Document:-
A/CN.4/SR.2185

Summary record of the 2185th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1990, vol. I

dispensed with, to enable more victims to claim compensation more rapidly, there must, in the interest of fairness to the operator, be a ceiling on financial liability, which might vary according to the activity covered. Looking beyond the limitations of the traditional law of tort, he considered that the kind of approach he had outlined could best resolve the difficulty.

58. In adopting a broad concept of damage, to include damage to the environment, the Commission must not disregard the goals of restoration and of adequate and reasonable compensation, nor must it unduly burden the operator, the State or the international community. Prescriptions for bilateral or multilateral negotiations, or specific rules of procedure for notification, consultation and dispute settlement, could only be effective if there were generally accepted common standards and fairly shared benefits and burdens. All parties concerned must be willing to achieve a balance of interests by accommodating all legitimate competing interests. Otherwise, the procedural obligations would merely lead to disputes and jeopardize friendly relations. Hence he was not convinced that the draft articles should give priority to procedural obligations, which could be considered after an acceptable régime on liability had been developed.

59. Attention should be paid to the concerns of the developing countries, their present stage of economic development, and the need to share with them current knowledge on the conduct of dangerous activities. They stood in need of training, as well as technical and financial assistance, in order to develop the necessary infrastructure to achieve a safe environment and sustainable development. Multinational corporations operating in their territories must conform with international standards of accountability and liability. Developing States had difficulty in obtaining the transfer of appropriate technology under equitable terms and they were anxious to exercise control over the natural resources under their jurisdiction, and to remain competitive in world trade and international markets.

60. Turning to the draft articles, he would prefer to replace the word "places", in article 1, by "areas". He agreed with Mr. Graefrath that the proposed definitions of terms in article 2 could be regarded as guidelines and reviewed later. Article 3, however, required more careful consideration and a detailed commentary. If liability was to be established, the State of origin must be fully aware of the potential risk of an activity, not merely of its existence. The Bhopal disaster was a particularly relevant example in that regard. There must also be an element of control over the activity in question and it should be made clear in the commentary that an important factor in the attribution of responsibility would be the operator's profit from the activity.

61. He objected to the expression "sovereign freedom", in article 6, and would prefer the word "right". The language of article 7 was too complex. The intention was, apparently, to require States to reduce or contain the risks of an activity, without preventing the activity itself; but the sense should be brought out more clearly.

62. With regard to article 12, he agreed with Mr. Al-Baharna (2183rd meeting) that the word "intervene" should be avoided in relation to international organizations. They were to be invited, on a consensual basis, to bring their skills and expertise to bear in the management of a crisis. As Mr. McCaffrey had pointed out, the various factors listed in article 17 should be weighted, either in the commentary or in additional paragraphs.

63. The obligation, in article 21, to negotiate full compensation was too far-reaching and would not be accepted by States. Because exonerating factors were allowed for in article 23, there would be problems in the negotiating process if the principle of full compensation was upheld. In the same article, the phrase "if the State of origin has taken precautionary measures ... and the activity is being carried on in both States" was difficult to understand. The fact that an activity was conducted by both States, rather than by the State of origin alone, made no difference to the outcome. If both States were operating nuclear reactors, and one of the nuclear reactors was involved in an incident, the activity by the other State was irrelevant.

64. In article 24, the Special Rapporteur had attempted to bring within the compass of a single article both harm to the environment and harm to persons or property. In his opinion, the two types of harm should be treated separately, even if the requirement of reparation and compensation was the same. Again, the exoneration from liability in article 26, paragraph 1 (*b*), was not stated clearly. Was it the intention to extend liability to a person who caused harm and affected innocent persons in the process? Provision must also be made for acts by terrorists, for harm to innocent victims and for measures of relief and restoration.

65. Lastly, with regard to article 29, he pointed out that even the affected State might want to pursue a remedy in the courts of the other State, and that possibility should not be foreclosed. In other respects, he agreed with the Special Rapporteur's proposals.

The meeting rose at 6.15 p.m.

2185th MEETING

Tuesday, 3 July 1990, at 3 p.m.

Chairman: Mr. Jiuyong SHI

Present: Prince Ajibola, 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. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo,

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

State responsibility (*concluded*)* (A/CN.4/416 and Add.1,[1] A/CN.4/425 and Add.1,[2] A/CN.4/L.443, sect. C)

[Agenda item 3]

***Part 2 of the draft articles*[3]**

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

ARTICLE 8 (Reparation by equivalent)

ARTICLE 9 (Interest) *and*

ARTICLE 10 (Satisfaction and guarantees of non-repetition)[4] (*concluded*)

1. The CHAIRMAN recalled that the Commission still had to take a decision concerning draft articles 8, 9 and 10. From the consultations he had held, he had the impression that the Commission wished to refer those articles to the Drafting Committee, on the understanding that the Committee would take full account of the comments and observations made during the debate.

It was so agreed.

International liability for injurious consequences arising out of acts not prohibited by international law (*continued*) (A/CN.4/384,[5] A/CN.4/423,[6] A/CN.4/428 and Add.1,[7] A/CN.4/L.443, sect. D)[8]

[Agenda item 7]

SIXTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLES 1 TO 33[9] (*continued*)

2. Mr. OGISO said that there was even more reason than at earlier sessions to be grateful to the Special Rapporteur, whose sixth report (A/CN.4/428 and Add.1) contained all the articles of chapters I to V of the draft, as well as an outline on liability for harm to the environment in areas beyond national jurisdictions —the "global commons". The Commission thus had a general picture of the topic and of the links between the respective chapters.

3. Most of his comments on the report would be of a preliminary nature and it was possible that, on reflection, he might change his position on certain points. There were three general points which were of basic importance for the consideration of the topic.

4. First, it appeared that the concept of transboundary harm, as defined in subparagraph (*g*) of draft article 2 (Use of terms), was confined to harm "which arises as a physical consequence of the activities . . ." and that economic harm was therefore excluded.

