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Summary record of the 2377th meeting

Topic:
Other topics

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non laedas. Accordingly, States were under an obligation to avoid causing significant harm to other States.

75. Mr. ROSENSTOCK said that article 1 dealt with the scope of the articles. The obligation to avoid causing harm was not mentioned in article 1.

76. The CHAIRMAN said the placement, rather than the substance of paragraph (28) seemed to be at issue.

77. Mr. PELLET proposed that paragraph (28) should be transferred to the beginning of the commentary to article 14.

78. Mr. TOMUSCHAT said that paragraph (28) dealt with the core issue of the draft articles and did not belong in its present place in the commentary.

79. Mr. ROSENSTOCK reminded the Commission that Lauterpacht, whose views were mentioned in paragraph (28), had spoken of unduly injurious activities.

80. Mr. EIRIKSSON proposed that paragraph (28) should become paragraph (4 *bis*).

81. The CHAIRMAN said that the matter could be left pending for the moment.

Paragraphs (29) and (30)

Paragraphs (29) and (30) were adopted.

The meeting rose at 1 p.m.

2377th MEETING

Friday, 22 July 1994, at 3.15 p.m.

Chairman: Mr. Vladlen VERESHCHETIN

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. He, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Tomuschat, Mr. Yamada, Mr. Yankov.

Draft report of the Commission on the work of its forty-sixth session (*concluded*)

CHAPTER V. *International liability for injurious consequences arising out of acts not prohibited by international law (concluded)* (A/CN.4/L.498 and Add.1-2)

C. Draft articles on international liability for injurious consequences arising out of acts not prohibited by international law (*concluded*) (A/CN.4/L.498/Add.2)

2. TEXTS OF DRAFT ARTICLES 1, 2, SUBPARAGRAPHS (a), (b) AND (c), 11 TO 14 *bis* [20 *bis*], 15 TO 16 *bis* AND 17 TO 20 WITH COMMENTARIES THERETO, PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS FORTY-SIXTH SESSION (*concluded*) (A/CN.4/L.503 and Add.1-2)

Commentary to article 2 (Use of terms) (A/CN.4/L.503)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

1. Mr. de SARAM, noting that paragraph (4) stated that “significant” was something more than “detectable”, but less than “serious” or “substantial”, said that “significant” harm could also be “serious” or “substantial”.

2. Mr. BARBOZA (Special Rapporteur), supported by Mr. CALERO RODRIGUES, said that the point was not to define the term, but to set a threshold: any harm which was more than “detectable” was “significant” without necessarily being “serious” or “substantial”.

3. The CHAIRMAN, speaking as a member of the Commission, said that, if the point was simply to set a threshold, the sentence in question should end after the word “detectable” because, as worded, it could suggest that harm which was “serious” or “substantial” was not within the scope of the draft articles.

4. Mr. EIRIKSSON proposed that, after the word “detectable”, the sentence should be amended to read: “but need not be at the level of ‘serious’ or ‘substantial’ to be within the scope of these articles”.

It was so agreed.

Paragraph (4), as amended, was adopted.

Paragraph (5)

5. Mr. BARBOZA (Special Rapporteur) proposed that the words “The Commission is mindful that” in the first sentence and the words “The Commission is aware that” in the second sentence should be deleted.

It was so agreed.

6. Mr. TOMUSCHAT said that the words “ongoing mutual impacts” in the second sentence were not very clear.

7. Mr. BARBOZA (Special Rapporteur) said they meant that a State which was the State of origin in one case could be an affected State in another.

8. Mr. EIRIKSSON proposed that the sentence should be amended to read: “In carrying out lawful activities within their own territories, States have impacts on each other”. The word “mutual” at the beginning of the third sentence would be deleted.

It was so agreed.

Paragraph (5), as amended, was adopted.

Paragraph (6)

9. Mr. TOMUSCHAT said that it was not wise to refer to the *Trail Smelter* case in connection with risk since harm had actually been caused in that case. The question of risk arose before harm took place. The same comment applied to the reference to the *Lake Lanoux* case and, in that connection, the words “has been” in the third sentence should be replaced by the words “can be”.

