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2560th MEETING

Wednesday, 12 August 1998, at 3.10 p.m.

Chairman: Mr. João BAENA SOARES

Present: Mr. Addo, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Bennouna, Mr. Brownlie, Mr. Candiotti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Operti Badan, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Yamada.

International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities) (*continued*)* (A/CN.4/483, sect. D, A/CN.4/487 and Add.1,¹ A/CN.4/L.556, A/CN.4/L.568)

[Agenda item 3]

CONSIDERATION OF DRAFT ARTICLES 1 TO 17 PROPOSED BY THE DRAFTING COMMITTEE AT THE FIFTIETH SESSION

1. Mr. SIMMA (Chairman of the Drafting Committee), introducing draft articles 1 to 17 on prevention of transboundary damage from hazardous activities adopted by the Drafting Committee (A/CN.4/L.568), said that the Drafting Committee had devoted seven meetings to the topic, from 8 to 12 June and from 5 to 10 August 1998. At its forty-ninth session, the Commission had decided to divide the topic of international liability for injurious consequences arising out of acts not prohibited by international law into two sub-topics, in order to address, first, the problem of prevention of transboundary damage from hazardous activities and then the question of international liability. The draft articles before the Commission dealt with the first sub-topic. At the current session the Special Rapporteur for the topic had proposed a set of articles (A/CN.4/L.556) drawn basically from the draft articles contained in the report of the Working Group on international liability for injurious consequences arising out of acts not prohibited by international law at the forty-eighth session.² The numbers in square brackets indicated the numbers of the corresponding articles proposed at the forty-eighth session. The commentary to the articles, contained in the report of the Working Group at the forty-eighth session, carefully explained the scope of each article and the criteria essential to an understanding of it.

* Resumed from the 2542th meeting.

¹ Reproduced in *Yearbook . . . 1998*, vol. II (Part One).

² See 2527th meeting, footnote 16.

However, since the Commission was beginning a new quinquennium and had several new members, some further explanation was necessary.

2. Article 1 (Activities to which the present draft articles apply) defined the scope of the articles. It was identical to article 1, subparagraph (a), of the draft articles proposed by the Working Group at the forty-eighth session. It limited the scope of the draft articles to activities not prohibited by international law which created a risk of causing significant transboundary harm through their physical consequences. Three criteria were stated.

3. The first criterion was concerned with “activities not prohibited by international law” and made a crucial distinction between the articles on the topic under consideration and those on State responsibility. The second criterion was that the activities to which preventive measures were applicable must contain a risk of significant transboundary harm. The element of risk was intended to exclude from the scope of the draft articles activities which in fact caused transboundary harm in their normal operation. The qualifier “transboundary” was intended to exclude activities which harmed the territory of the State in which they were undertaken or activities which harmed the global commons but did not harm any other State. The phrase “risk of causing significant transboundary harm” should be taken as a single term and understood as defined in article 2.

4. The third criterion was that the significant transboundary harm must have been caused by the physical consequences of the activities. That was consistent with the long-standing view of the Commission that the topic should remain within a manageable scope and therefore exclude transboundary harm which might be caused by the economic, monetary, socio-economic or other policies of States. The activities should thus have physical consequences resulting in significant harm. The title of the article was the one adopted at the forty-eighth session.

5. There appeared to be a discrepancy between the title of the draft articles and their scope as defined in article 1. That was a matter which the Commission would have to resolve at some point. At the current stage the draft articles addressed a sub-topic of the topic of international liability for injurious consequences arising out of acts not prohibited by international law. They therefore dealt with activities not prohibited by international law. However, if the draft articles were to stand on their own, their title would have to be brought into line with their scope.

6. Article 2 (Use of terms) defined five more terms commonly used in the draft articles. The four terms defined in subparagraphs (a), (c), (d) and (e) had already been defined in article 2 of the draft at the forty-eighth session. Subparagraph (b) was new.

7. Subparagraph (a) defined the concept of “risk of causing significant transboundary harm” as a low probability of causing disastrous harm and a high probability of causing other significant harm. The adjective “significant” applied to both risk and harm. For the purposes of the articles, “risk” referred to the combined effect of the probability of the occurrence of an accident and the magnitude of its injurious impact. It was therefore the combined effect of those two elements which defined the

threshold, which must be located at a level deemed significant. The use of “encompasses” was intended to highlight the fact that the spectrum of activities covered was limited and did not include, for example, activities in which there was a low probability of causing significant transboundary harm.

