provisions and adapt the wording of article 11 to them by deleting the reference to "procedure" in the title and, instead of granting the State of origin the right to invoke reasons of national security, simply to stress that nothing in the present articles would prejudice the right of that State to protect sensitive information.

64. Draft articles 13 and 14 did not call for any comment except to note that they referred to the "potential effects" of an activity, which was an indication that they were indeed directed at planned activities and not at existing activities.

65. Draft article 15 provided for the case in which, in the absence of a reply to notification, the legal régime proposed by the State of origin became operative. It was a reasonable solution. However, the rights of the potentially affected State should perhaps not be unlimited, since it could re-evaluate its position and put forward claims at a later stage. There was therefore a need to formulate some form of estoppel to enable a State of origin which received no reply to continue its activity without fear.

66. On the whole, articles 13 to 15 were based on a bilateral approach, as Mr. McCaffrey had pointed out, and further consideration should be given to whether they would be appropriate in the event of an accident causing widespread harm or in the case of creeping pollution, the effects of which were difficult to localize. The procedure envisaged in chapter III of the draft demonstrated, on the whole, how difficult it was to deal with ultra-hazardous activities and permanent transboundary harm at the same time.

67. Draft article 16 raised the problem to which he had already referred of the difference between the obligation to negotiate and the obligation to hold consultations. Consultations could, of course, lead to an agreed legal régime governing the activity in question, but it would be too inflexible to impose an absolute obligation on all States parties to conclude an agreement on all activities referred to in article 1. As to the two alternative texts proposed by the Special Rapporteur in paragraph 1, they seemed to complement each other rather than to be mutually exclusive.

[16] See article 20 (Data and information vital to national defence or security) of the draft articles on international watercourses, provisionally adopted by the Commission at its previous session (*Yearbook . . . 1988*, vol. II (Part Two), p. 54).

68. Mr. BEESLEY said that he wished to draw attention to a book by the eminent jurist, Jan Schneider.[17] It contained an excellent analysis of the distinction between strict liability and absolute liability[18] and also some very good passages—which he quoted—on notification procedure, with many examples taken from recent conventions.[19] Some of the precedents cited might allay fears over the idea of creating a precedent for an obligation to negotiate. The same author provided authoritative quotations (rather than interpretations) from the *Trail Smelter*, *Lake Lanoux* and *Corfu Channel* cases.[20]

The meeting rose at 12.30 p.m.

[17] J. Schneider, *World Public Order of the Environment: Towards an International Ecological Law and Organization* (University of Toronto Press, 1979).

[18] *Ibid.*, pp. 163-164 and 168.

[19] *Ibid.*, pp. 52-53.

[20] *Ibid.*, pp. 48-50 *et passim*.

2112th MEETING

Tuesday, 6 June 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

International liability for injurious consequences arising out of acts not prohibited by international law (*continued*) (A/CN.4/384,[1] A/CN.4/413,[2] A/CN.4/423,[3] (A/CN.4/L.431, sect. B)[4]

[Agenda item 7]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

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

[2] Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

[3] Reproduced in *Yearbook . . . 1989*, vol. II (Part One).

[4] Consideration of the present topic is based in part on the schematic outline submitted by the previous Special Rapporteur, R. Q. Quentin-Baxter, at the Commission's thirty-fourth session. The text is reproduced in *Yearbook . . . 1982*, vol. II (Part Two), pp. 83-85, para. 109, and the changes made to it are indicated in *Yearbook . . . 1983*, vol. II (Part Two), pp. 84-85, para. 294.

ARTICLES 1 TO 17[5] (*continued*)

1. Mr. CALERO RODRIGUES commended the Special Rapporteur on his very useful fifth report (A/CN.4/423) on a most difficult topic, a report which would undoubtedly help to ensure that the Commission's work on the subject was conducive to good results. Because it contained 45 pages of tight legal reasoning and only one section (in the general comments on articles 10 to 12) dealt with international practice (*ibid.*, paras. 79-95), the report required in-depth analysis. Members had been given insufficient time to study it and he earnestly hoped that some of the issues raised would be left over for the next session.

2. Many points called for in-depth discussion, which was not possible under the circumstances. He would confine his remarks on the report itself at the present stage to two of those points, by way of example, and would comment only on the articles proposed. The first remark concerned the distinction drawn in the report (*ibid.*, paras. 2-15) between acts and activities. The Special Rapporteur stated:

> . . . Liability is linked to the nature of the activity, and the isolated acts referred to . . . would thus not be included in the scope of the topic. In order for the régime of the present articles to apply to certain acts, those acts must be inseparably linked to an activity which . . . has to involve risk or have harmful effects (art. 1). Harm caused by isolated acts is not covered by the draft, and the dreaded absolute liability . . . is thus avoided. (*Ibid.*, para. 14.)

Thus the main purpose of the draft articles seemed to be to regulate activities through procedures to prevent possible harm; in other words, the purpose was to create a legal régime. Harm, however, could result from acts or from situations, whether or not associated with activities. Many acts or man-made situations could produce transboundary harm even if they were not related to activities. They should therefore entail liability for the harm caused and so come within the scope of the present topic. The subject-matter of the topic was the detrimental physical effects caused in one State by acts or activities carried on in another State that were not prohibited by international law and, accordingly, were not wrongful acts. The articles should therefore set out the general principle that such harm should be compensated for and lay down rules for the application of that principle.

3. The articles could also deal with the prevention of harm and with co-operation to that end. Those questions, however, should not become the more prominent aspect of the work in hand. At one point, it had seemed as though the concept of "risk" rather than the concept of "harm" would define the scope of the draft. At the present stage, "activities" should not be allowed to exclude "acts" as a source of harm. Harm could result from an activity, such as the operation of a nuclear plant. If the activity ceased and it was decided to dismantle the plant, the question would arise whether the dismantling should be regarded as an activity. And yet harm could occur as a result. Certainly no one would contend that such harm lay outside the scope of the draft and that compensation under the articles should be ruled out. No doubt the notion of acts of State should be avoided, but it was essential for the concept of activities to include acts. He for one could not accept the argument put forward in paragraph 14 of the report.