10. Mr. BARBOZA (Special Rapporteur) said that the purpose of paragraph (6) was to indicate that, over 60 years earlier, an arbitral tribunal had considered it necessary to set a threshold and had used the words “serious consequences” in order to do so.

11. Mr. ROSENSTOCK proposed that the second sentence should be replaced by the following sentence: “The idea of a threshold is illustrated by the threshold chosen in the *Trail Smelter* award, which used the words ‘serious consequences’.”

12. Following a discussion in which Mr. de SARAM, Mr. PELLET, Mr. ROSENSTOCK and Mr. BARBOZA (Special Rapporteur) took part, the CHAIRMAN proposed that the Special Rapporteur should be requested, with the secretariat’s assistance, to reword the second and third sentences on the basis of the proposals by Mr. Rosenstock and Mr. Tomuschat.

It was so agreed.

Paragraph (6) was adopted on that understanding.

Paragraphs (7) and (8)

Paragraphs (7) and (8) were adopted.

Paragraph (9)

13. Mr. BARBOZA (Special Rapporteur) proposed that the beginning of the first sentence should be amended to read: “In paragraph (c), the term ‘State of origin’ is introduced to refer to the State in the territory” The last two sentences of the paragraph would be deleted and replaced by the following: “See commentary to article 1, paragraphs (4) to (20).”

It was so agreed.

Paragraph (9), as amended, was adopted.

The commentary to article 2, as amended, was adopted.

Commentary to article 11 (Prior authorization) (A/CN.4/L.503/Add.1)

14. The CHAIRMAN said that it should be explained why the Commission was jumping from article 2 to 11.

15. Mr. YANKOV proposed that one or two sentences should be included for that purpose in paragraph 6 of the introduction to chapter V of the report.

It was so agreed.

Paragraph (1)

16. Mr. ROSENSTOCK said that the last two sentences of paragraph (9) of the commentary to article 12

were extremely important and also applied to article 11 and subsequent articles. He therefore proposed that those sentences should be a separate paragraph of the commentary to article 11.

17. Mr. EIRIKSSON said that the two sentences in question related to the scope of the draft articles and that they therefore belonged in the commentary to article 1. He proposed that they should be included before the last sentence of paragraph (2) of the commentary to article 1 and that the last sentence of that paragraph should be reworded to read: “The definition of scope now contained in the article introduces four criteria.”

It was so agreed.

Paragraph (1) was adopted.

Paragraph (2)

18. Mr. EIRIKSSON proposed that the beginning of the first sentence should be amended to read: “In the *Corfu Channel* case, the International Court of Justice held that a State.”

It was so agreed.

Paragraph (2), as amended, was adopted.

Paragraph (3)

19. Mr. BARBOZA (Special Rapporteur) proposed that the words “for consistency” at the end of the first sentence should be deleted and that the second sentence should be amended to read: “The expression ‘activities referred to in article 1’ introduces all the requirements of that article for an activity to fall within the scope of these articles.”

It was so agreed.

Paragraph (3), as amended, was adopted.

Paragraph (4)

Paragraph (4) was adopted.

The commentary to article 11, as amended, was adopted.

Commentary to article 12 (Risk assessment)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

20. Mr. TOMUSCHAT proposed that paragraph (2) should be deleted because there had not been any prior risk assessment in the *Trail Smelter* case.

21. Following a discussion in which Mr. BARBOZA (Special Rapporteur), Mr. PELLET, Mr. de SARAM, Mr. ROSENSTOCK and Mr. YANKOV took part, Mr. YANKOV proposed that paragraph (2) of the commentary to article 12 should be replaced by the following text:

“(2) Although the impact assessment in the *Trail Smelter* case may not directly relate to liability for

risk, it however emphasized the importance of an assessment of the consequences of an activity causing significant risk. The arbitral tribunal in that case indicated that the study undertaken by 'well-established and known scientists was 'probably the most thorough [one] ever made of any area subject to atmospheric pollution by industrial smoke'.'

Paragraph (2), as amended, was adopted.