5. Secondly, with reference to the Special Rapporteur's own interpretation of the draft articles, he said that he was not sure whether there had been any formal agreement that the articles would constitute a framework convention in the sense in which the Commission understood that term as far as the topic of the law of the non-navigational uses of international watercourses was concerned. If there had been such an agreement, however, the articles would be binding on the parties only to the extent that they had concluded an international agreement in respect of certain dangerous activities or substances, and the convention would then serve only as guidelines for that agreement. In the absence of a special agreement, the convention would not be binding on the parties. That seemed to be the Special Rapporteur's intention in draft article 4 (Relationship between the present articles and other international agreements), which included the words "subject to that other international agreement". However, article 4 really meant that, if another agreement contained the same provisions as the future convention, those provisions would apply for States which were parties both to the agreement and to the convention and that, if there were no other agreement, the convention would be binding on the parties. That would certainly make the convention a framework convention within the meaning assigned by the Commission to the draft articles on international watercourses. He personally did not object to the present draft being treated in that way, but, if his interpretation was correct, it should be duly recorded as that of the Commission.

6. Thirdly, he would prefer activities involving risk and their legal consequences to be classified in the following way. The first group was that of activities which involved a high probability of accidents or

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* Resumed from the 2175th meeting.

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

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

[3] Part 1 of the draft articles (Origin of international responsibility), articles 1 to 35 of which were adopted on first reading, appears in *Yearbook . . . 1980*, vol. II (Part Two), pp. 30 *et seq.*

Articles 1 to 5 of part 2 of the draft (Content, forms and degrees of international responsibility), which were provisionally adopted by the Commission at its thirty-fifth and thirty-seventh sessions, appear in *Yearbook . . . 1985*, vol. II (Part Two), pp. 24-25. For the texts of the remaining draft articles of part 2, articles 6 to 16, referred to the Drafting Committee by the Commission at its thirty-sixth and thirty-seventh sessions, *ibid.*, pp. 20-21, footnote 66. For the texts of the new articles 6 and 7 of part 2 referred to the Drafting Committee at the forty-first session, see *Yearbook . . . 1989*, vol. II (Part Two), pp. 72-73, paras. 229-230.

Articles 1 to 5 and the annex of part 3 of the draft ("Implementation" (*mise en œuvre*) of international responsibility and the settlement of disputes) were considered by the Commission at its thirty-eighth session and referred to the Drafting Committee. For the texts, see *Yearbook . . . 1986*, vol. II (Part Two), pp. 35-36, footnote 86.

[4] For the texts, see 2168th meeting, para. 2.

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

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

[7] Reproduced in *Yearbook . . . 1990*, vol. II (Part One).

[8] 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.

[9] For the texts, see 2179th meeting, para. 29.

incidents causing considerable or disastrous transboundary harm. Activities of that kind should be covered by the prohibition provided for in draft article 20 (Prohibition of the activity). He cited the example of a nuclear reactor which had become so obsolete that its safe operation could not be guaranteed and which therefore involved a high probability of accidents, including transboundary harm. In that case, the State which exercised jurisdiction or control over the reactor had to prohibit continued operation; if it failed to do so and transboundary harm occurred, it would be under an obligation to pay full compensation to the affected States.

7. The second category of activities included those which normally involved a low probability of causing transboundary harm, but which, in the event of an accident, could have physical consequences constituting considerable or disastrous transboundary harm. That category would include "ultra-hazardous" activities. In accordance with emerging international practice, liability for the harm had to be borne by the operator in such a case. The same rule could apply to transboundary harm caused by an activity involving risk, in which case the operator's liability could, in principle, be "causal" liability. The State in whose territory or under whose jurisdiction or control the activity was carried on would not bear primary liability for the damage, unless it was itself the operator. However, if the operator could not pay full compensation, the State of origin would be held subsidiarily liable. In that connection, it would be desirable to set up a special legal régime on prevention, negotiation and compensation among the States concerned, as provided for in draft article 14 (Consultations). Only in the context of such a special régime could he accept the idea of strict or causal liability advanced by the Special Rapporteur.

8. The third category consisted of activities which involved a high probability of causing transboundary harm, but whose physical consequences were much less significant or "appreciable" than those in the second category. Liability for damage resulting from activities of that kind could also be placed primarily on the operator, the State of origin becoming liable only if it had failed to fulfil the obligation of due diligence.

9. That classification of activities and their legal implications might differ from the approach adopted by the Special Rapporteur, but he hoped it would be taken into account in the consideration of the topic.

10. Turning to the draft articles, he said that, with regard to article 2, he doubted whether the "dangerous substances" listed in subparagraph (*b*) covered every category of dangerous materials or substances. For instance, chemical agents, which were to be listed in the convention on chemical weapons being prepared within the United Nations, were excluded. If the list was to be retained, it should not be left in article 2, but should be placed in an annex as an exhaustive list subject to periodic review. He did not think it would be useful to have a purely illustrative list.

11. As to the choice between the terms "appreciable" and "significant" in subparagraph (*b*) and other provisions of the draft, he would prefer the word "significant", because the word "appreciable" was too vague. In that connection, subparagraph (*h*) should be simplified to read: " 'Significant harm' means harm which is greater than normally tolerated". The expression "mere nuisance" was tautological and would require further explanation.

12. In subparagraph (*k*), the Special Rapporteur defined the word "incident", which was used, for instance, in draft article 16; but he also used the word "accident" in draft articles 7 and 27. It appeared, *prima facie*, that the word "incident" was intended to mean any sudden event which caused transboundary harm or created the risk of causing it, whereas the word "accident" would mean any event which had actually caused harm. If so, was it not necessary to define the word "accident" as well? If not, and if the two words were interchangeable, why not use only one?

13. In the definition of the expression "preventive measures" in subparagraph (*m*) of article 2, reference should be made to "transboundary harm" and the words "an incident or harm" should be replaced by "an incident causing transboundary harm", in line with subparagraph (*k*).

14. At the previous session, several members of the Commission had expressed doubts about the title of draft article 3 (Assignment of obligations) and had asked for clarifications. In his sixth report, the Special Rapporteur did explain the term "obligations", but not the term "assignment".

15. In draft article 7 (Co-operation), he welcomed the reference to assistance by international organizations, but he was not sure whether the constituent instruments of international organizations would allow them to provide such co-operation. For safety's sake, article 7 should refer to the need to conclude co-operation agreements.

16. Subject to any drafting improvements to be made by the Drafting Committee, draft article 8 (Prevention) was acceptable, as was the alternative text suggested by the Special Rapporteur in the footnote to the article in the annex to the report.