4. A second point which called for clarification was the applicability of the two régimes of causal liability and responsibility for wrongfulness, a question discussed by the Special Rapporteur in his comments on draft article 5 (*ibid.*, paras. 40-54). The Special Rapporteur presented an extensive analysis but did not offer any final conclusions and was probably inviting the Commission to indicate its own position. Clearly, the matter required far more study of the problems involved than was possible in the limited time available. He was therefore obliged to reserve his position for the time being.

5. Those observations, as well as the ones he was to make on the draft articles, were necessarily of a very preliminary nature.

6. Draft articles 1 to 9, constituting chapter I (General provisions) and chapter II (Principles) of the draft, were revised and improved versions of draft articles 1 to 10 as referred to the Drafting Committee at the previous session. The revised texts now also had to be referred to the Drafting Committee. That situation was an invitation to consider whether the Commission's usual practice of referring articles to the Drafting Committee as soon as they were presented was correct. A far more effective course would be for the Special Rapporteur to redraft articles in the light of the discussion held in plenary, and for the articles to be referred to the Drafting Committee only after they had been discussed again in plenary.

7. In draft article 1, the scope of the articles was defined better than in the previous text and now covered both harm and risk. One problem, however, was the meaning to be given to the term "activities": the definition contained in draft article 2 was not sufficient to clarify that point. Fortunately, most of the problems regarding article 1, and indeed articles 2 to 9, could be solved by suitable drafting and could therefore be left to the Drafting Committee, along with the useful proposals made by Mr. McCaffrey and Mr. Hayes (2109th meeting), which, even though they involved more than purely stylistic changes, were designed to achieve more clarity and completeness in the expression of concepts which seemed to be accepted by the Special Rapporteur and by the Commission in general.

8. He did not believe it necessary to engage in a debate in plenary to decide whether "territory" should be mentioned alongside "jurisdiction" and "control" in article 1, whether each of the definitions in article 2 was satisfactory, whether the term "assignment" should replace "attribution" in the title of article 3, to choose even between the two alternative texts proposed for article 5, or to decide whether the principle that the innocent victim of transboundary harm should not be left to bear the loss should be explicitly included in article 9.

9. The new articles 10 to 17 of chapter III of the draft (Notification, information and warning by the affected State) obviously drew on the draft articles on the law of the non-navigational uses of international watercourses, as the Special Rapporteur himself admitted. Nevertheless, the almost infinite variety of situations to be covered by the articles on the present topic meant that the transposition gave rise to serious doubts. For instance, the six-month period which, under draft article 13, the notifying State must "allow" the notified State to reply was hardly suitable in the present context. In the articles on watercourses, the

[5] For the texts, see 2108th meeting, para. 1.

notifying State had to allow the notified State a period in which to reply, but it was a waiting period: no action on the project could be undertaken; no activity could be initiated. That was not the case in the draft articles under consideration, as the Special Rapporteur himself recognized (A/CN.4/423, paras. 111-112). What, therefore, was the meaning of the six-month period? Under draft article 10, the procedural machinery would be set in motion for "an activity referred to in article 1", i.e. an activity whose physical consequences caused transboundary harm or created an appreciable risk of causing such harm. The two situations—of "harm" and "risk"—were different and it was difficult to imagine that the same procedures could be usefully applied in both cases. Specific provisions on mechanisms to prevent or minimize harm were usually set forth in specific instruments concerning specific fields of activity. The draft articles were intended to cover so many different activities that it seemed impractical, even impossible, to establish a detailed set of obligations of a procedural nature to cover all of them.

10. The Special Rapporteur stressed in his report that "one of the basic principles, perhaps the most important, on which the obligations . . . rest is the obligation to co-operate laid down in article 7" (*ibid.*, para. 76). Surely the essence of that part of the draft was the issue of prevention. Instead of embarking on the impossible task of drawing up procedural provisions on co-operation, it would be better for the articles to set out the principle of co-operation as clearly as possible and leave it to States to devise in each case, and according to circumstances, the ways in which it should apply. It was appropriate to cite once again Gilberto Amado's dictum that States were not children. They could be trusted to work out the most appropriate procedures themselves.

11. Indeed, draft articles 10 to 17 set out a very complex and very burdensome set of obligations. Under article 10, the State of origin had to "assess" the potential transboundary effects of the activity and notify other States, providing technical data and information, including information on measures taken to prevent or minimize risk and which could serve as a basis for a legal régime. It had to proceed to assessment and notification if "warned" by another State (art. 12). It had to "allow" the notified State six months to reply and, on request, provide additional information during that period (art. 13). It had to hold consultations "without delay" to establish the facts and had to enter into negotiations to establish a suitable legal régime (art. 16). It had to apply the measures and the legal régime indicated in the notification if the notified State agreed (art. 14) or did not reply (art. 15). Lastly, it had to apply the régime laid down in the articles if it had not proposed any régime and the notified State had not replied within six months (art. 15).

12. The main purpose of the procedural machinery seemed, in the final analysis, to be to create a legal régime. The Special Rapporteur gave the following explanation of that expression:

> . . . The expression "legal régime" should not be taken to mean that this will be a complex legal instrument in every case. When the situation is straightforward, it may be enough for the State of origin to propose certain measures which either minimize the risk (in the case of activities involving risk) or reduce the transboundary harm to below the level of "appreciable harm". The State of origin may, of course, also propose some legal measures, for instance the principle that it is prepared to compensate for any harm which may be caused. . . . (*Ibid.*, para. 99.)

Personally, he did not find that explanation very satisfactory. For one thing, there was no need for the State of origin to indicate that it was "prepared to compensate", since its obligation to compensate would be imposed by the provisions of the articles.