8. Subparagraph (*b*) was new; it did not define the harm but rather the scope for harm, indicating that it included harm caused to persons, property or the environment.

9. Subparagraph (*c*) defined “transboundary harm” as harm caused in the territory or in other places under the jurisdiction or control of a State other than the State of origin, regardless of whether the States concerned shared a common border. The definition was self-explanatory and made it clear that the draft articles did not apply to harm affecting the global commons but did apply to activities conducted under the jurisdiction or control of a State, on the high seas for example, having effects in the territory of another State or in places under the jurisdiction or control of another State and producing injurious consequences, for example for ships of another State on the high seas.

10. Subparagraph (*d*) defined “State of origin” as the State in whose territory or under whose jurisdiction or control the activities referred to in article 1 were carried out.

11. Subparagraph (*e*) defined “State likely to be affected” as the State in whose territory the significant transboundary harm was likely to occur or which had jurisdiction or control over any other place where such harm was likely to occur. The Drafting Committee had changed the tense of the verb “has occurred” in the draft article at the forty-eighth session to “is likely to occur” because that seemed more appropriate in the context of prevention.

12. Article 3 (Prevention) set forth the general obligation of prevention on which the entire set of draft articles was based. It had been drafted along the lines of article 4 of the draft at the forty-eighth session but differed from that text in not dealing with the obligation to take all appropriate measures to minimize the effects of harm once it had occurred, since the Drafting Committee had regarded that question as relating to liability and not to prevention.

13. Article 3 imposed on the State a duty to take all necessary measures to prevent or minimize significant transboundary harm. That might involve taking such measures as were required by abundant caution, even if full scientific certainty did not exist, to avoid or prevent harm which risked causing serious or irreversible damage. That idea was put well in principle 15 of the Rio Declaration³ and was subject to the capacity of the States concerned. It was realized that the optimum and more effective implementation of the duty of prevention would require upgrading the input of technology in the activity as well as the allocation of adequate financial and manpower resources, accompanied by the necessary training for the management and monitoring of the activity. The operator

of the activity was expected to bear the costs of prevention to the extent that he was responsible for the operation. The State of origin was also expected to make the necessary expenditure to put in place the administrative, financial and monitoring mechanisms referred to in article 5. The Drafting Committee had noted that States made mutually beneficial arrangements with each other in the areas of capacity-building, transfer of technology, and financial resources. Such efforts served the common interest of all States to develop uniform international standards for regulating and implementing the duty of prevention.

14. Article 4 (Cooperation) was also based on the corresponding article of the draft at the forty-eighth session. However, once again the question of minimizing the effects of harm which had occurred was considered to be outside the scope of prevention. The Drafting Committee had also replaced “any” by “one or more”. The commentary would explain that the organizations referred to in the article were those which had the competence to assist the States concerned in preventing or minimizing significant transboundary harm. It would also explain that, in addition to such assistance, international organizations could provide a framework within which States would discharge their obligation of cooperation in matters of prevention under the article.

15. Article 5 (Implementation) was based on article 7 of the draft at the forty-eighth session. It stated the obvious: once a State had become a party to the draft articles it must take the necessary measures to implement them. Such measures might be of a legislative, administrative or other character, or might include, for example, the establishment of suitable monitoring mechanisms—a term which emphasized the continuing character of the duty established in the draft article.

16. Article 6 (Relationship to other rules of international law) was a simplified version of article 8 in the draft at the forty-eighth session. It made it clear that the draft articles were without prejudice to the existence, operation or effect of any other rule of international law, either treaty-based or customary, relating to an act or omission to which the draft articles might apply in the absence of such a rule.

17. Article 7 (Prior authorization) stated in the first part of the first sentence of paragraph 1 the basic rule that activities within the scope of the draft articles required the prior authorization of the State of origin. The Drafting Committee had felt it necessary also to spell out in that sentence an element previously included in the commentary to the corresponding article 9 of the draft at the forty-eighth session, namely that prior authorization was also required for a major change in a hazardous activity which was already authorized. As explained in the commentary, a “major change” would be one which increased the risk or altered its nature or scope. The second sentence of paragraph 1 addressed a different type of change, one transforming an activity without risk into an activity involving risk. The Drafting Committee had deleted the qualifier “major”, which had appeared in the draft at the forty-eighth session, since any change which would result in an activity falling within the scope of the draft articles would trigger the requirement of prior authorization.