17. He preferred the alternative text for draft article 9 (Reparation) suggested in the footnote to the article, on the assumption that the words "the State of origin shall ensure" meant that the State of origin had an obligation to take appropriate legislative or administrative measures to facilitate the payment of compensation by the operator and to establish a fund to supplement compensation paid by the State itself. In the text proposed in the annex itself, the words "appreciable harm" should be replaced by "significant transboundary harm" in order to take account of the definitions of the expressions "transboundary harm" and "significant harm" and to avoid the ambiguity of the present wording.

18. With regard to draft article 11 (Assessment, notification and information) and draft article 13 (Initiative by the presumed affected State), he would like some clarification concerning the following hypothetical situation: if a ship of State A noticed that a ship of State B was conducting on the high seas an

activity referred to in article 1, what should it do? Should it inform State A, State B or indeed the affected State, if the latter's identity was not in dispute? Or was it State A which should inform either State B or the affected State? He hoped that some explanations would be given in the Special Rapporteur's next report.

19. The title of draft article 14 (Consultations) was too weak compared to the measures of implementation to be taken. The article should, in fact, cover both consultation and negotiation among the countries of the region or among the States concerned by particular activities involving risk. For example, if a nuclear power station was built, the State which built it and the States which might suffer the consequences of an accident arising from it might consult and negotiate with a view to devising a legal régime for that activity.

20. Although he thought that draft article 15 (Protection of national security or industrial secrets) was necessary, he was concerned about its wording. Again taking the example of an obsolete nuclear reactor, where there was a danger of explosion or a leak, he asked whether a State could refuse to provide information on such a plant by advancing the argument of national security. Conceivably, a State might even refuse to disclose the existence of such a dangerous activity. In his view, the existence and location of a dangerous activity should not be concealed on the pretext of national security. Article 15 should therefore be reconsidered in that light.

21. He supported the concept of a "balance of interests" in draft article 17, but had doubts about the usefulness of including a detailed list of the factors involved. It would be enough to describe in general terms what was meant by a "balance of interests". He would, however, also have no objection if the explanation were included in the commentary.

22. As he had already explained, he took the view that the prohibition provided for in draft article 20 should apply to the first group of activities in the classification he had proposed, namely activities which involved a high probability of causing disastrous transboundary harm. The article would have to be reformulated along those lines. In particular, he wished to know whether, as it now stood, article 20 merely meant that the State of origin must refuse authorization for a planned activity or whether it was also obliged to withdraw authorization when an activity became so dangerous that transboundary harm might occur. Furthermore, the article referred to the obligation of the State of origin to refuse authorization if an assessment showed that transboundary harm was unavoidable or could not be adequately compensated for. He wondered whether the words "cannot be adequately compensated for" referred to the operator's capacity for compensation or to supplementary compensation by the State.

23. He agreed with the Special Rapporteur's idea to provide in draft article 22 (Plurality of affected States) for the intervention of an international organization where more than one State was affected, but pointed out that an international organization might not be competent to intervene, even at the request of one of the affected States, if the State of origin was not a member of the organization. He would like to hear the Special Rapporteur's view on that point.

24. He endorsed the basic idea contained in draft article 23 (Reduction of compensation payable by the State of origin), but he wished to know why the words "precautionary measures" had been used instead of "preventive measures".

25. It was his understanding that, in draft article 25 (Plurality of States of origin), alternative A was based, *mutatis mutandis*, on article V of the 1972 Convention on International Liability for Damage Caused by Space Objects. However, he had doubts as to the applicability of that provision to the present topic. He was also not convinced that alternative B could solve the problems arising from a plurality of States of origin, because it would in practice be very difficult to attribute liability on a *pro rata* basis according to the harm incurred by each affected State. In any event, article 25 required further consideration.

26. If the word "Proceedings" used at the beginning of draft article 27 (Limitation) meant proceedings instituted before the courts of the State of origin or the affected State, the limitation of such proceedings should be determined in accordance with the domestic legislation or the code of civil procedure of the country concerned. It would be difficult to establish a uniform rule in the draft articles.

27. Draft article 28 (Domestic channel) drew on the idea contained in article XI of the Convention on International Liability for Damage Caused by Space Objects, and the Special Rapporteur stated in the report that "As a minimum, the present articles could establish a system based in part" on that Convention (A/CN.4/428 and Add.1, para. 63). He was not convinced, however, that it was justified to generalize or to apply automatically the rule or principle contained in article XI to all cases of transboundary harm.

28. Draft article 31 (Immunity from jurisdiction) and draft article 32 (Enforceability of the judgment) departed from the solutions proposed in the draft articles on jurisdictional immunities of States and their property. Although the Special Rapporteur was completely free to propose his own concept of State immunity, careful consideration was needed when that concept deviated from the one followed in the Commission's study on the topic of jurisdictional immunities as such.

29. With regard to the question of areas beyond national jurisdictions—the "global commons"—he took the view that, in the topic under consideration, it was premature to speak of liability for harm caused to such areas.

30. In the first place, the understanding reached on the scope of the topic had been to deal with transboundary harm which arose as a physical consequence of the activities referred to in article 1 and which, in the territory or in places under the jurisdiction or control of another State, was significantly detrimental to persons, objects, property, etc. (art. 2 (*g*)). The vague concept of "harm to the global commons" did not fit those conditions and would only cause confusion.

31. Secondly, the protection of the global commons could be ensured through international co-operation on preventive activities; there was no need to introduce a legal principle for compensation or to set up a régime of international liability. For example, to tackle the problem of the greenhouse effect, more scientific data should first be collected so as to determine with some accuracy what was causing the phenomenon of global warming and then to create international co-operation mechanisms to control the phenomenon on the basis of scientific knowledge. It was unnecessary to establish prematurely a régime of international liability for harm to the ozone layer: instead, effective mechanisms must be instituted for implementing or enforcing the principles and rules embodied in the 1985 Vienna Convention for the Protection of the Ozone Layer and its 1987 Montreal Protocol.

32. Mr. PELLET said that he would make a few general comments on the substance of the topic before turning to more specific points.