Paragraph (3)

22. Mr. PELLET said that the word "compatible" in the first sentence was too weak and proposed that it should be replaced by the word "consonant".

It was so agreed.

Paragraph (3), as amended, was adopted.

Paragraph (4)

23. Mr. TOMUSCHAT proposed that the second sentence should be deleted. Practices in that regard varied widely and the sentence was a generalization that might be quite wrong.

It was so agreed.

24. Mr. YANKOV proposed that the words "or under applicable international instruments" should be added at the end of the third sentence.

It was so agreed.

Paragraph (4), as amended, was adopted.

Paragraph (5)

Paragraph (5) was adopted.

Paragraph (6)

25. Mr. BARBOZA (Special Rapporteur) proposed that the last sentence should be deleted.

It was so agreed.

26. Mr. ROSENSTOCK proposed that the words "However, the Commission feels that" at the beginning of the second sentence should be deleted.

It was so agreed.

Paragraph (6), as amended, was adopted.

Paragraph (7)

Paragraph (7) was adopted.

Paragraph (8)

27. Mr. PELLET, referring to the first sentence, said that there could be no obligations for States "to be aware". The sentence might, for example, read: "obliges a State to conduct investigations into the possible exercise in its territory ...".

28. Mr. TOMUSCHAT proposed that the Commission might use the word "ascertain", as in the draft articles

on the law of the non-navigational uses of international watercourses.

It was so agreed.

29. Mr. TOMUSCHAT proposed that the word "more" in the second sentence should be deleted and that the words "is compatible with" in the last line should be replaced by the word "reflects".

It was so agreed.

30. Mr. ROSENSTOCK said that, in the third sentence it would be better to cite the award in the *Trail Smelter* case than to paraphrase it. He therefore proposed that the beginning of the third sentence should be amended to read: "The Commission takes note in this respect that, in the *Trail Smelter* case, the arbitral tribunal stated that the Canadian Government had 'the duty . . . to see to it'", the rest of the sentence remaining unchanged.

It was so agreed.

31. The CHAIRMAN recalled that the Commission had agreed that paragraph (8) should come after paragraph (1) of the commentary to article 11.

Paragraph (8) of the commentary to article 12, as amended, was adopted and inserted after paragraph (1) of the commentary to article 11.

Paragraph (9)

Paragraph (9) was adopted.

The commentary to article 12, as amended, was adopted.

Commentary to article 13 (Pre-existing activities)

Paragraph (1)

32. Mr. CALERO RODRIGUES proposed that, in the first sentence, the words "by a State" should be replaced by the words "in a State".

It was so agreed.

Paragraph (1), as amended, was adopted.

Paragraph (2)

33. Mr. BARBOZA (Special Rapporteur) proposed that, in the first sentence, the words "before these articles come into force for it" should be replaced by the words "when it assumes the obligations under these articles".

It was so agreed.

Paragraph (2), as amended, was adopted.

Paragraph (3)

34. Mr. BARBOZA (Special Rapporteur) proposed that the last sentence should be deleted.

It was so agreed.

35. Mr. TOMUSCHAT suggested that, in the fifth sentence, the words “to take no action to identify such activities or merely” should be deleted.

It was so agreed.

36. Mr. PELLET proposed that, throughout the paragraph, the words “when becoming parties to these articles” should be replaced by the words “when assuming the obligations under these articles”.

It was so agreed.

Paragraph (3), as amended, was adopted.

Paragraph (4)

37. Mr. PELLET proposed that, in the last sentence, the word “other” should be deleted.

It was so agreed.

Paragraph (4), as amended, was adopted.

Paragraph (5)

Paragraph (5) was adopted.

38. Mr. de SARAM proposed that the following text should be added as a new paragraph after paragraph (5):

“(6) The view was expressed by one member of the Commission that the last sentence of article 13 [reading ‘Pending authorization, the State may permit the continuation of the activity in question at its own risk.’] should be deleted; and if this were done, the words, having assumed the obligations contained in these articles’ at the beginning of article 13 would not be necessary. The words in question touched on the difficult question of liability, which had still to be considered by the Commission; and moreover seemed to predetermine whether the principles being formulated ought or ought not to be in treaty form. It had already been agreed by the Commission that the treaty or other form to be given to the principles should be considered at a later date.”