³ Ibid., footnote 8.

18. Paragraph 2 of article 7 dealt with activities within the scope of the draft articles which had already been carried out before the articles entered into force. That issue had been addressed separately in article 12 in the draft at the forty-eighth session. The Special Rapporteur's proposal was more general than that provision, which had spelled out the various procedural steps involved. The Drafting Committee had made two changes in the Special Rapporteur's text, deleting "prior", since the provision dealt with pre-existing activities, and the reference to paragraph 1, which could be misinterpreted as meaning that the two paragraphs dealt with entirely different situations.

19. The Drafting Committee had concluded that it was important to include a provision dealing with the consequences of the operator's failure to conform with the requirements of the authorization. Indeed, the rule of prior authorization contained in the article would lose much of its practical effect if the State of origin did not also have the obligation to ensure that the activity was carried out in accordance with the conditions established by that State when authorizing the activity. The manner in which the obligation was to be fulfilled was left to the discretion of States. Paragraph 3 of article 7 indicated, nevertheless, that in some cases the operator's failure might result in the termination of the authorization.

20. Article 8 (Impact assessment) was based on article 10 of the draft at the forty-eighth session. It provided basically that an authorization must be preceded by an assessment of the transboundary impact of the activity. Such an assessment would enable a State to determine the extent and the nature of the risk involved in the activity and consequently the type of preventive measures which it must take. The question of who should make the assessment was left to States. The article did not specify what the content of the risk assessment should be. Obviously, such an assessment could be meaningful only if it related the risk to the possible harm which might be caused.

21. Article 9 (Information to the public) was based on article 15 of the draft at the forty-eighth session. It provided that States must keep the public likely to be affected informed about the risk involved in an activity subject to authorization and also to ascertain the public's views. The article reflected a new trend in international law of seeking to involve in the State's decision-making processes those people whose lives, health and property might be affected and to give them an opportunity to present their views to decision makers. The obligation stated in the article was circumscribed by the phrase "by such means as are appropriate", which gave States a choice of the means by which information was provided to the public.

22. Article 10 (Notification and information), which corresponded to article 13 of the draft at the forty-eighth session addressed the situation in which the assessment provided for in article 8 indicated that the planned activity did indeed contain a risk of causing significant transboundary harm. Together with articles 11 and 12, article 10 provided for a set of procedures which were essential to any attempt to balance the interests of all the States concerned by giving them an adequate opportunity to find a way of taking reasonable preventive measures. The core idea of the article was that the State of origin had a duty

to notify the States likely to be affected by the activities. The text adopted by the Drafting Committee was slightly different from article 13 of the draft at the forty-eighth session. First, it reflected an idea contained in the commentary to article 13. The State of origin was currently required, "pending any decision on the authorization of the activity", to provide the States likely to be affected with "timely" notification of the activity. The current text was more finely nuanced and flexible than that at the forty-eighth session which provided for notification "without delay".

23. With regard to the time available to the States likely to be affected to reply, the draft at the forty-eighth session provided that in its notification the State of origin should indicate the time within which a response was required. Article 10 currently did not contain such a requirement. According to paragraph 2, the States likely to be affected should provide a response within "a reasonable time", a formula regarded by the Drafting Committee as more flexible. However, the Drafting Committee understood that, insofar as it applied to the time limits prescribed for procedures before an activity was undertaken, "a reasonable time" should be interpreted to mean that no authorization might be granted before the elapse of "a reasonable time". That point would be explained in the commentary.

24. Article 11 (Consultations on preventive measures) corresponded to article 17 of the draft at the forty-eighth session; it provided for consultations between the States concerned on the measures to be taken in order to prevent or minimize the risk of significant transboundary harm and attempted to strike a balance between two equally important considerations. First, it must be kept in mind that the article dealt with activities which were not prohibited by international law and which, normally, were important to the economic development of the State of origin. But, secondly, it would be unfair to other States to allow such activities to be conducted without consulting them or taking adequate preventive measures. Article 11 provided neither a mere formality which the State of origin had to complete, with no real intention of reaching a solution acceptable to the other States, nor a right of veto for a State likely to be affected. In order to maintain that balance, the article placed emphasis on the manner in which and the purpose for which the parties entered into consultations. They must do so in good faith, taking into account each other's legitimate interests. On the recommendation of the Special Rapporteur, the Drafting Committee had made a number of changes in paragraph 1. It had deleted the phrase "and without delay", which was implicit in the principle of good faith governing the consultations, and the reference to the duty of cooperation, already contained in more general terms in article 4.