33. In considering the present topic, the Commission must start by giving some thought to the line of reasoning on which international liability was based. He had reservations in that regard about the distinction which the Special Rapporteur had drawn between "activities involving risk" and "activities with harmful effects". He wondered whether, in the first case, liability was meant to be based on risk and, in the second, on harm. In his view, risk gave rise to liability and harm gave rise to reparation in both cases. In the draft articles on State responsibility for internationally wrongful acts, it had been logical to distinguish between responsibility and reparation; but, in the topic under discussion, liability appeared to be a "digest" of sorts and was in fact largely synonymous with reparation. In other words, reparation became the key element. It was no longer one consequence of liability among others: where there was harm, there must be reparation. That was the reasoning on which the draft articles were based, especially draft article 9, and he wondered why the Special Rapporteur had not indicated more clearly that harm had been the focus of his thinking. Personally, he had no objection to the idea of harm serving as the foundation for the system of liability, because certain circumstances could be found in practice in which harm resulting from a lawful activity could give rise to reparation, for example the nationalization of foreign property, although in principle the nationalizing State did not incur any liability. On the contrary, in the context of the draft articles under consideration, the reason harm must be repaired was that it was caused by an activity involving risk, so that it could be said that risk gave rise to liability and harm gave rise to reparation.

34. In his view, however, the real question lay elsewhere: whether the harm caused by an activity involving risk must be repaired. Draft article 9 replied that it must: "the State of origin shall make reparation for appreciable harm". He was not convinced that that was a rule of positive law. Although there probably were international régimes of strict liability in certain areas that were part of positive law, those were conventional régimes in areas of very limited scope and there was no reason to conclude that such rules could be generalized. The Commission could thus not consider that, in the present case, it was engaged in codification: its efforts were an attempt at progressive development and they were very ambitious, because the case under consideration could not be regarded as the crystallization of a custom that was in the process of taking shape. It was a question of establishing a new rule virtually from scratch—and that made him wonder about the important question of the purpose of the draft.

35. The Special Rapporteur appeared to regard the draft articles as a first step towards the conclusion of an international convention. He personally doubted whether such an approach was appropriate or realistic. Even if the development of international law to which the Special Rapporteur was leaning seemed desirable as such, it was important not to overlook a basic element: the accession of States, or at any rate of the main States concerned, would be essential if the future convention was to have a practical effect. He greatly feared, however, that States would be reluctant to accept liability in such a general form, even if it was imposed only in a rather "soft" way.

36. He also wondered whether the draft articles might not be out of date even before their completion. The draft was justified by the absence of relevant rules; it was necessary to turn to the idea of strict liability because positive international law did very little to regulate activities involving risk. However, he had been struck by the fact that those activities, most of which were new, had been increasingly codified: either the need for States to be vigilant in respect of such activities was stated in conventions, or certain activities were globally condemned, as in the case of the attempt to make massive pollution of the environment an international crime. That then led back to the more familiar area of liability for failure to comply, and in those conditions it was perhaps unnecessary to seek the basis of liability in "strict" or "causal" liability.

37. For those reasons, he suggested that the draft articles should be divided into two separate parts. The first part would contain a set of relatively detailed and stringent articles devoted exclusively to defining the obligation of States to be vigilant; it would include questions of both prevention and co-operation, and would more or less cover chapter III of the present draft. The second part would be composed of "model clauses" in respect of strict liability as such and would correspond to chapters IV and V of the present draft. Those clauses, which might be adjusted according to the types of activities envisaged, would serve as a reference for States during negotiations on specific activities.

38. That division would improve the draft's effectiveness. Furthermore, it would avoid having to decide on the justification of "causal" liability, a concept on which the Commission was divided. In the event of failure to comply with the obligation to be vigilant, the liability of the State of origin would be that dealt with in the draft articles on State responsibility.

39. In the draft articles submitted by the Special Rapporteur, he wondered whether, since "soft law" already

existed, the Commission was not in the process of creating "soft liability". Chapter III, for example, contained a number of expressions that watered down the obligation of prevention embodied in draft article 8: "in an attempt to establish" (art. 14); "encouraging the adoption of compulsory insurance" (art. 16); "may . . . take into account the following factors" (art. 17); and "the State of origin shall refuse [*devrait refuser*] authorization" (art. 20). Not only were no legal sanctions envisaged in the event of failure to comply with those "soft" obligations, but draft article 18, to the very principle of which he was strongly opposed, even excluded any ordinary-law penalties. The same soft approach could be found, to a lesser degree, in chapters IV and V of the draft. Those precautions were probably meant to reassure States, but he wondered whether that did not go too far and whether, by not laying down real obligations, the Commission was not confirming doubts as to whether the future convention was really necessary. Such caution was particularly excessive because it meant lagging behind existing general international law, for example the decision in the *Trail Smelter* case (see A/CN.4/384, annex III). Not only was no progress being made on prevention and on certain aspects of reparation, but there was even a tendency to regress. That did not contradict what he had already said about the absence of rules of positive law. It was in the area of vigilance and of the consequences of failure to comply with the obligation to be vigilant that the draft did not go as far as it should. On the other hand, with regard to reparation without failure to comply with that obligation, it seemed to go too far and to depart rather dangerously from positive law, particularly as far as the question of that liability was concerned.

40. On that point, he agreed with Mr. Graefrath (2183rd meeting): in the case of the activities under consideration, primary liability lay not with the State, but with the operator. That was generally the case in existing conventions, which virtually all embodied the principle of supplementary compensation by the State, under which the operator paid compensation up to a previously set threshold and the State paid the remainder. States might also be obligated more strictly than under draft article 16 to see to it that the operator was properly insured. Shifting primary liability from the operator to the State was another matter entirely, however, and that was probably one of the points on which the draft went the furthest.

41. Turning briefly to a number of specific points, he shared the surprise expressed by Mr. Hayes (2182nd meeting) at the rather sudden appearance of the concept of "an international organization with competence" in draft articles 11, 12 and 22. He wondered which organization was meant and on what basis it could intervene. Moreover, draft articles 11, 12 and 13 could be grouped with draft article 14, and draft article 16 should be the first article in chapter III.

42. He had reservations about the wording of draft article 21 and thought that it would be more logical to state the principle of compensation before referring to negotiations. In draft article 23, the passage in square brackets, which was purely illustrative, should be placed in the commentary. He did not see why the fact that the affected State was benefiting without charge should have a bearing on the agreement reached. He also had doubts about draft article 24, because he was not sure that the draft should deal with harm to the environment. If it was believed that the question really raised a particular problem, it should be taken up in a separate convention. Article 24 also addressed the question of the exhaustion of local remedies. Although paragraph 3 provided that the claim for reparation could be made through the diplomatic channel, the diplomatic procedure was usually subordinated, at least in ordinary international law, to the exhaustion of local remedies. In draft articles 28 *et seq.*, however, the Special Rapporteur appeared to want to exclude that customary rule of international law, probably in order to ensure speed and efficiency. If that was his intention, it would have to be expressed clearly in the draft itself, and not just in the commentary.

