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Summary record of the 2181st meeting

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

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that, even in cases covered by conventions or headquarters agreements, some States might fail to comply with their obligations.

12. He would suggest that the draft articles be referred, together with members' comments and proposals, to the Drafting Committee for further consideration. He wished to assure members that their comments had been greatly appreciated and would serve as a guide in his further work on the topic.

13. Mr. CALERO RODRIGUES said that he had no objection to the Special Rapporteur's proposal, but felt bound to place on record his view that it was not the proper course at the present stage. A question that had wider implications was involved and it did not concern the topic under consideration alone. The question was: should the Commission refer draft articles to the Drafting Committee when it knew that the articles would not be examined by the Committee during the term of office of the Commission's current members? In view of the fact that the new members would not have had an opportunity to study the draft articles, it would be preferable for the Commission in its new membership to take the decision to refer the articles to the Drafting Committee.

14. Mr. THIAM said that, while he understood Mr. Calero Rodrigues's concern, it would not, in his opinion, be a good idea to divide the Commission's term of office into two periods, as it were, one during which draft articles could be referred to the Drafting Committee and one during which they could not. It was not a method of which he could approve.

15. After a procedural discussion in which Mr. DÍAZ GONZÁLEZ (Special Rapporteur), Mr. AL-QAYSI, Mr. FRANCIS, Mr. BARBOZA, Mr. EIRIKSSON, Mr. BEESLEY, Mr. McCAFFREY, Mr. TOMUSCHAT, Mr. GRAEFRATH, Mr. PAWLAK, Mr. ILLUECA, Mr. MAHIOU and Mr. SOLARI TUDELA took part, the CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer draft articles 1 to 11 to the Drafting Committee.

It was so agreed.

The meeting rose at 11.10 a.m. to enable the Planning Group to meet.

2181st MEETING

Wednesday, 27 June 1990, at 10.05 a.m.

Chairman: Mr. Jiuyong SHI

Present: Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo,

Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

International liability for injurious consequences arising out of acts not prohibited by international law (*continued*)* (A/CN.4/384,¹ A/CN.4/423,² A/CN.4/428 and Add.1,³ A/CN.4/L.443, sect. D)⁴

[Agenda item 7]

SIXTH REPORT OF THE SPECIAL RAPPORTEUR
(*continued*)

ARTICLES 1 TO 33⁵ (*continued*)

1. Mr. CALERO RODRIGUES said that his comments would be of a preliminary nature, even though he was well aware that he would have no opportunity at the current session to come back to the topic. Because of its complexity and density, the Special Rapporteur's excellent sixth report (A/CN.4/428 and Add.1) was one of those which could not be considered in their entirety the year they were submitted. He regretted not having had the time to give it the detailed consideration it required.

2. The Special Rapporteur had adopted a constructive and very flexible method of work which enabled him to amend the draft articles in the light of the comments made in the Commission. That flexibility nevertheless had one drawback: the introduction of new concepts and amendments seemed to call into question the purpose of the draft, which had often been discussed in the Commission, most recently at the thirty-ninth session, in 1987. On that occasion, he himself had stated:

... The main purpose of the draft articles should therefore be to delimit the legal consequences of harm caused in the absence of wrongfulness. It would also be useful to include in the draft rules of prevention, which ... would be based on the principle of co-operation. Nevertheless, the essence of the articles should be to establish the legal consequences of transboundary damage.⁶

He was no longer sure, however, that the draft articles were still being developed from that angle, especially when he considered section B of the introduction to the sixth report, entitled "Activities involving risk and activities with harmful effects."

3. Although the Special Rapporteur stated in the report that "the question whether activities involving risk and activities with harmful effects should be considered separately has already been dealt with" (*ibid.*,

* Resumed from the 2179th meeting.

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

² Reproduced in *Yearbook* ... 1989, vol. II (Part One).

³ Reproduced in *Yearbook* ... 1990, 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.

⁵ For the texts, see 2179th meeting, para. 29.