The subsequent paragraph would be renumbered.

It was so agreed.

New paragraph (6) was adopted.

Paragraph (6)

39. Mr. BARBOZA (Special Rapporteur) proposed that, at the end of the paragraph, the words “and therefore the second sentence of article 13 becomes applicable” should be replaced by the words “and the Commission has not yet explored the consequences of this situation. See paragraph (4) above”.

It was so agreed.

Paragraph (6), as amended, was adopted.

The commentary to article 13, as amended, was adopted.

Commentary to article 14 (Measures to prevent or minimize the risk)

Paragraph (1)

40. Mr. PELLET proposed that, throughout the French text, the words *diligence requise* and *diligence voulue* should be replaced by the words *diligence due*.

It was so agreed.

Paragraph (1), as amended, was adopted.

Paragraph (2)

41. Mr. BARBOZA (Special Rapporteur) proposed that the first sentence should be amended to read: “An obligation of due diligence has been widely used and can be deduced from a number of international conventions, as well as from resolutions and reports . . .”

It was so agreed.

Paragraph (2), as amended, was adopted.

Paragraphs (3) to (8)

Paragraphs (3) to (8) were adopted.

Paragraph (9)

42. Mr. ROSENSTOCK suggested that the word “possible” at the end of the paragraph should be deleted.

It was so agreed.

Paragraph (9), as amended, was adopted.

Paragraph (10)

Paragraph (10) was adopted.

43. Mr. de SARAM proposed that the following new paragraph (11) should be added to the commentary to article 14:

“(11) The reference made to the ‘due diligence’ criterion in the preceding paragraphs of the commentary to article 14 gave rise to concern on the part of one member of the Commission. It was, in his view, a difficult criterion to apply, particularly when facts were complex, and could lead to the unfortunate result that certain risks of transboundary harm, which would be included if the ‘all appropriate measures’ standard provided for in the text of article 14 was applied, may be excluded by the State of origin under the ‘due diligence’ criterion. The question of the appropriateness of the ‘due diligence’ criterion would need to be further examined in the course of the second reading of the articles by the Commission.”

It was so agreed.

The commentary to article 14, as amended, was adopted.

Commentary to article 14 bis [20 bis] (Non-transference of risk)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

44. Mr. BARBOZA (Special Rapporteur) proposed that the beginning of paragraph (4) should be amended to read: "The expression 'simply transferred, directly or indirectly, from one area to another or transformed from one type of risk into another' is designed to preclude . . ." and that the following sentence should be added at the end of the sentence: "(see principle 13 of the Principles for Assessment and Control of Marine Pollution adopted by the Stockholm Conference in 1972)".

It was so agreed.

Paragraph (4), as amended, was adopted.

Paragraph (5)

45. Mr. EIRIKSSON proposed that, in the second and third sentences, the words "is taken from" and "are also taken from" should be replaced by the words "is used in" and "are also used in".

It was so agreed.

Paragraph (5), as amended, was adopted.

The commentary to article 14 bis [20 bis], as amended, was adopted.

Commentary to article 15 (Notification and information)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

46. Mr. PELLET proposed that, in the second sentence, the words "This principle is well developed" should be replaced by the words "This principle is recognized" or "This principle has been applied".

It was so agreed.

Paragraph (3), as amended, was adopted.

Paragraph (4)

47. Mr. PELLET proposed, as he had done for paragraph (3), that the words "is well developed" should be replaced by the words "is recognized" or "has been applied".

It was so agreed.

Paragraph (4), as amended, was adopted.

Paragraph (5)

48. Mr. BARBOZA (Special Rapporteur) suggested that the words "Principle on" in the last sentence of the English text, should be deleted.

It was so agreed.

Paragraph (5), as amended, was adopted.

Paragraphs (6) to (8)

Paragraphs (6) to (8) were adopted.