43. He also objected to draft article 26, paragraph 1 (*a*), for it was not certain that an exception resulting from "a natural phenomenon of an exceptional, inevitable and irresistible character" really belonged in the draft in such a general form in view of the draft's objectives and the particular nature of the liability under consideration. While he was not opposed to draft article 30, he believed it would be useful to recall—even if it was obvious—that international law was applicable in addition to national law.

44. Chapter VI of the Special Rapporteur's sixth report (A/CN.4/428 and Add.1), to which the preceding speakers had hardly referred, was a useful basis for discussion. Throughout his reading of the first five chapters of the report and the draft articles contained in the annex, he had been concerned about the absence of any reference to areas beyond national jurisdictions and he therefore welcomed the Special Rapporteur's initiative. In that connection, however, he had reservations similar to those he had expressed with regard to draft article 24 as it related to harm to the environment, because, once again, the problem was a very special one. He wondered whether it might not be preferable to state in the draft articles that harm caused to or in areas beyond the national jurisdiction of States was not being taken into account and to consider that question separately. In any event, the problem was important and his reply to the question raised by the Special Rapporteur was that it should certainly be taken into consideration in one way or another.

45. Mr. KOROMA congratulated the Special Rapporteur on his very stimulating sixth report (A/CN.4/428 and Add.1) and on the patience with which he had responded to the various comments made by members of the Commission and by representatives in the Sixth Committee of the General Assembly.

46. He first wished to remind members that the Commission had decided to change the title of the topic in English. As that had still not been done, he formally proposed that the word "acts" should be replaced by "activities".

47. The Special Rapporteur had maintained the distinction between activities involving risk and activities

with harmful effects, even though he conceded in his report that the two kinds of activities had sufficient features in common to bring their consequences under a single régime. While he welcomed that approach, he considered, like Mr. Calero Rodrigues (2181st meeting) and Mr. Hayes (2182nd meeting), that it was not necessary to classify the activities in two separate categories. What was required, in his view, was to elaborate a régime for activities that caused serious injurious consequences whether or not such activities involved risk. If the State of origin was liable for certain activities, it was not because they were activities that involved risk, but because they had caused harm. The operation of a nuclear power station or of a fertilizer plant, for example, might be an activity involving risk, but the State of origin became liable only if such activity caused harm. He therefore concurred with the approach adopted in 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) and, in particular, with the title of that draft, which emphasized "damage". Even the Experts Group on Environmental Law of the World Commission on Environment and Development, which had apparently taken another view, had not based liability on risk in article 11 of its legal principles and recommendations on environmental protection and sustainable development (*ibid.*, para. 5). Under the terms of that article, if one or more activities created a significant risk of substantial harm, the State which engaged in those activities or which authorized them must ensure that compensation was provided if significant harm occurred. The conclusion was not so clear, however, when the Experts Group attempted to treat risk and harm as two separate categories. In referring to damage resulting from the normal operation of an activity, it had stated: "Thus, in spite of the fact that the activity would cause substantial extraterritorial harm, it is not regarded either as clearly unlawful, or as clearly lawful. Instead a duty to negotiate on the equitable conditions under which the activity could take place has been provided for." (*Ibid.*, para. 8 *in fine*.) The Experts Group concluded, however, that even such a régime would have to establish compensation for the harm caused. In his view, it was clear, therefore, that the Commission should elaborate rules for liability for activities causing harm that might involve risk.

48. With regard to preventive measures, one could conceive of measures designed to mitigate harmful effects after an accident had occurred, but it would make for clarity if different terms were used for measures taken before and after the act occurred.

49. The Special Rapporteur had for the first time introduced a list of activities which, according to the report (*ibid.*, para. 15), would define the scope of the draft and thus make it more acceptable to States, which would then know the limits of their liability. There again, however, the list in draft article 2 was predicated on the risk involved in the use of certain dangerous substances or of technology that produced hazardous radiation. His concern was that such a list would limit the scope of the topic not only in terms of substance, but also from a geographical standpoint, particularly as far as the more developed regions of the world were concerned. It would therefore not make for a global convention or for more precision, except obliquely, in respect of the nature of the activities referred to in draft article 1. He did not think the Special Rapporteur was saying that the topic related solely to ultra-hazardous activities, activities in which very harmful substances were used or activities involving risk alone, but the list did not address certain issues, such as that of the screwworm fly, which had escaped from one region of the globe following certain scientific manipulations and was now destroying livestock in other continents. More than $16 million had already been spent on combating that scourge and both FAO and IFAD were currently working on its eradication. On the other hand, the list could conceivably have covered the Bhopal incident; but, in that case, even without the list, the cause of the accident had been established and liability was not contested except for the quantum of damages. The Commission must strive to make the future instrument as universal as possible. The Special Rapporteur had, of course, stated that the list was not exhaustive but, as Mr. Graefrath (2183rd meeting) had argued, a non-exhaustive list might not be so useful and would not make the basis of liability sufficiently precise. Furthermore, in his own view, it would unduly restrict the scope of the topic and the basis of liability. He therefore had yet to be convinced as to the usefulness of the list.

50. Draft article 1, as worded, succeeded, paradoxically, in enlarging and restricting the scope of the articles at the same time, by covering activities that created—although "involve" might perhaps be the better word—a risk of causing transboundary harm. In one sense, that was correct inasmuch as risk was associated with all human endeavours; interpreted in that way, however, the article could make the scope of the draft unduly wide. On the other hand, "activities creating a risk" could be interpreted to mean that, if the venture was not considered, in the view of the operator, risky in the first place, no liability would be incurred if harm were caused during the course of its operation. He realized that that was not the intention of article 1, but, as worded, it was open to such an interpretation. Perhaps it would be preferable to speak of "such activities including risk causing harm". He also favoured the deletion of the words "throughout the process", unless their limiting effect was justified for some particular reason which the Special Rapporteur had in mind.