⁶ *Yearbook* ... 1987, vol. I, p. 156, 2019th meeting, para. 8.

para. 3), he discussed it again in no fewer than 12 paragraphs. The very fact that the question was reconsidered at such length was in itself an indication of uncertainty on the part of the Commission. As long as there was any uncertainty, the whole exercise would, despite the progress suggested by the formulation of 33 articles, be on shaky ground. After an extensive analysis, the Special Rapporteur appeared to conclude that, as far as liability proper was concerned, there should be no difference of treatment between the two types of activity. He could not but agree with that view: if harm had occurred, an activity involving risk had become an activity with harmful effects. On the other hand, he found it difficult to see how activities which were classified as activities with harmful effects could be subject to measures of prevention. According to the definition proposed by the Special Rapporteur, activities with harmful effects were "activities . . . which cause transboundary harm in the course of their normal operation" (art. 2, subpara. (f)). If they caused harm—and that was their main characteristic—the harm could not be prevented from having been caused. The harm could be prevented only before it had actually occurred; but, in that case, the activity in question was one which might produce harm and such an activity, at that particular moment, had to be regarded as an activity involving risk, not as an activity with harmful effects.

4. In his view, the Commission should not go into that question any more deeply, even though it could do so, theoretically and semantically. Instead, it should be pragmatic and simply try to formulate rules of prevention to be applied to activities involving risk—risk of harm, of course—as well as rules of liability to compensate for harm caused by activities with harmful effects, whether or not such activities might have been regarded, before the harm had occurred, as activities involving risk.

5. With regard to activities involving risk, he recalled that, in 1987, when the Commission had discussed whether a list of such activities should be drawn up, he had said that it should not. In his opinion: (a) in order to be meaningful, the articles had to be general in nature, and a list could only be contrary to that aim; (b) the activities most likely to be included in such a list, such as nuclear activities, marine pollution, accidents at sea and space activities, should be, or already were, covered in specific instruments; (c) in any event, it would be necessary to define the relationship between the present articles and those specific instruments, as the Special Rapporteur had done in draft article 4.

6. He had thought that the idea of a list had been set aside, but it had come up again now that the Special Rapporteur had introduced the new concept of "dangerous substances". That concept came from the Council of Europe's draft rules on compensation for damage caused to the environment (see A/CN.4/428 and Add.1, footnote 8), although it had already been used in other instruments. The Special Rapporteur had defined the expression in draft article 2, subparagraph (b), "in order to visualize more clearly how the system of a list of dangerous substances would operate" (*ibid.*,

para. 18). He (Mr. Calero Rodrigues) assumed that such a list was intended to contribute to the definition of activities involving risk, but he did not think that it would be of much help, for two reasons. First, it would make it more difficult to classify an activity which did not use a substance included in the list as an activity involving risk; and, secondly, as the Special Rapporteur himself recognized, "if substances are included that cast suspicion on the activities in which they are used, it remains to be seen whether the risk of *transboundary* harm is real" (*ibid.*, para. 17). In fact, an activity which used a dangerous substance was not necessarily an activity involving risk. He therefore believed that the preparation, with the assistance of experts, of a list of "dangerous substances" accompanied by annexes would not be advisable. Such an exercise would involve considerable effort and the resulting list would serve little if any purpose.

7. The concept of "dangerous substances" was already playing havoc with the balance of the proposed articles, particularly article 2, which now included 14 definitions and might cause the Drafting Committee and the Commission a number of thorny problems.

8. The definition of the expression "activities involving risk" in draft article 2, subparagraph (a), was not based on any independent, self-contained concept in describing the activities in question. It relied entirely on three separate concepts: "dangerous substances", "technologies that produce hazardous radiation" and "dangerous genetically altered organisms and dangerous micro-organisms". Any activity which was not related to one of those three elements, even if, objectively speaking, it might be the cause of transboundary harm—for instance, the construction or operation of a dam—would apparently be excluded from the definition and would therefore not be considered an activity involving risk. Moreover, the expressions "dangerous substances", "dangerous genetically altered organisms" and "dangerous micro-organisms" used in subparagraph (a) had to be defined separately, in subparagraphs (b), (c) and (d), respectively; and subparagraphs (b) and (c) had to be expanded on in annexes.

9. The use in a definition of expressions which had to be defined separately did not stop there. Subparagraph (f), which defined the expression "activities with harmful effects", used the expression "transboundary harm", which was defined in subparagraph (g), which contained the expression "[appreciable] [significant] harm", which in turn was defined in subparagraph (h). It was easy to imagine the problems the Drafting Committee would face when it considered the proposed definitions, especially the last sentence of subparagraph (g), subparagraph (k), according to which a "continuous process" could be an "incident", and subparagraph (l), which provided that "restorative measures" were measures to replace "natural resources" and was far too restrictive. The fact that subparagraphs (g) and (l) were based on the Council of Europe's draft rules (see para. 6 above) did not make them any more acceptable. As to subparagraph (k), the Council of Europe's text, quoted in the report (A/CN.4/428 and Add.1, para. 24 *in fine*), was better,

since it referred to “any sudden or continuous occurrence”.