25. Paragraph 2 had been left unchanged. In paragraph 3, which dealt with the situation in which consultations had failed to produce an agreed solution, the Drafting Committee, again on the proposal of the Special Rapporteur, had replaced "and may proceed with the activity at its own risk" by "in case it decides to authorize the activity to be pursued at its own risk", in order to make it clear that an activity which might cause significant transboundary harm might be carried out only with the authorization of the State of origin, as provided in article 7. The Drafting Committee had also simplified the

saving clause contained in the last sentence, which currently read “without prejudice to the rights of any State likely to be affected”. The Drafting Committee had considered whether, if the settlement procedure envisaged in article 17 had been put into motion as a result of the failure of the consultations, the State of origin had to await the result of that procedure before authorizing the activity. Most of the members had felt that, since the activities were not prohibited by international law, such a requirement would put an undue burden on the State of origin.

26. Article 12 (Factors involved in an equitable balance of interests) was identical, with the exception of subparagraph (*d*), to article 19 in the draft at the forty-eighth session. Its purpose was to provide some guidance to States in their consultations. In the search for an equitable balance of interests many facts had to be established and all the relevant factors and circumstances weighed. The article should therefore be interpreted in the light of the rest of the draft articles, in particular article 3, which placed the obligation of prevention on the State of origin. The opening clause of the article provided that “In order to achieve an equitable balance of interests . . . the States concerned shall take into account all relevant factors and circumstances”. It was followed by a non-exhaustive list of such factors and circumstances. In view of the wide diversity of types of activity covered by the draft articles and the different situations and circumstances in which they would be conducted, it was impossible to compile an exhaustive list of the factors relevant to all individual cases. Some factors might be relevant in a particular case, while others might not, and still others not contained in the list might prove relevant. Furthermore, no priority of weight was assigned to the factors and circumstances listed, since some of them might be more or less important according to the case.

27. Subparagraph (*a*) compared the degree of risk with the availability of means of preventing or minimizing the risk of harm. For example, the degree of risk might be high but there might be measures which could prevent or reduce it, or there might be good possibilities of repairing the harm. The comparisons were both quantitative and qualitative. Subparagraph (*b*) compared the importance of the activity in terms of its social, economic and technical advantages for the State of origin with the potential harm to the States likely to be affected. Like subparagraph (*a*), subparagraph (*c*) compared the risk of harm to the environment with the availability of means of preventing the damage or reducing the risk. Subparagraph (*d*) took into account the fact that the States concerned frequently embarked on negotiations concerning the distribution of the costs of preventive measures. In so doing, they proceeded from the basic principle derived from article 3 that the costs were to be borne by the operator or the State of origin. Such negotiations mostly took place when there was no agreement on the amount of the preventive measures and when the affected State contributed to the costs of the measures in order to be better protected than it might be by the preventive measures which the State of origin had to take. That link between the distribution of costs and the amount of preventive measures was reflected in particular in subparagraph (*d*). Subparagraph (*e*) provided that the economic viability of the activity in relation to the costs of prevention and the possibility of carrying out the activity elsewhere or by other

means or of replacing it with an alternative activity should be taken into account. Lastly, subparagraph (*f*) compared the standard of prevention demanded of the State of origin with the standard applied to the same or a comparable activity in the State likely to be affected. The rationale was that it might be unreasonable to require the State of origin to comply with a much higher standard of prevention than the States likely to be affected. However, that factor was not in itself conclusive.