51. The comments he had just made concerning the "list" approach applied directly to draft article 2. His concern was that, as worded, the article would restrict the scope of the topic and that its emphasis on dangerous substances might give the impression that the draft related only to the industrialized countries.

52. Draft article 3 could simply be entitled "Liability", as its present title was ambiguous. The word "assignment" had a technical meaning in law and certainly did not reflect the content of the article, the opening clause of paragraph 1 of which could be amended to read: "The State of origin shall be liable under the present articles provided that it knew or . . .".

He also agreed with the view that the operator, not the State, should be held directly responsible for damage caused by certain operations, so that States which imported technology with which they were not completely familiar were not encumbered with liability.

53. In the interests of clarity, the first part of draft article 6 could be amended to read: "The right of a State to carry on or permit human activities in its territory . . .".

54. Draft article 11 stipulated that a State in which an activity was being conducted that was likely to cause harm or to create a risk of causing harm must inform the State or States likely to be affected by providing them with the available technical information, but it did not state what the affected States were supposed to do when they received such notification and information. Could they call upon the State of origin not to undertake the activity? A potentially affected State could, of course, take measures to prevent the potential harm or to remedy the effects of harm if it did occur. In his view, however, if the State of origin had foreknowledge of such harm or if it had not been an accident, it should be the responsibility of that State to prevent such harm from occurring or to prohibit the activity.

55. He supported draft article 12, on participation by an international organization, but did not think it was necessary to specify that the organization must operate within its sphere of competence. International organizations were very much aware of the need to respect the terms of their constituent instruments and it was rare for them to act *ultra vires*. Unless the Special Rapporteur had a special reason for making that reference, it should be deleted.

56. He was in full agreement with the various requirements under draft article 16, particularly those pertaining to the adoption of a compulsory system of insurance, the utilization of the best technology to ensure that the activity was conducted safely and the possibility of prohibiting an activity which involved a high risk of causing harm.

57. In draft article 17, the Special Rapporteur had endeavoured to achieve an equitable balance between the interests of the States concerned by activities referred to in article 1. However, he noted that the Special Rapporteur was not very enthusiastic about the article. In his own view, article 17 should not be linked to article 1, since it was after harm had been caused and liability had been established that the balance of interests had to be weighed. That was what had happened in the *Trail Smelter* case (see A/CN.4/384, annex III): the operator had been held liable and it was only when reparation had come to be negotiated that some of the factors enumerated in draft article 17 had been taken into account. The reference to article 1 would have been justified if that article had related to harm caused to the environment of the "global commons". That was not so, however, since article 1 dealt only with activities undertaken in the territory or under the jurisdiction of States.

58. The six-month period provided for in draft article 19 was too short, in his view. The State receiving the information in question might not have the technical capability to assess it and, if it sought the advice of an international organization, the latter might not be able, on account of its programme of work, to render assistance as expeditiously as the State concerned would like. He therefore agreed with Mr. Calero Rodrigues that it would be preferable to speak of a "reasonable period".

59. He was pleased to note that, in draft article 20, the Special Rapporteur had provided for the possibility of prohibiting an activity. That was entirely in keeping with the evolution of State practice. A number of developed and developing countries had already prohibited the export and dumping of toxic and hazardous wastes in the absence of adequate guarantees.

60. He was not sure why draft article 21 imposed an obligation to negotiate on the State of origin. Obviously, in the event of transboundary harm, the State of origin would want to enter into negotiations; if it did not do so, it would be up to the affected State to pursue its claims through different channels. He appreciated the Special Rapporteur's efforts to arrive at a compromise and perhaps even to exclude third-party settlement procedures from the draft, but in his view the article should be toned down and made less restrictive.

61. He agreed in principle with draft articles 23 and 24, subject to their reformulation by the Drafting Committee.

62. With regard to draft article 26, he considered that the Commission should guard against the new tendency to refer in its draft articles to acts of war, hostilities, civil war and insurrection. That was not in tune with the times or with contemporary international law, particularly the Charter of the United Nations. The only possible exception that could be contemplated was *force majeure*.

63. He was unable to discern any obligation in draft article 28. If it was a question of the obligation to exhaust local remedies, that was stating the obvious, but it was not apparent from the text. Perhaps the article was simply a prelude to draft article 29 on jurisdiction of national courts. It had been said that article 29 was to be seen in the context of the progressive development of international law; it was, however, over-ambitious and there would be many obstacles to its implementation. As worded, it would allow State B to sue State A in State A's courts. He was not sure that States were prepared to go that far. As for individuals, while one could conceive of a Norwegian citizen suing in the courts of the United Kingdom, it was difficult to imagine a national of Sierra Leone, for instance, suing before the Norwegian courts, for very obvious reasons, such as the prohibitive cost of the proceedings and the difficulties of collecting evidence. Article 29, though good in intent, could perhaps be applied in some, but not all parts of the world. For the time being, it would be necessary to rely on States to prosecute a claim on behalf of their nationals when harm occurred.

64. Referring to chapter VI of the sixth report, on liability for harm to the environment of the "global

commons", he said that the Special Rapporteur had pinpointed the problems to be solved. For now, the Commission would have to determine the obligations of States with regard to the environment, as damage to the environment and environmental degradation, whose consequences affected the whole world, were the subject of universal disapproval. The Commission must decide whether the standard to be adopted in that connection should be strict liability or liability based on due diligence, as in the 1982 United Nations Convention on the Law of the Sea. He agreed that, in determining the obligations of States regarding the environment, account must be taken of the need to ensure a balance of interests, as, for instance, in the 1988 Convention on the Regulation of Antarctic Mineral Resource Activities (see A/CN.4/428 and Add.1, footnote 37). The Commission must also decide whether, in the matter of liability, the same standards should apply to activities conducted in the territory of States and to activities that caused harm to the global commons or to the environment.

65. Mr. BARBOZA (Special Rapporteur) said that he had three points to make at the current stage. First, the proposed list was a list of dangerous substances, not a list of activities. He had always said that he was opposed to the second type of list, which was too restrictive, while the first kind offered rather more flexibility. That was explained in his sixth report (A/CN.4/428 and Add.1, para. 16). Secondly, the liability in question was "causal" liability and, since it did not presuppose a breach of an obligation, it was within the realm of primary, not secondary rules (*ibid.*, para. 43). Thirdly, the term "nuisance" in draft article 2, subparagraph (*h*), was not to be understood according to its technical meaning in English and American law. Rather, it was the equivalent of the term "embarrassment" (*molestia* in Spanish; *inconvénient* in French).