13. As he had already pointed out, the procedural articles were intended to deal with a far greater variety of situations than were the draft articles on international watercourses. That was recognized by the Special Rapporteur in his report (*ibid.*, para. 111). Clearly, draft articles 10 to 17 should be discussed in depth at the next session. Draft articles 1 to 9 could be referred to the Drafting Committee.

14. The CHAIRMAN said that he fully agreed with Mr. Calero Rodrigues about the inadequate time given to members to examine the Special Rapporteur's report. Reports should be circulated before the start of the session.

15. Mr. BENNOUNA said that, in his remarkable fifth report (A/CN.4/423), the Special Rapporteur had taken into account the Commission's discussions on a topic which had emerged as a separate item more as an outcrop from the overall subject of international responsibility than as a response to the concrete exigencies of international realities. In any case, it was too late for any doubts about the feasibility of embarking on the present topic. It would be for States at a later stage to decide whether they wished to commit themselves to the hazardous subject of international liability for injurious consequences arising out of acts not prohibited by international law. Nevertheless, it was necessary to look ahead and envisage new situations in the context of the constant upheavals which marked the present international scene. The protection of the environment, the search for a better quality of life, the greater feeling of solidarity in those matters, and the awareness of growing interdependence in the face of chaotic growth were being considered more and more in international forums. The Commission should therefore show some measure of boldness, without losing sight of the mandate actually assigned to it by the General Assembly.

16. The provisions the Commission was formulating should give more substance to the new topic of international liability for injurious consequences arising out of acts not prohibited by international law, and it was essential not to lose sight of that guiding principle, so as to avoid serious setbacks and even the possibility of failure of the whole exercise. Hence the importance of chapters I and II of the draft, containing general provisions and principles, and of the revised draft articles 1 to 9.

17. Article 1, on the scope of the draft, was of fundamental importance. Obviously, maximum clarity was essential in determining the scope of such a controversial topic. Jurisdiction took three different forms: territorial jurisdiction, functional jurisdiction, and control or *de facto* jurisdiction. The latter figured in article 1 as an alternative to jurisdiction ("or, in the absence of such jurisdiction, under its control"). However, jurisdiction and control could in fact be cumulative. A State could exercise its jurisdiction over its territory and its control over a disputed area. International judicial opinion had repeatedly stressed that liability depended in fact on the effective control exercised over an area.

18. He agreed with the Special Rapporteur's approach in making the topic revolve round the concept of transboundary harm and the risk of causing such harm. Those two aspects were closely bound up with each other for the purposes of liability, which was incurred only where harm had been caused, which in turn implied the existence of an activity involving risk. In that connection, he associated himself with other speakers who had requested that the content of draft article 2, on the use of terms, be reserved until the Commission had adopted the whole draft on first reading. The wording of some of the definitions could, of course, be simplified.

19. Draft article 3 had been introduced in order to take account of the disparities between States and the inequality regarding the means available to them to fulfil their obligation to supervise their territory. The fact remained, however, that the rule of due diligence imposed on a State the duty to provide itself with the means of knowing.

20. Draft article 4 should set forth more clearly the preeminence of *lex specialis*, i.e. special agreements which dealt with particular forms of liability for activities which were not prohibited. As already indicated, in particular by Mr. Reuter and Mr. Tomuschat (2110th meeting), the present articles would have a residual character or take the form of a framework agreement.

21. As he had stated at previous sessions, the article on prevention (art. 8) had its place in the draft, but as an element for determining the extent of the liability incurred, or rather the amount of compensation necessary in the event of harm, according as the State had fulfilled its obligations with respect to prevention in whole or in part or had completely neglected them. He maintained, however, that failure to respect such obligations could not be invoked to make the State of origin responsible for a wrongful act even in the absence of harm.

22. It would have been more logical for draft article 9, on reparation, to be preceded by a general provision laying down the principle of liability. The term "reparation" itself was certainly not appropriate since it was linked, historically, to fault. It had been suggested that it could be replaced by another term such as "compensation", which he was quite prepared to accept, although he understood that in English that term signified indemnification. In French, on the other hand, it denoted the need to find a balance, on the basis of a series of criteria, without going so far as to provide for complete indemnification for any harm suffered. That inevitably led to the concept of equity, which he preferred to that of the "balance of interests affected", which had been introduced into the article by the Special Rapporteur. It was somewhat naive to think that the balance of interests could be restored: interests, by their very nature, changed. That concept might seem fairly attractive in theory, but in concrete terms it was of little use.

23. Turning to the new draft articles 10 to 17, he was not convinced that it was appropriate to base the procedure under what was supposed to be a framework agreement—n instrument extremely broad in scope—on the draft articles on the law of the non-navigational uses of international watercourses—the scope of which was very limited—or on specific bilateral or regional conventions involving a few States with good relations between them. The proposed procedure was based on two assumptions, namely that it was possible to know in advance, first, which was or were the potentially affected State or States and, secondly, which was the State of origin. In the case of transboundary pollution, however, the States likely to be the most seriously affected were not necessarily known in advance and, since pollution could come from various sources, it was not possible to determine which was the State of origin: indeed, there could be several such States. How could a procedure based on such precise elements as, for instance, notification and reply function properly when the assumptions were so uncertain?

24. Another question calling for an answer related to the common heritage of mankind, which could also be affected by harm, in which case not one State alone was affected. Again, how could such a procedure be envisaged when the whole of the international community was concerned? It would be preferable to introduce a procedure for notification or submission of periodic reports to an expert committee, as had been done in the case of human rights and of the law of the sea and as it was planned to do in connection with the prevention of natural disasters. The committee, which could be appointed by the States parties to the future convention, would meet under the auspices of an international organization such as the United Nations or one of its competent bodies—for example, UNEP—and would examine the reports, seek information from States parties and make recommendations to a meeting of the contracting parties or to the executive head of the organization in question. It would then be for the States concerned to draw the appropriate conclusions and, if there was any dispute, to have recourse to the relevant procedure for the peaceful settlement of disputes. In that respect, he considered that the obligation of co-operation under article 7 should be institutionalized within the framework of a committee, which should not be too cumbersome and the costs of which should be borne by the States parties themselves. That would foster a spirit of solidarity among States parties without which co-operation would be a dead letter.