28. Article 13 (Procedures in the absence of notification) addressed the situation in which a State had reasonable grounds to believe that an activity planned or carried out in another State might contain a risk of causing significant transboundary harm although it had not received any notification to that effect. The issue had been dealt with in article 18 of the draft at the forty-eighth session, but the Special Rapporteur had felt that it was preferable to use the language of article 18 of the Convention on the Law of the Non-Navigational Uses of International Watercourses, which envisaged a more progressive mechanism, and the Drafting Committee had shared his view. Thus, instead of immediately requesting consultations, as in the draft at the forty-eighth session, the State which believed that it was likely to be affected would first request the State of origin to notify the activity and transmit relevant information about it. It was only if the State of origin refused, on the ground that it was not required to do so—in other words, if it believed that the activity did not contain a risk of causing significant transboundary harm—that consultations might take place at the request of the other State. The Drafting Committee had felt that it was necessary to specify in paragraph 2 that the State of origin must respond “within a reasonable time”. Indeed, consultations were pre-empted as long as that response was not forthcoming, and the State which believed that an activity in the State of origin risked causing it significant transboundary harm would be left without recourse.

29. The Drafting Committee had made a further change in the text proposed by the Special Rapporteur for paragraph 3, according to which the State which believed that the activity was hazardous could request the State of origin to suspend the activity for six months. It had been felt indeed that the obligation imposed on the State of origin was unduly stringent. The articles dealt with activities which were not prohibited by international law. The Drafting Committee had therefore softened the obligation by requiring the State of origin to “take appropriate and feasible measures to minimize the risk”. Suspension of the activity would only be required “where appropriate”. There was thus a sliding scale of measures which the State of origin could take. Moreover, the commentary would make it clear that such measures would also depend on whether the activity in question was still proceeding or had been completed.

30. Article 14 (Exchange of information) indicated the steps which had to be taken after an activity had begun. The purpose of that stage, as of the previous ones, was to prevent or minimize the risk of significant transboundary harm. The provision had been taken verbatim from article 14 of the draft at the forty-eighth session, except for the addition of “available” before “information”. The article required the exchange of information between the State of origin and the States likely to be affected while

the activity was in progress. Prevention was not a one-off measure but a continuing effort. Therefore the duties of prevention did not terminate once authorization had been granted for the activity; they continued for as long as the activity continued.

31. The information which had to be communicated under the article included whatever would be useful and relevant for the purposes of prevention. The addition of "available" had been found useful by the Drafting Committee as a means of alleviating the burden on the State of origin, which would otherwise have been required to provide "all information relevant". The new language introduced a further nuance and was fairer. The information had to be exchanged "in a timely manner", which meant that when a State became aware of such information it should inform the other State quickly, so that there would be enough time for all the States concerned to consult each other about preventive measures. The obligation to exchange information became operational only when the States had information relevant to preventing trans-boundary harm.

32. Article 15 (National security and industrial secrets) reproduced article 16 of the draft at the forty-eighth session without any changes. The Drafting Committee had felt that article 15 adequately reflected a narrow exception to the obligation of the State of origin to provide information under other articles. That type of clause was not unusual in treaties requiring an exchange of information, including the Convention on the Law of the Non-Navigational Uses of International Watercourses. However, article 31 of the Convention dealt only with information about national defence or security, while article 15 also protected industrial secrets. Indeed, in the context of the topic it was highly probable that some of the activities might involve the use of sophisticated technology protected under domestic legislation on industrial property. As in all the provisions of the draft articles, an attempt had been made to balance the legitimate interests of all the States concerned. Thus, the State of origin, while allowed to withhold certain information, must "cooperate in good faith with the other States concerned to provide as much information as can be provided under the circumstances".

33. Article 16 (Non-discrimination) was based on article 32 of the Convention on the Law of the Non-Navigational Uses of International Watercourses. It set out the basic principle that the State of origin must grant access to its juridical and other procedures without discrimination on the basis of nationality, residence or the place where the damage had occurred. It obligated States to ensure that any person, whatever his nationality or residence and regardless of where the harm might occur, received the same treatment as that afforded by the State of origin to its nationals under its domestic law. The article should be understood as preventing States from discriminating on the basis of their legal systems and not as constituting a general non-discrimination clause with respect to human rights. In fact, the provision was about equal access by nationals and non-nationals and by residents and non-residents to the courts and administrative agencies of the States concerned.