Paragraph (9)

49. Mr. PELLET suggested that, for the sake of logic, the words "during the process of authorization or" in the first sentence should be deleted.

It was so agreed.

Paragraph (9), as amended, was adopted.

The commentary to article 15, as amended, was adopted.

Commentary to article 16 (Exchange of information)

The commentary to article 16 was adopted.

Commentary to article 16 bis (Information to the public) (A/CN.4/L.503/Add.2)

Paragraph (1)

50. Mr. PELLET said that the words *leur propre public*, as used not only in that paragraph, but also throughout the body of article 16 bis, did not mean anything. He therefore proposed, if the Commission agreed, to try to find better wording.

It was so agreed.

Paragraph (1), as amended, was adopted.

Paragraphs (2) to (5)

Paragraphs (2) to (5) were adopted.

Paragraph (6)

51. Mr. TOMUSCHAT suggested that the word "only" in the last sentence should be deleted.

It was so agreed.

Paragraph (6), as amended, was adopted.

Paragraphs (7) and (8)

Paragraphs (7) and (8) were adopted.

The commentary to article 16 bis, as amended, was adopted.

Commentary to article 17 (National security and industrial secrets)

The commentary to article 17 was adopted.

Commentary to article 18 (Consultations on preventive measures)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

52. Mr. ROSENSTOCK suggested that, in the third sentence, the word "adequate" should be replaced by the word "appropriate".

It was so agreed.

Paragraph (2), as amended, was adopted.

Paragraphs (3) to (6)

Paragraphs (3) to (6) were adopted.

Paragraph (7)

53. Mr. BARBOZA (Special Rapporteur) suggested that, in the second sentence, the word “sentence” should be replaced by the word “clause”.

It was so agreed.

Paragraph (7), as amended, was adopted.

Paragraphs (8) to (11)

Paragraphs (8) to (11) were adopted.

Paragraph (12)

54. Mr. ROSENSTOCK said that he would like paragraph (12) or an additional paragraph to reflect the objection which had been raised with regard to the words “at its own risk” and which applied in the present case as well.

55. The CHAIRMAN said that the secretariat would ensure that that was done.

Paragraph (12) was adopted on that understanding.

The commentary to article 18, as amended, was adopted.

Commentary to article 19 (Rights of the State likely to be affected)

Paragraphs (1) to (7)

Paragraphs (1) to (7) were adopted.

Paragraph (8)

56. Mr. BARBOZA (Special Rapporteur) said that the third sentence should be amended in the following way to bring it into line with the text of the article: “For that reason the affected State may claim ‘an equitable share’ of the cost of the assessment.”

It was so agreed.

Paragraph (8), as amended, was adopted.

The commentary to article 19, as amended, was adopted.

Commentary to article 20 (Factors involved in an equitable balance of interests)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

Paragraph (5)

57. Mr. BARBOZA (Special Rapporteur) suggested that, in the first sentence, the word “significant” should be added before the word “harm”.

It was so agreed.

58. Mr. TOMUSCHAT proposed that the second sentence should be amended to read: “the Commission emphasized the particular importance of the protection of the environment”.

It was so agreed.

Paragraph (5), as amended, was adopted.

Paragraphs (6) to (8)

Paragraphs (6) to (8) were adopted.

Paragraph (9)

59. Mr. BARBOZA (Special Rapporteur) proposed that the beginning of the penultimate sentence should be amended to read: “These regulations might be much stricter than those applied in a State of origin which, because of its stage of development, might not have adopted.”

It was so agreed.

Paragraph (9), as amended, was adopted.

Paragraph (10)

Paragraph (10) was adopted.

The commentary to article 20, as amended, was adopted.

The commentaries to the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law, as a whole, as amended, were adopted.

Section C.2, as amended, was adopted.

Chapter V, as a whole, as amended, was adopted.

The draft report of the Commission on the work of its forty-sixth session, as a whole, as amended, was adopted.

Closure of the session

60. After the usual exchange of courtesies, the CHAIRMAN declared the forty-sixth session of the International Law Commission closed.

The meeting rose at 6 p.m.