25. Draft article 16, on the obligation to negotiate, was unrealistic because it did not reflect the existing state of international law and presupposed that international society had achieved a sufficiently advanced degree of integration. Within integrated organizations like EEC, it might be possible for each State to negotiate legal régimes governing many of its own national activities with the other States in the organization, but that would not be possible under the terms of an instrument as broad in scope as the present draft. However, a special provision on relations between neighbouring States would have his support.

26. It should not be forgotten that States would be dissuaded from embarking on a particular activity if a report by an international organization on any harm or risk of harm that might result from that activity was made public. Publication could likewise persuade a State to adopt preventive measures and pay compensation for any harm incurred.

27. In conclusion, he would advocate a modest approach. The Commission should confine itself to provisions that would encourage, rather than compel, States to conclude specific agreements.

28. Mr. NJENGA thanked the Special Rapporteur for his outstanding fifth report (A/CN.4/423) and for his detailed

introduction (2108th meeting), which would facilitate the Commission's understanding of a complex topic. He welcomed the various provisions placed before the Commission, and in particular the revised draft articles 1 to 9, which would provide an opportunity for further refinement of the texts.

29. For the topic under consideration, he had always maintained that the Commission should have a modest goal, namely the elaboration of a draft framework agreement which was not too detailed and which would assist States in accommodating each other's legitimate interests. With the increasing sophistication of technology and the growing pressure on finite natural resources, it was becoming ever more important to ensure that the balance of interests between States was maintained. States should not be hindered in their legitimate activities, but they should not cause unreasonable injurious consequences to the rights and interests of other States, or to the international community as a whole, in carrying on those activities. Should they do so, they must be liable to take measures to mitigate those consequences and, where appropriate, to make reparation. In that connection, he agreed with the Special Rapporteur that, "in order for the régime of the present articles to apply to certain acts, those acts must be inseparably linked to an activity which . . . has to involve risk or have harmful effects" (A/CN.4/423, para. 14).

30. While he applauded the Special Rapporteur's efforts to reformulate article 1, on the scope of the draft, the reference to "other places under its jurisdiction" created considerable conceptual difficulties. Also, he was not persuaded by the explanation given (*ibid.*, para. 21) for the deletion of the word "effective" before "control"—"effective control" being a concept that was found in many multilateral and bilateral conventions. The Special Rapporteur might therefore wish to consider replacing the phrase "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" by "within an area under the national jurisdiction of a State". That was a concept which had recently been defined in the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal[6] (art. 2 (9)) and was broad enough to meet the needs of the topic and avoid all the legal complexities to which the Special Rapporteur had referred. He also agreed with Mr. McCaffrey's proposal (2109th meeting, para. 13) that article 1 could be amended to refer to "activities which are carried on under the jurisdiction or effective control of a State and whose operation gives rise to transboundary harm or entails an appreciable risk thereof".

31. He was unable to agree with the Special Rapporteur's explanation (A/CN.4/423, paras. 25-26) for the use of the word "appreciable". In particular, the Special Rapporteur said that he preferred to use the word "appreciable", which qualified the word "harm" in the draft articles on the law of the non-navigational uses of international watercourses, in order to underscore the similarity between the two topics. The draft on international watercourses, however, was concerned with a relatively quantifiable risk as between interdependent States linked by virtue of a common international watercourse. "Appreciable risk", according to draft article 2 (*a*) (ii) could be readily identified on the basis of the things used in the activities concerned. The amended text proposed by Mr. McCaffrey (2109th meeting, para. 14), particularly the second alternative, which referred to risk that was "discoverable upon a reasonable examination", was better. To subject all the activities of States to such a standard, with the corresponding liability, and to the requirements regarding notification, assessment and negotiation procedures under chapter III of the draft, would be unrealistic and unacceptable, since it would seriously hamper a State's freedom of action within its own territory. That did not, however, mean that a State should not be seriously concerned about the adverse consequences of any activities carried on within its territory, particularly since the first victims of such activities would be its own citizens and interests, which no reasonable State would want to prejudice.

32. The Special Rapporteur's survey of international practice (A/CN.4/423, paras. 79-95) made it clear that there was a higher threshold than "appreciable" harm. On the basis of the terms used in the Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution, the Convention on Long-range Transboundary Air Pollution, the 1983 Agreement between the United States of America and Mexico on co-operation for the protection and improvement of the environment in the border area, Principle 6 of UNEP's "Draft principles of conduct in the field of the environment for the guidance of States in the conservation and harmonious utilization of natural resources shared by two or more States" and many other instruments, he was convinced that, if the draft articles were to command the support of the international community, the word "appreciable" would have to be replaced by "significant", "substantial" or "important", all of which denoted a higher threshold.

33. He would invite the Special Rapporteur to consider the drafting changes in article 2 suggested by Mr. McCaffrey (2109th meeting, paras. 14-16), which went a long way towards clarifying the terms defined. He also agreed fully on the need to add a reference to the environment, in which regard the international community was rightly, though belatedly, showing increasing concern: concerted international co-operation alone would prove effective.

34. He supported the replacement of the term "Attribution" by "Assignment" in the title of draft article 3. In paragraph 2, the presumption that the State of origin knew or had the means of knowing of activities in its territory was also logical, to the extent that it was a rebuttable presumption.