34. Article 17 (Settlement of disputes) was a new provision proposed by the Special Rapporteur and did not have

an equivalent in the draft at the forty-eighth session. It was based on article 33 of the Convention on the Law of the Non-Navigational Uses of International Watercourses in that it envisaged compulsory resort to a fact-finding commission at the request of one of the parties if the dispute had not been settled by any other means within six months. Among those other means the Special Rapporteur had highlighted the binding procedures of arbitration and judicial settlement. However, the Drafting Committee had felt that it was also important expressly to mention other means of third-party settlement, in particular mediation and conciliation. As for the fact-finding procedure, the Drafting Committee had been aware that in practice the stipulation in article 17 that the parties should "have recourse to the appointment of an independent and impartial fact-finding commission" would not be sufficient for the actual establishment of such a commission. Indeed, in binding international instruments that type of provision was normally accompanied by a detailed procedure on the appointment and functioning of the fact-finding commission, as was the case, for example, in article 33 of the Convention on the Law of the Non-Navigational Uses of International Watercourses. However, since the nature of the draft articles on prevention had not yet been decided, the Drafting Committee had felt it premature to set out such a detailed procedure in the text. That point would also be explained in the commentary. With regard to the last sentence of article 17, concerning the report of the fact-finding commission, the Drafting Committee had considered it preferable to delete the phrase "shall be recommendatory in nature" since it could give rise to misunderstandings. Such a report would normally be limited to an account of the facts which the fact-finding commission had established and would not contain recommendations as such. The commentary would make it clear that the report was not binding in any way.

35. The CHAIRMAN invited the members of the Commission to comment on the draft articles.

36. Mr. BENNOUNA said that article 17, which the Chairman of the Drafting Committee had just introduced, was not complete and, as it stood, of very little use. Paragraph 1 merely listed the means of settlement, which were available to States anyway, and thus it added nothing to Article 33 of the Charter of the United Nations. While paragraph 2 mentioned the appointment of a fact-finding commission, it said nothing about the actual modalities of the appointment of the members and the functioning of such a commission. He therefore proposed that the draft article should be sent back to the Drafting Committee.

37. Mr. FERRARI BRAVO said that the Special Rapporteur was to be congratulated for having made a selection from the texts already drafted in his endeavour to identify the rules to underpin an outline of a codification text. In the end, having started with a very general title the Special Rapporteur had arrived at conclusions which were fairly close to the ones which he himself had reached as Special Rapporteur on the environment for the Institute of International Law.

38. Article 17 was indeed a little thin, but that did not mean that it was totally useless, for prevention was an area in which States had always been reluctant to accept binding procedures. Even the modest fact-finding

commission provided for in paragraph 2 was a first step. Article 17 was not perhaps definitive in its form, but it would be difficult to go any further at the current stage and there was no need to send it back to the Drafting Committee.

39. The CHAIRMAN, in response to a question from Mr. PELLET, suggested that the Commission should proceed article by article.

It was so agreed.

ARTICLE 1 (Activities to which the present draft articles apply)

Article 1 was adopted.

ARTICLE 2 (Use of terms)

40. Mr. PELLET said that he wanted to be sure that the term “or control”, which was used in article 2 and in articles 7 and 13, did indeed address the case of a State which exercised effective control in a territory which did not belong to it and must therefore be held liable for what happened in that territory.

41. Mr. Sreenivasa RAO (Special Rapporteur) said that that was indeed how “or control” should be understood, that is to say, in accordance with the interpretation given by ICJ in the *Namibia* case.

42. Mr. HAFNER said that the phrase “under the jurisdiction or control” had been the subject of a long debate in Stockholm in 1972,⁴ since when it had usually been found in documents of the current type. It had been felt at the time that to speak solely of jurisdiction would immediately prompt the question of whether the jurisdiction was exercised lawfully. That was why “or control” had been added—in order to cover such questions as, for example, jurisdiction or control exercised over ships on the high seas. In other words, the addition of “or control” was designed essentially to circumvent a debate on the legality or illegality of the jurisdiction.

Article 2 was adopted.

ARTICLE 3 (Prevention)

43. Mr. PELLET said that he did not understand the reasons for the deletion of former article 3 proposed by the Working Group at the forty-eighth session and its replacement by the new article 3, which used virtually the same language as former article 4 proposed by the Working Group at the forty-eighth session. The deletion of the article had also removed the assertion of an essential principle, namely that the freedom of action of States had limits.