10. Lastly, subparagraph (*m*), on preventive measures, which must be read in conjunction with subparagraph (*l*) on restorative measures, called for a number of comments. According to subparagraph (*m*), “preventive measures” meant measures to prevent the occurrence of an incident or harm and measures intended to contain or minimize the harmful effects of an incident once it had occurred. He had never cared for the concept of prevention after the event, first introduced by the previous Special Rapporteur, Mr. Quentin-Baxter, and now used by the current Special Rapporteur. It seemed to be a contradiction in terms: prevention, which by definition preceded the event, was not possible after the event had occurred. That appeared, however, to be a question of semantics because both Special Rapporteurs had included in the idea of prevention two different concepts, which could be seen in subparagraph (*m*), namely measures to prevent an occurrence and measures to prevent the harmful effects of the occurrence. If that was the case, the distinction should be made clear. For the first type of measures, the provision should not speak of “measures to prevent the occurrence of an incident or harm”, but only of “measures to prevent an incident”; as to the second type of measures, the text should read: “measures to avoid, contain or minimize the harmful effects of an incident once it has occurred”. He was deliberately using the terms employed in subparagraph (*m*), but the text could also be reworded. To make the distinction even clearer, the provision might contain two separate terms to designate the two sets of measures. The question was not purely one of semantics: agreement on precise terminology would be most useful in clarifying the concepts embodied in draft article 8 (Prevention) and in the whole of chapter III of the draft.

11. With regard to chapter II of the draft, devoted to principles and consisting of articles 6 to 10, the only changes made in the sixth report to the texts submitted in the fifth report (A/CN.4/423) were of a drafting nature and the only real innovation was the introduction, in a new article 10, of the principle of non-discrimination. In annex I of the draft articles on the law of the non-navigational uses of international watercourses, submitted in his sixth report on that topic,⁷ Mr. McCaffrey had also proposed provisions on non-discrimination, drawing inspiration from the 1982 United Nations Convention on the Law of the Sea and the 1974 Convention between Denmark, Finland, Norway and Sweden on the protection of the environment (see A/CN.4/384, annex I). In the present case, Mr. Barboza had drawn on texts prepared by the Experts Group on Environmental Law of the World Commission on Environment and Development (see A/CN.4/428 and Add.1, paras. 29-30).

12. The two Special Rapporteurs had produced texts that were similar in content, but quite different in form. Draft article 10 submitted by Mr. Barboza contained two sentences, each of which aimed to prevent a form

of discrimination. Mr. McCaffrey had also provided for those two aspects, but in several provisions, which, as he (Mr. Calero Rodrigues) pointed out during their consideration, could be grouped. The text proposed by Mr. Barboza was thus more in keeping with his expectations, since he was in favour, first, of a provision stating that harmful effects arising in the territory of another State must be treated in the same way as those arising in the territory of the State of origin and, secondly, of extending to foreign victims the same access to the courts and the same remedies as those enjoyed by the nationals of the State of origin. Although article 10 was not entirely satisfactory and must be substantially amended, the general ideas on which it was based and which were also contained in the provisions proposed by Mr. McCaffrey were entirely valid.

13. Turning to chapter III of the draft, devoted to prevention and consisting of articles 11 to 20, he noted with satisfaction that the Special Rapporteur had chosen to simplify the procedure for co-operation and prevention in a number of ways. The principle had also been introduced that failure on the part of the State of origin to comply with the obligations enunciated did not constitute grounds for an affected State to institute proceedings (art. 18). He fully supported the idea that failure to comply with procedural obligations did not constitute grounds for instituting proceedings, but he wondered whether the Special Rapporteur had not gone a little too far, since the obligations referred to in draft article 18 were the “foregoing” obligations. In the articles preceding that provision, the distinction between procedural obligations and substantive obligations had not been made clear. He welcomed the simplification of procedures, but, unfortunately, they had also been so diluted as to make them indistinguishable from substantive obligations. That was the case in draft article 11 (Assessment, notification and information): notification was a procedural obligation, but information might be regarded as a substantive obligation. The same applied to draft article 14 (Consultations): an obligation to consult in order to establish a régime for a given activity and the obligation to hold joint meetings for that purpose might be regarded as procedural obligations, whereas a general obligation to consult might be considered a substantive obligation.