35. The question of the assignment of obligations raised an issue of great importance to the developing countries, namely the activities of transnational corporations. There was a growing tendency to shift responsibility for the serious adverse effect of those activities on the health and welfare of human beings and their environment from the industrialized to the developing countries. As the environmental lobbies in the developed countries had become more organized and more powerful, the Governments of those countries had been forced to introduce increasingly stringent manufacturing standards, and even to impose a total ban on substances proved to have particularly harmful after-effects. That had, of course, increased production costs, the

[6] See document UNEP/IG.80/3 (22 March 1989); reproduced in *International Legal Materials* (Washington, D.C.), vol. XXVIII (1989), p. 657.

result being that many transnational corporations, with the full knowledge and encouragement of their States of origin, had relocated their activities to developing countries, where they did not have to incorporate the latest technology and where they could continue in many instances to use materials banned in the industrialized States. Still more reprehensible was the recent growth in the nefarious trade in toxins, involving massive transboundary movement of hazardous and toxic wastes from industrialized countries to developing countries, a problem to which the recent Basel Convention (see para. 30 above) had provided no more than a partial and largely unsatisfactory solution.

36. Faced with enormous burdens of poverty, debt and external economic pressures, many developing countries were not in a position to resist something which in the short term seemed an attractive commercial proposition but, in the end, might have very severe adverse effects, on the population and the environment and also on other States. In most cases, the transnational corporations, while assuming the nationality of the developing country, remained under the effective control of the parent corporation and continued to enjoy the patronage of the industrialized country concerned. However, in the draft articles under consideration that relationship was entirely ignored, and the developing country in question would be deemed to be the State of origin of the localized transnational corporation, with all the liability for transboundary harm that that entailed. In fact, since industrial secrets were protected from abroad, the developing country might not have been able directly to assess the likelihood of such harm.

37. If the problem was merely one of drafting, he would be glad to present some proposals. However, it was a highly substantive issue which required the closest attention of the Special Rapporteur and the Commission if the draft articles were to command wide international support.

38. He would refrain from extensive comment on the articles in chapter II of the draft, which had been discussed at the previous session and to which the Special Rapporteur had made useful changes. Some minor improvements might be suggested, but could be dealt with in the Drafting Committee. However, the importance of draft article 7, on co-operation, should be emphasized for it was central to the topic. The role of relevant international organizations, some of which were explicitly mentioned in the report (A/CN.4/423, para. 61), must be given a prominent place in article 7, and in that regard the article should be worded more positively. It might be formulated, somewhat along the lines of article 242 of the 1982 United Nations Convention on the Law of the Sea, to read:

> "States and competent international organizations shall co-operate in good faith among themselves in trying to prevent any activities referred to in article 1 carried on in their territory or in other places under their national jurisdiction or effective control from causing transboundary harm."

The Drafting Committee might also wish to consider merging articles 7 and 8.

39. As to the new articles on assessment, notification and information in chapter III of the draft, a critical approach was required in order to determine whether, although based broadly on articles already provisionally adopted in the topic of international watercourses, they might not impose an unnecessarily onerous obligation on the State of origin. The two topics were similar but not identical: the topic of international watercourses had a specific character due to the nature both of the parties and of the activities concerned, whereas the present topic dealt with much more generalized situations which were ill-suited to a rigid and detailed régime. For example, draft article 10 could be read as requiring notification and the communication of information to an indeterminate number of States when the State of origin decided to undertake any activity involving the risk of transboundary harm.

40. Other articles in chapter III, such as articles 13, 14 and 15, were excessively detailed for the purposes of the modest type of framework agreement the Commission had in mind. The general thrust of the Commission's work should be to encourage States to enter into consultations and negotiations when significant adverse effects could be anticipated either by the State contemplating the activity or by any other States likely to be affected or actually affected, so as to minimize, eliminate or mitigate transboundary harm. Rigid provisions with inflexible time-limits might have exactly the opposite result, as they would tend to impose too many restrictions on freedom of action.

41. He fully endorsed draft article 16, on the obligation to negotiate where the States concerned disagreed on the nature of the activity or its effects, or on the necessary legal régime for such activity. He did, however, believe that consultations and the establishment of fact-finding machinery were not necessarily alternatives: they might, in fact, be complementary. It might even be desirable to make specific reference to the involvement of competent international organizations where necessary. Such an approach could well be the best way of ensuring that negotiations were conducted in good faith and that the balance of interests so fundamental to the protection of the rights and legitimate interests of all the States concerned was restored.

42. Mr. ROUCOUNAS said that the Special Rapporteur was to be congratulated on his fifth report (A/CN.4/423), which reflected the proposals made at the Commission's previous session and also in the Sixth Committee of the General Assembly. There was increasing international interest in the present topic and it was important to ensure that the Commission did not lag behind in making its own contribution to the growing corpus of pertinent instruments and texts, which included the OECD drafts and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal,[7] to which reference had already been made. If he had any criticism to make it was that the report was perhaps too abstract and lacked examples to illustrate the nature of the activities covered by the draft articles.

43. The Special Rapporteur had introduced a new element by speaking of activities which, when repeated, could have harmful environmental effects, an approach which seemed to find some support in the General Assembly. Personally, he believed that the Commission should not abandon concepts and terminology that were well established in international law and should not invent new and unnecessary terms. For example, he still doubted whether

[7] See footnote 6 above.

the expression "appreciable risk" was sufficiently established in international practice to merit use in the draft. Also, the term "places", as used in draft articles 1, 2 and 3, should be avoided because the draft would apply to vessels: a vessel could not be regarded as a "place".

44. Regarding the scope of the draft articles, a generally accepted formula could be used, such as "persons and property under the jurisdiction or control of a State", thus avoiding a number of possible semantic difficulties which could hinder the Commission's progress. He also had reservations about the terms "areas" in subparagraph (*c*) of article 2, and about the term "objects" in subparagraph (*e*).

45. As to draft article 4, it should not be forgotten that the draft would be residual in character, and that it would not be possible until the Commission had concluded its work to determine the relationship between the present articles and other international instruments and their status *vis-à-vis* those instruments.

46. Draft article 5 raised the familiar problem of the effect of the present articles on other rules of international law. While he appreciated the Special Rapporteur's efforts to explain his position on that issue, the conceptual framework of the draft remained unclear in that respect, simply because the difficulties involved were generally acknowledged to be considerable. The Commission might find itself suggesting to the General Assembly that, if the present articles were to achieve their purpose, the Commission must go beyond the "lawful"/"wrongful" distinction and concentrate on the aspects of prevention of and reparation for transboundary harm.