66. Mr. TOMUSCHAT thanked the Special Rapporteur for a very rich sixth report (A/CN.4/428 and Add.1) on a fascinating topic which was also extremely difficult because there were few precedents to rely on. There were, of course, a number of agreements and instruments, but their scope was limited. Never before had such an ambitious attempt been made to bring together in a framework agreement all the legal aspects of human activities which caused or might cause transboundary harm. Even the 1972 Stockholm Declaration[10] merely stated broad substantive principles, whereas the draft articles submitted by the Special Rapporteur rightly emphasized procedures, especially for the purpose of prevention, as a means of achieving the goal in view.

67. The ambitious nature of the task and the inherent problems it involved did, however, have one regrettable corollary: that neither the present Special Rapporteur nor his predecessor had been able to be "operational" from the start. The Commission and the Special Rapporteurs had had to use a trial-and-error approach to determine the general direction the future régime should take. What were the needs of the international community? Where were the gaps that had to be filled? How far was it possible to go as matters now stood? Were Governments prepared to accept any limitation of their sovereign powers? All those questions had to be discussed in addition to the strictly legal problems involved.

68. He was not sure that the Commission had found all the answers to those basic questions, on which the success of its work depended. In any case, it had spent a great deal of time on them—inevitably so—and was now paying the price for its thoroughness and hesitations. Many other international bodies were actively pursuing their own codification work, and the Commission, which had been among the first to concern itself with the environment, the corner-stone of the topic, was now in danger of falling behind the others. The Special Rapporteur had mentioned that risk in introducing his report (2179th meeting). It was therefore essential to make rapid progress, for otherwise the topic might become moot. If every detail had already been regulated elsewhere, it would be extremely difficult to show the need for a general framework agreement in addition to other instruments.

69. Without going into details, he considered that there was room for improvement in the texts of the draft articles. In particular, he would have preferred it if the Special Rapporteur had drawn more heavily on existing instruments, *mutatis mutandis*, instead of opting to a large extent for his own drafting. He would not comment on individual articles, but would refer to the scope of the draft articles *ratione materiae*, prevention, the role which could be played by international organizations and the need to distinguish between substantive and procedural provisions.

70. He had to admit that he could not clearly identify the scope of the draft articles *ratione materiae*. He agreed with draft article 1, according to which the articles would apply to human activities to the extent that they caused, or created a risk of causing, physical transboundary harm. However, draft article 2 did not use the same wording as article 1. It introduced two new concepts: "activities involving risk" (subpara. (*a*)) and "activities with harmful effects" (subpara. (*f*)). What was its relationship with article 1? Was the expression "activities involving risk" a synonym for "activities [which] create a risk of causing transboundary harm"? Was the expression "activities with harmful effects" synonymous with "activities [which] cause ... transboundary harm"? Unfortunately, the text was not clear, whereas it should be crystal clear.

71. At first sight, the Special Rapporteur seemed to be making a distinction between two kinds of activities. However, that distinction was not reflected in the articles that followed. He could not agree with the concept of "activities involving risk" as understood by the Special Rapporteur in article 2 because, as Mr. Koroma had said, it was too restrictive for a framework agreement. In reply to the Special Rapporteur, who had focused exclusively on the handling of dangerous substances, which were to be defined in a list, Mr. Calero Rodrigues (2181st meeting) had already drawn the Commission's attention to dams and other

[10] See 2179th meeting, footnote 17.

waterworks. Water was not in itself a dangerous substance, but, when a dam burst, the effects could be disastrous. The same was true of crude oil: as such, it did not affect human health, but it could contaminate the coastline or rivers following an accident or pollute groundwater in the event of a leak, etc. According to his own reading of article 2, it would not apply to damage caused by water or crude oil, even if the list of dangerous substances was not exhaustive, as the Special Rapporteur indicated (A/CN.4/428 and Add.1, para. 17).

72. That approach was far too narrow. What about air pollution, for instance? What about all those seemingly normal and innocuous activities which, through a slow, but frightening process of accumulation, contaminated the air, soil and water of the planet every day and every minute? Since the Commission had opted in principle for a framework agreement that was intended to be comprehensive in scope, such activities could not be disregarded. However, the draft articles said nothing about pollution by accumulation. It had been argued that it was not the Commission's task to draft a convention on the environment, since the liability under consideration was much broader in scope. That was true: but the environment was the core of the topic and the provisions being drafted were intended essentially as a set of rules to protect the environment and mankind within that environment. So far, that had not been achieved and the Commission was not living up to the expectations of the international community. To focus the articles on dangerous substances was a suitable approach when the aim was to determine reparation in the event of harm, but prevention had to be much broader in scope and extend to all the processes whereby material damage could be caused by accumulation.

73. In several of the proposed articles, a distinction should have been drawn between dangerous activities themselves and other activities. For instance, the procedure provided for in draft article 11 was supposed to apply to the activities referred to in article 1. That was, however, almost impossible. Any State could take special precautionary measures if it knew beforehand that a given activity involved certain risks, but an activity which simply "caused" transboundary harm—the other category of activities referred to in article 1—would not appear *ex ante* as hazardous. As in the draft articles on the law of the non-navigational uses of international watercourses, the procedure for assessment, notification and information was entirely suited to planned measures which might adversely affect neighbouring States, but, in the present draft articles, "dangerous substances" could not be the sole criterion. It was one thing to refer to activities and projects which could have harmful effects (power stations, the construction of motorways and airports, etc.), as in the directive of 27 June 1985 of the Council of the European Communities on environmental impact assessment and in the draft framework agreement of the Economic Commission for Europe on environmental impact assessment in a transboundary context (*ibid.*, footnote 35), but to speak globally of the "activities referred to in article 1" was quite another thing and it made no real sense.

74. Similarly, in draft article 21, the Special Rapporteur should have drawn a distinction between activities involving risk which, by their nature, caused harm and activities which simply caused harm. It was already going quite far to say that full compensation was warranted if an inherent risk materialized, but to go beyond that and say that any kind of transboundary harm must in principle be fully compensated for was simply indefensible. The Special Rapporteur's proposals in that regard were technically, if not conceptually, wrong. Article 1 mentioned two different categories of activities which could not always be dealt with in the same manner. Prevention and compensation must be kept separate in each case.