14. He therefore took the view that obligations that were clearly procedural should be clearly identified, because failure to comply with them would not have legal consequences. On the other hand, substantive obligations would give rise to the right to institute proceedings. Thus, if the system envisaged was to be viable, the obligations should not be too stringent: failure to comply with them would have legal consequences. For example, draft article 16 should be entirely redrafted so as to indicate only the essentials of the obligation to take unilateral preventive measures.

15. With regard to the role that the relevant international organizations might be called upon to play, he was not satisfied with the wording of paragraph 2 of draft article 11 or of draft article 12. Article 11, paragraph 2, provided that, if the State of origin was unable to determine precisely which States would be

⁷ *Yearbook . . . 1990*, vol. II (Part One), pp. 58 *et seq.*, document A/CN.4/427 and Add.1.

affected by transboundary harm, an international organization with competence in that area was also to be notified; but he doubted that that was an obligation. Article 12 stated that any international organization that intervened was to participate in the manner stipulated in the relevant provisions of its statutes or rules, if the matter was regulated therein, and, if it was not, the organization was to use its good offices to foster co-operation between the parties. There again, he was not sure about the possible role being attributed to international organizations.

16. He had considerable doubts about the need for draft article 17 and also about the justification for the very concept of a "balance of interests", which, although it might prove useful from the theoretical point of view, did not deserve a place in the draft articles from the practical point of view. Furthermore, in the sixth report, the Special Rapporteur himself confessed to "a certain lack of enthusiasm for including such concepts in a body of norms, because they are only recommendations or guidelines for conduct and not genuine legal norms, and because the factors involved in this kind of negotiation are too varied to be forced into a narrow conceptual framework" (A/CN.4/428 and Add.1, para. 39).

17. Lastly, the Special Rapporteur had been too cautious with the wording of draft article 20. Prohibiting an activity was a serious matter, but, when it was obvious that an activity was about to cause or was causing considerable harm, the activity became wrongful by that very fact and its prohibition should unquestionably be stated in the form of a rule. It might even be possible to define harmful effects by choosing a ceiling that was not too low. However, the only prohibition provided for in article 20 was the refusal to authorize the activity in question, leaving the operator complete discretion for proposing less harmful alternatives.

18. Mr. BEESLEY said that, although he was not yet prepared to take the floor, he fully endorsed the comments made by Mr. Calero Rodrigues.

19. It seemed to him that the new articles proposed by the Special Rapporteur, despite being based on a variety of opinions, reflected a retreat on a number of points and a departure on others at a time when the Commission was making definite progress in its pioneering work. The approach appeared to be so narrow as to run counter to the objective sought. He was particularly troubled by the emphasis placed on dangerous substances, some of which were already the subject of instruments in force, and above all by the shifting away from harm to *ex post facto* risk as the basis for liability.

The meeting rose at 10.45 a.m. to enable the Planning Group to meet.

2182nd MEETING

Thursday, 28 June 1990, at 10 a.m.

Chairman: Mr. Jiuyong SHI

Present: Prince Ajibola, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Diaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

International liability for injurious consequences arising out of acts not prohibited by international law (*continued*) (A/CN.4/384,¹ A/CN.4/423,² A/CN.4/428 and Add.1,³ A/CN.4/L.443, sect. D)⁴

[Agenda item 7]

SIXTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLES 1 TO 33⁵ (*continued*)

1. Mr. BARBOZA (Special Rapporteur) said that he wished to clarify certain points raised in the statements made at the previous meeting. In the first place, he wished to reassure Mr. Beesley that the introduction of the concept of "dangerous substances" did not mean any radical departure from the earlier approach. In fact, the approach was still the same: provision was being made for activities which had harmful effects.

2. The concept of "dangerous substances" helped to make the key notion of "appreciable" or "significant" risk more precise. It was in the nature of an alarm signal for any operator using such substances, and for his Government: both knew that certain obligations were incumbent upon them and that certain precautions were in order. The introduction of that concept thus eliminated the uncertainties involved in one of the two aspects of "appreciable" risk: that of its being "foreseeable" or "appreciable at first sight" after a simple examination.

3. Mr. Calero Rodrigues had said that the concept of "dangerous substances" was unduly narrow, citing the example of a dam: water was in itself not a dangerous substance but could cause transboundary harm. Water could thus be considered dangerous in certain quantities or concentrations or in certain situations, "without prejudice to the provisions of subparagraph

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