44. Mr. Sreenivasa RAO (Special Rapporteur) said that the old language had been removed out of a concern for brevity and in order not to overload the draft articles, but the essential underlying ideas and principles had not disappeared and had not been changed. As a whole, the draft

articles stated the limits on the freedom of action of States clearly and provided a regime to govern that question.

45. Mr. PELLET said that he agreed with the Special Rapporteur that other articles did contain the idea of a general duty of prevention found in the second sentence of former article 3. But the principle of the freedom of action of States and the limits thereto, which had been the essence of the whole text had completely disappeared. He proposed that the first sentence of former article 3, which was well drafted and said something fundamental, should be reproduced in an article 2 *bis*.

46. Mr. ECONOMIDES said that the very existence of the text under discussion proved not only that the freedom of States was not unlimited but also that it was very strictly limited. That was why it had been felt that the general duty of prevention, stated very strongly in article 3, would cover the whole of the first sentence of the former text, which could thus be deleted.

47. Mr. HAFNER said that he would be reluctant to reinsert the sentence in question, which was quite different from and went further than the current article 3. It was true that the Commission could and perhaps should address fairness between the generations and the duty to use natural resources in a reasonable manner, but its mandate did not extend that far.

48. Mr. BENNOUNA said that Mr. Pellet’s criticism was relevant and that the general principles stated in the first sentence of former article 3 could be inserted in the preamble of an eventual convention.

49. Mr. Sreenivasa RAO (Special Rapporteur) said that the commentary to article 3 would discuss the fundamental principle, which was a very general and universally accepted one.

50. Mr. PELLET said that he regretted the disappearance of the first sentence of former article 3 because he belonged to the school of legal objectivism, for which the will of the State was not everything in international law. In a world of internationalists there were too many people who thought that anything which was not prohibited was permitted. He would accept the decision to delete the sentence but thought it profoundly regrettable from a doctrinal standpoint.

Article 3 was adopted.

ARTICLE 4 (Cooperation)

51. Mr. GOCO said that the term “States concerned”, which appeared in article 4 and in articles 11 and 16, had not been included in article 2, on the use of terms, which defined only “State of origin” and “State likely”. Moreover, “State” was used without qualification in other articles. Did the different usages correspond to differences of substance?

52. Mr. SIMMA (Chairman of the Drafting Committee) said that the term “States concerned” had been used to avoid overburdening the text when the meaning was clear. In article 4 the States concerned were clearly the State of origin and the State likely to be affected. When “State” was used without qualification it could mean either the

⁴ See *Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972* (United Nations publication, Sales No. E.73.II.A.14 and corrigendum).

State as distinct from another institution or either the State of origin or the State likely to be affected. In every case the context clearly showed the meaning of the term used.

53. Mr. ECONOMIDES said that “States concerned” always meant the State of origin and the State likely to be affected, whereas “State” without qualification also covered the States parties to the future instrument or even States which were not parties but wished to apply the instrument. Those details should be made clear in the commentary.

54. Mr. AL-KHASAWNEH said that the phrase “shall cooperate in good faith” might give the impression, arguing *a contrario*, that States could cooperate “in bad faith”. Similarly, an *a contrario* argument might allow article 4 to mean that when the transboundary harm was not significant, States were not required to cooperate. Lastly, a logical sequence would require “minimizing” to be placed before “preventing”.

55. Mr. SIMMA (Chairman of the Drafting Committee) said that the phrase “shall cooperate in good faith” had been used in dozens of treaties. The term “significant harm” was also firmly established. In any event, there was no reason to raise *a contrario* arguments, and the Commission would not be able to rewrite the whole of the text in order to remove any risk of interpretations of that kind. Lastly, the terms “minimizing” and “preventing”, and their link with each other, had prompted a very lively debate in the Drafting Committee, which had concluded that the meaning of the article was that the primary requirement was to prevent harm but, failing that, at least to minimize the risk.

56. Mr. Sreenivasa RAO (Special Rapporteur) said that it had never been the Commission’s intention to minimize the importance of cooperation between States, regardless of how significant the harm was, even if in the current case the provision was addressing significant harm. All those points would be made clear in the commentary.

57. Mr. KABATSI said that in the English version “organization” should be in the plural. Article 1 spoke of a risk of causing harm but article 4 of reducing the risk of harm. Perhaps the verb “causing” should be inserted in article 4.