47. Draft article 6 was liable to give a misleading impression with regard to sovereignty, and might be a more useful provision if it were less strongly worded. In general, he approved of the revised draft article 7, which introduced the element of co-operation with relevant international organizations.

48. Draft articles 8 and 9 would need further elaboration, since they were concerned with principles. The introductory phrase of article 9 ("To the extent compatible with the present articles"), however, still went beyond the scope of the draft. The "interdependence" alluded to in the report (*ibid.*, para. 70) might indeed be a reality of the modern world, but the Special Rapporteur was only partly correct in going on to assert that it was that interdependence which "makes us all victims and perpetrators". The purpose of the draft was to make provision for prevention and reparation, rather than to establish who was the victim and who the perpetrator. In the absence of an insurance régime for transboundary harm resulting from activities which were not prohibited, the Commission must content itself with proceeding step by step.

49. The title of chapter III of the draft, "Notification, information and warning by the affected State", did not fully reflect the chapter's content. Generally speaking, the main feature of the chapter was that it borrowed heavily from the draft articles on the law of the non-navigational uses of international watercourses. Those articles stemmed from extensive and continuing international practice embodied in a large number of relevant norms, procedures and instruments on a topic which, though related to the present one, was at the same time different. If the provisions of the draft articles on international watercourses were incorporated wholesale into the draft articles on international liability, the result might be to jeopardize what progress the Commission had achieved in the latter area.

50. It could be assumed from the wording of article 10 that the draft was not intended to cover existing activities involving risk, but that it did extend to activities which had a cumulatively harmful effect. That distinction should be brought out more clearly. He agreed with the provision in subparagraph (*a*) that each State should review activities which might cause transboundary harm, but wondered whether a State could meet the requirement in subparagraph (*b*) that it give the affected State or States timely notification of the conclusions of the review, since the State of origin was unlikely to know which States were affected. The wording of the provision should, accordingly, be less categorical.

51. Presumably, the purpose of draft article 12 was simply to afford an affected State the possibility of approaching the State of origin, i.e. to draw its attention to the activity being carried on.

52. The situation envisaged in draft articles 13 to 17 was more complex in that it assumed that the States concerned would enter into a strict legal régime. Draft article 15 established a rather strange legal system in that the primary obligation was still unspecified. By ignoring the fact that the object of the exercise was to draw up a residual régime, the Commission was proceeding towards a presumption in favour of a legal régime proposed by the alleged victim State, without, however, knowing what that régime would consist of.

53. It would be noted that draft article 16 referred to negotiations in the title, but to consultations in the text. Once again, it was necessary to avoid drawing too many parallels with the draft articles on international watercourses, in which the corresponding article[8] reflected a very different approach. With regard to negotiations as such, reference to the precedents on the subject was of necessity incomplete, and two cases in particular, *Minquiers and Ecrehos*[9] and *Delimitation of the Maritime Boundary in the Gulf of Maine Area*,[10] had introduced refinements.

54. Draft article 17 added new elements of presumption and automaticity, elements which would scarcely be acceptable for article 15. What would happen, for example, if the presumed affected State conveyed a warning, and the State of origin replied? Article 17 covered the case in which the State of origin did not reply, but not what would happen if it did. It therefore compounded the difficulties to which article 15 gave rise.

55. Lastly, the draft should include specific provisions on compensation, and they should be considered in detail.

56. Mr. AL-QAYSI paid tribute to the Special Rapporteur's efforts to guide the Commission's work on a topic which, though once of questionable viability, was now regarded as a high priority. The fifth report (A/CN.4/423) showed that the scope of the topic was broader than

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[8] Article 17 (Consultations and negotiations concerning planned measures), provisionally adopted by the Commission at its previous session (see *Yearbook ... 1988*, vol. II (Part Two), p. 51).

[9] Judgment of 17 November 1953, *I.C.J. Reports 1953*, p. 47.

[10] Judgment of 12 October 1984, *I.C.J. Reports 1984*, p. 246.

originally thought; its complexities had likewise been further compounded, and he felt that the Commission should therefore accept a measure of ambiguity in its work at the present stage.

57. Draft article 1 now encompassed activities which actually caused transboundary harm, as well as activities which created an appreciable risk of causing it. The wider scope of the article was gratifying, but the formulation should be sufficiently precise to avoid any confusion between the two kinds of activity. It would be best to deal with them separately, because their consequences were different. For the same reason, the procedural obligations arising from them must, in the subsequent articles, be differentiated accordingly.

58. He supported the amended text of article 1 proposed by Mr. McCaffrey (2109th meeting, para. 13), but had serious doubts about the use of the adjective "appreciable" to qualify "risk". As already pointed out, the texts relied upon by the Special Rapporteur used the term "significant". He was not convinced by the argument in the report (A/CN.4/423, para. 26) in favour of the term "appreciable" on the basis of harmonization between the present topic and that of the law of the non-navigational uses of international watercourses. In the fourth report by Mr. McCaffrey on the latter topic,[11] the term "appreciable" was justified more fully than in the report now before the Commission. It was, moreover, used to qualify harm alone, whereas in the present draft articles it qualified both risk and harm. Indeed, draft article 2 contained five separate uses of the word "appreciable". Moreover, in his report (*ibid.*, para. 57), the Special Rapporteur himself indicated that the threshold of tolerance for the purposes of article 6 would be set by harm which was not "insignificant", rather than by that which was "appreciable".

59. On the question whether the scope of the draft, as defined in article 1, extended to the activities of transnational corporations, much depended on how jurisdiction was understood in relation to the provisions of internal law on such corporations. According to the Special Rapporteur, private corporations shared in the duty of prevention under article 8, "and the State will have to impose and enforce the corresponding obligation under its domestic law" (*ibid.*, para. 66).