75. He also disagreed with the Special Rapporteur's tendency to merge substantive and procedural rules, especially in draft article 21, but also in draft articles 14 and 16. He could not approve of that method, which had also been that of the previous Special Rapporteur. Article 21 as it now stood was rather confusing. Its title was "Obligation to negotiate", but what it actually said was that, in principle, transboundary harm must be fully compensated for. That was a substantive rule and, if the Commission adopted it, it would first have to be embodied in a separate provision; only after that could circumstances be defined in which less than full compensation was warranted. Negotiation did not offer any criterion: in general, it favoured the stronger party, which could simply reject any claim made, whereas the weaker State could never be so adamant in its refusal. The draft articles should contain objective rules applicable to large and small States alike.

76. Draft article 18, which had also been inherited from the previous Special Rapporteur, was particularly unfortunate. Why derogate from the general régime of State responsibility? Did the Commission not take the draft articles seriously and did it really intend to formulate rules of soft law, not of hard law? It was awkward to state that no proceedings could be instituted. Normally, in international law, when certain obligations had been breached, there were no formal proceedings which the injured State could set in motion. It was, however, quite another matter to deny such a State the benefit of the usual rights of reciprocity by prohibiting it from taking countermeasures or reprisals. Was that the intended meaning of article 18? Why did the Special Rapporteur consider that the draft articles on prevention did not deserve to be based on the general rules of international law? On that point, he agreed with the comments made by Mr. McCaffrey (2184th meeting) and Mr. Pellet. The Commission should confine itself to formulating the substantive and procedural rules it deemed necessary. Any breach of those rules would be covered by the draft articles on State responsibility. It should not establish a special régime simply for lack of courage.

77. In that connection, he emphasized a point just made by the Special Rapporteur: the fact that the draft articles were supposed to constitute a framework agreement did not mean that they were within the realm of

secondary rules. What was the difference between primary rules and secondary rules? Secondary rules were rules which governed chiefly, but not exclusively, State responsibility and hence the consequences of the breach of any substantive international obligation. In devising a régime on international liability for injurious consequences arising out of acts not prohibited by international law, however, the Commission must not forget its specific primary objective, which was to formulate provisions to govern a specific sector of international relations, namely the duties incumbent on States as a result of the basic principle of sovereign equality, which included territorial integrity. In particular, if it chose to enunciate a duty of compensation, as proposed by the Special Rapporteur in article 21, it would not merely be repeating an established secondary rule which was within the scope of the draft articles on State responsibility; it would be formulating a new rule for a specific field of international law. As he had already pointed out, the best course would be to leave aside anything which belonged to the realm of State responsibility. There was no need for the draft articles under consideration to state the consequences of the breach of an international obligation. The fewer derogations from the normal régime, the better. The rules on liability should not look like a monster with no parallel in international law.

78. He welcomed the fact that the Special Rapporteur had included specific provisions on the role of international organizations, but he could not agree with their substance. Like Mr. McCaffrey, he thought that there should be a rule stipulating that States must comply with generally accepted international rules and standards. At present, such rules and standards were elaborated within the framework of international organizations. There were still some gaps, however. In particular there was as yet no agency with responsibility for combating air pollution. For that very reason, however, acceptance of the formula "generally accepted international rules and standards", which was used in many articles of the 1982 United Nations Convention on the Law of the Sea, would be a major step forward in the progressive development of the law. A qualitative leap of that kind, which would affirm that no State could persist in its polluting practices if the majority of States considered them a threat to the international community, was justified by the fact that States enjoyed full sovereignty only within their own territory. If their polluting practices had adverse effects on other States, they could not rely on the principle of sovereignty, whereas the affected States could, *a contrario*, invoke their territorial sovereignty. Thus, through the co-operation of all States within the framework of the competent international organizations, rules could be formulated that would apply to the various aspects of potential transboundary harm and States which infringed those generally accepted international rules and standards would then simply be committing an internationally wrongful act.

79. As to the wording of draft article 12, on participation by international organizations, he, like other members of the Commission, could not agree with the use of the word "intervene", which smacked of unlawful interference. The Special Rapporteur was, of course, correct in pointing out that international organizations could not perform just any kind of activity; they had only the powers and responsibilities conferred on them by their constituent instruments. With the possible exception of the United Nations, whose role was no longer the same as it had been originally, most international organizations were still subject to the limitations and constraints of their statutes. In the framework agreement, the Commission could propose procedures to be introduced by the competent international organizations. In particular, provision should be made for a reporting obligation under which States would have to report at regular intervals on the manner in which they were respecting and fulfilling their international obligations. Provision might even be made for on-site inspections, on the understanding that they would have to be expressly accepted. It would thus be possible to set up a whole system of confidence-building measures, which might now be as necessary in the environmental field as in the military field.

80. For all those reasons, he deplored the extreme caution that was evident in the articles of chapter III of the draft, on prevention. For example, article 14 said that the States concerned had an obligation to enter into consultations in an attempt to establish a régime for the activity in question. In his own view, the primary obligation should be to comply with generally accepted rules and standards; only in the absence of such rules and standards would it be necessary to establish a régime to govern the bilateral relationship between the States concerned. That was another case where substance and procedure must be kept separate. The same was true of article 16, which was just a more elaborate version of article 8: the obligations it enunciated, such as prior authorization, insurance coverage, etc., should be applicable in general, and not only in a specific procedural situation. On that point, he agreed with Mr. Pellet's conclusions.

81. For the sake of clarity, he thought that draft article 17 should simply be deleted. It was inconceivable that a flagrant violation of generally accepted rules or standards could be justified by any of the factors referred to in that long and confusing list.

82. In conclusion, he reserved the right to comment at the next session on chapters IV and V of the draft articles and on chapter VI of the sixth report. He welcomed the thought-provoking debate which had taken place on the topic. It was now time for the Commission to produce tangible results and he hoped that it would not be long in doing so.

83. Mr. BARBOZA (Special Rapporteur), replying to Mr. Tomuschat, said that the sixth report and the draft articles did deal with transboundary pollution, either in the form of accidental pollution caused by an activity involving risk or in the form of pollution which occurred during the normal operation of an activity. They even covered air pollution resulting from an activity carried on in an area within national jurisdiction.

The meeting rose at 6.05 p.m.