60. The formulation of draft article 2 should, as Mr. Hayes (2109th meeting) had suggested, be regarded as provisional until the first reading of the draft articles had been completed.

61. He welcomed the revised title of draft article 3, and was also prepared to accept the substance, but the formulation should be simplified. The useful proposal by Mr. McCaffrey appeared to assume that only activities involving risk were covered; hence the cross-reference to article 1 should be retained.

62. Alternative B of draft article 5 was, in his opinion, the better of the two texts submitted.

63. The co-operation with international organizations required under draft article 7 should be mandatory, since the technical expertise and impartial assistance of such organizations would be valuable to the States concerned. He would query the statement in the report that "such an obligation would not be automatic in all cases, but only in those that required it" (A/CN.4/423, para. 61). Who would decide whether a case required the assistance of an international organization? It was to be inferred from article 7 that both the State of origin and the potentially affected State must agree that such a need existed; but if they failed to agree, would the dissenting State be in breach of the obligation? If that was not the case, the text of article 7 should be amended.

64. If, as the Special Rapporteur suggested (*ibid.*, para. 63), the obligation set out in article 7 was "towards" a régime of prevention, it failed to meet the requirements of equity, since the potentially affected State was not a beneficiary of the potentially harmful activity. By contrast, draft article 8 correctly placed the burden of prevention on the State of origin. Mr. McCaffrey had rightly pointed out that the formula "the best practicable, available means" in article 8 should be explained: the power to act necessarily implied availability of the means to do so.

65. In draft article 9, the term "reparation" should be replaced by "compensation". Such compensation need not, in practice, be confined to monetary compensation; it might include the contribution made by new technologies in remedying a particular case of transboundary harm. But it could not "seek to restore the balance of interests affected by the harm" other than by putting an end to the harmful activity. Presumably, what was actually intended was an adjustment of the balance of interests.

66. In his opinion, articles 1 to 9 were not yet ready for referral to the Drafting Committee.

67. Draft article 12 could include a provision similar to that in paragraph 2 of article 18 of the draft articles on international watercourses.[12]

68. Draft articles 13 to 15 appeared to refer only to prevention of the potential effects of an activity involving risk, yet it was clear from the report (*ibid.*, para. 99) that activities actually causing harm were also covered. Hence there was a lack of consistency with articles 1 and 10, which likewise covered both types of activity. For the sake of clarity the two types of activity should be handled separately, and the substantive obligations arising from each should be specially tailored. The procedural rules set forth in the draft articles on international watercourses could not be followed too slavishly.

69. The two alternative texts proposed in draft article 16 should be treated as a two-tier obligation, and in that connection he commended the solution that had been suggested by the previous Special Rapporteur in section 2 (6) of the schematic outline.

70. In conclusion, he endorsed the practical and modest approach suggested by the Special Rapporteur (*ibid.*, paras. 119-121) for future work on the topic. However, technical advice was indispensable at the present stage and an interdisciplinary approach would help to remove many of the remaining uncertainties.

[11] *Yearbook ... 1988*, vol. II (Part One), p. 205, document A/CN.4/412 and Add.1 and 2.

[12] For the text of article 18 (Procedures in the absence of notification), provisionally adopted by the Commission at its previous session, see *Yearbook ... 1988*, vol. II (Part Two), p. 52.

71. Mr. SOLARI TUDELA said that the draft articles submitted by the Special Rapporteur essentially constituted progressive development of international law, envisaging a range of possible future situations. He agreed with Mr. Francis (2111th meeting) that the present topic was rooted in State responsibility. He recalled that, when it was first taken up in 1978, the Commission had shrunk from designating the harmful acts or activities in question as "lawful", preferring to describe them as "not prohibited by international law". The terminology was extremely important, since many of the activities bordered on unlawfulness, or might become unlawful in the future. There were acts, such as atmospheric nuclear tests, which had already made that transition, and others might follow. For example, chlorofluorocarbons were in everyday use in refrigerators and air-conditioning systems, but one of their effects was to destroy the ozone layer, which was vital to human survival, and their use was soon to be prohibited under a new international treaty. Consequently, the draft should retain the term "reparation" (art. 9), which pertained to State responsibility.

72. He agreed with the suggestions already made that the draft articles should cover the activities of multinational corporations and damage to "the commons" of mankind.

73. Draft article 1 had been properly reformulated to encompass both risk and harm. The difficulty arising with the word "control" was chiefly one of interpretation, and could be resolved in the commentary by citing examples. He maintained his view that a list of harmful activities should be included in the article itself, and would point out that EEC had recently adopted such a list.

74. Draft article 3 was acceptable, but a better title might be "General obligations". Article 4, as now drafted, appeared to contradict the principle that special agreements operated by derogation from general rules.

75. The revised article on reparation, draft article 9, reflected views expressed previously. He agreed with the explanation of the duty of prevention under article 8 given by the Special Rapporteur in paragraph 50 of his fifth report (A/CN.4/423), namely that the duty of reparation under article 9 should be quantified according to the degree of compliance by the State of origin with its duty of prevention under article 8. The process of negotiation, however, should be defined more clearly.

76. As to the procedures set out in draft article 10, a list of the activities concerned would be helpful to States. The word "serious" at the beginning of draft article 12 was unnecessary, since article 10 simply began: "If a State has reason to believe".

77. In his opinion, the draft articles could be referred to the Drafting Committee.

78. Mr. EIRIKSSON said that he welcomed the revised draft articles 1 to 9, which correctly represented the views expressed in the Commission and in the Sixth Committee of the General Assembly. What was destined to emerge from the Commission's work on the present topic was the principle that reparation should be made for significant transboundary harm. Machinery must therefore be devised to assess reparation, and measures must be prescribed to prevent or minimize the risk of such harm, without entering into too much detail. There was too much detail in draft articles 10 to 17. The Commission's next priority should therefore be to frame guidelines for negotiating reparation.

79. As to the scope of the redrafted articles 1 to 9, they should indeed cover both activities causing transboundary harm and activities creating the risk of such harm, but article 1 should draw a clearer distinction between the two. The reference to jurisdiction in article 1 could be omitted, since no departure from general international rules on the matter was involved; article 3, however, included a limitation which required the reference to areas of jurisdiction. Mr. McCaffrey (2109th meeting) had suggested extending the concept of "territory" to include extraterritorial jurisdiction, something that could certainly be done at a later stage, provided States were willing.

80. With regard to the term "appreciable", no scientific definition of transboundary harm was possible, and hence the definition attempted in draft article 2 (*a*) (ii) would be best avoided. In his view, only five of the concepts used in the draft required definition at the present stage: they were risk, the term "appreciable", transboundary harm (including "appreciable" and "continuing" harm), State of origin, and affected State. He agreed with Mr. Reuter (2110th meeting) and Mr. Bennouna that the term "reparation" should be defined to include all forms of compensation and should be distinguished from the same term as used in the context of State responsibility.

81. It was gratifying to see the new paragraph 2 of draft article 3, and also the redrafted version of article 6. Draft articles 7 and 8 should differentiate more clearly between the rules applicable to activities involving risk and those applicable to other activities causing harm.

82. He supported Mr. Hayes's proposal for the wording of draft article 9 (2109th meeting, para. 40), which would ensure protection of the innocent victim. The article must pose a clear duty to negotiate—a mere duty to consult was insufficient—and the guidelines for such negotiations must be devised as soon as possible.

83. His own drafting proposals in regard to chapters I and II of the draft were as follows:

Article 1

"The present articles apply to activities which cause transboundary harm or which create an appreciable risk of causing transboundary harm."

Article 2

"For the purposes of the present articles:

"(*a*) 'Transboundary harm' means appreciable physical harm, including continuing harm, to persons or objects, to the use or enjoyment of areas or to the environment in the territory or in areas under the jurisdiction or control of a State, hereinafter referred to as 'the affected State', which is caused by activities carried on in another State;

"(*b*) 'State of origin' means the State in whose territory or in areas under whose jurisdiction or control the activities referred to in article 1 take place;

"(*c*) 'Risk of causing transboundary harm' means the possibility of causing transboundary harm that cannot be eliminated by any reasonable precautions;"

For subparagraph (*d*), he would seek a definition of "appreciable risk" and "appreciable harm" based on a definable threshold.

Article 3

"1. The State of origin will not have the obligations set out in the present articles with respect to an activity referred to in article 1 unless it knew, or had the means of knowing, that the activity was being or was about to be carried on in its territory or in other areas under its jurisdiction or control."

Paragraph 2 of article 3 would be as proposed by the Special Rapporteur and the title would be "Limitations on applicability".

Article 6

"The exercise by a State of origin of its sovereign right to carry on or permit human activities in its territory or in other areas under its jurisdiction or control must be compatible with the protection of the rights emanating from the sovereignty of other States."

Article 7

"1. States of origin shall co-operate in good faith with affected States in trying to prevent transboundary harm resulting from activities which create an appreciable risk of causing such harm.

"2. Where transboundary harm occurs, the State of origin shall co-operate with the affected State in minimizing its effects."

Article 8

"States of origin shall, in accordance with chapter III, take appropriate measures to prevent or minimize the risk of transboundary harm."

84. He warmly thanked the Special Rapporteur for his efforts and looked forward to a comprehensive set of articles on the topic.

Organization of work of the session (*concluded*)*

[Agenda item 1]

85. Mr. TOMUSCHAT asked whether for the next agenda item to be considered, jurisdictional immunities of States and their property, the articles dealt with in the Special Rapporteur's second report (A/CN.4/422 and Add.1) would be discussed separately or together.

86. The CHAIRMAN said that, since the Drafting Committee needed the views of the Commission on all parts of the draft, members should not be restricted to commenting on separate articles.

87. Mr. OGISO (Special Rapporteur) said that he was willing for the Commission to proceed either with an initial general discussion or on the basis of individual articles. However, since his preliminary report (A/CN.4/415) had not been discussed at the previous session, members might wish to comment first on that report, taking up the second report at a later stage if time permitted.

88. Mr. BARSEGOV said that, if members were not ready to comment on the topic of jurisdictional immunities immediately after the introduction by the Special Rapporteur, the time saved at the next day's meeting could be used by any members still wishing to comment on the topic of international liability. The new concepts involved in the 17 revised or new articles on the latter topic warranted extra time for discussion.

89. The CHAIRMAN said that there could be no question of imposing a time-limit on speakers; however, any time saved from the next day's meeting would be needed by the Drafting Committee.

90. Mr. McCAFFREY suggested that, in order to facilitate orderly consideration, the draft articles on jurisdictional immunities of States and their property should be arranged in groups for discussion purposes. He pointed out that the preliminary and second reports on the topic were interrelated, and it was not feasible for members to deal with them separately.

91. The CHAIRMAN said that the practical problem would be resolved by consultation.

The meeting rose at 1.05 p.m.

* Resumed from the 2109th meeting.

2113th MEETING

Tuesday, 6 June 1989, at 3 p.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Al-Baharna, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

International liability for injurious consequences arising out of acts not prohibited by international law (*continued*) (A/CN.4/384,[1] A/CN.4/413,[2] A/CN.4/423,[3] A/CN.4/L.431, sect. B)[4]

[Agenda item 7]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

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

[2] Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

[3] Reproduced in *Yearbook . . . 1989*, vol. II (Part One).

[4] Consideration of the present topic is based in part on the schematic outline submitted by the previous Special Rapporteur, R. Q. Quentin-Baxter, at the Commission's thirty-fourth session. The text is reproduced in *Yearbook . . . 1982*, vol. II (Part Two), pp. 83-85, para. 109, and the changes made to it are indicated in *Yearbook . . . 1983*, vol. II (Part Two), pp. 84-85, para. 294.