58. Mr. HAFNER said that the term “causing” used in article 1 had been taken from principle 21 of the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration)⁵ and principle 2 of the Rio Declaration. Unless care was taken with the punctuation, the introduction of “causing” in article 4 might change the grammatical object of the verb “preventing”.

59. Mr. GALICKI said that “causing” also appeared in articles 11 and 14, for example. Thus the problem affected the whole of the text.

60. Mr. CANDIOTI pointed out that “causing” already appeared in the Spanish version of article 4.

61. Mr. PELLET said that if “causing” was introduced in article 4 it should also be introduced in article 3. In both cases it might be difficult to reformulate the French version.

62. Mr. Sreenivasa RAO (Special Rapporteur) said that “causing” added nothing in the context of articles 3 and 4, since the risk of harm was the same thing as the risk of causing harm. Having consulted other members of the Commission, he proposed that articles 3 and 4 should remain as they were but, for the sake of consistency, the subsequent occurrences of “causing” should be deleted during the consideration of the articles in question.

63. The CHAIRMAN suggested that the Commission should adopt article 4 as it stood, bearing in mind the Special Rapporteur’s proposal and with “organization” put in the plural in the English version.

It was so agreed.

Article 4 was adopted.

ARTICLE 5 (Implementation)

64. Mr. PELLET said that the article was longer than the corresponding article 7 in the draft at the forty-eighth session: the phrase “including the establishment of suitable monitoring mechanisms” had been added. The provision was less anodyne than might be thought, for it imposed on States an obligation which some of them would find too burdensome. No doubt the Chairman of the Drafting Committee would give a detailed explanation of that point.

65. Mr. BENNOUNA said that the additional obligation which was worrying Mr. Pellet was not so burdensome, for States were already required under customary international law to monitor activities taking place in their territory.

66. However, he had doubts about the phrase “legislative, administrative, or other action”. Some thought should also have been given to constitutional action, since it could be relevant. A simpler but broader expression such as “States shall take the necessary measures of internal law” would have been sufficient.

67. Mr. SIMMA (Chairman of the Drafting Committee), replying to Mr. Pellet, said that the added phrase “suitable monitoring mechanisms” did not refer to some sophisticated technological apparatus but to a permanent and durable administrative arrangement equipped with the resources and capacity permanently to monitor the conduct of the activities which it had been created to monitor.

68. Mr. Sreenivasa RAO (Special Rapporteur) said that in fact “suitable monitoring mechanisms” might consist, for example, of a corps of inspectors, a monitoring body, a system of surprise inspections, exercises and intervention measures for the case in which harm had actually occurred. It had seemed essential to stress the establishment of such mechanisms because it was precisely at that level that States most often sinned, not for want of goodwill but for want of means.

⁵ Ibid., part one, chap. I.

69. Mr. SIMMA (Chairman of the Drafting Committee), replying to Mr. Bennouna, said that the Drafting Committee had avoided using the term “internal law” anywhere in the text because it had realized that it would always give the impression that internal law took precedence over international law.

70. Mr. PELLET said that the article should mention not only “legislative, administrative and constitutional action”, as Mr. Bennouna was proposing, but also “measures of international law”. It would no doubt be simplest not to use any adjective and simply say “States shall take the necessary action to implement”. In any event, the commentary would explain very clearly the nature of article 5, which otherwise might be regarded either as imposing an obligation on States or as merely giving them some advice.

71. Mr. ECONOMIDES said that current article 7 mentioned a whole series of administrative procedures of authorization and control. States would therefore have some hard legislative work to look forward to. That was indeed what article 5 was talking about. International law had nothing to do with the case.

72. Mr. KABATSI said that although the measures envisaged in article 5 were certainly measures of internal law, it should not be forgotten that they might have an international aspect, since for example a State could “seek the assistance of one or more international organizations”, as article 4 rightly provided.

73. Mr. RODRÍGUEZ CEDEÑO and Mr. LUKASHUK said that they were willing to adopt article 5 as it stood.

74. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt article 5.

It was so agreed.

Article 5 was adopted.

75. Mr. ROSENSTOCK said that in one of his statements the Special Rapporteur had given the impression that article 5 was concerned with something other than an obligation of conduct. As he understood it, the provision just adopted was quite definitely concerned with an obligation of conduct.

Membership of the Commission

76. The CHAIRMAN announced that Mr. Ferrari Bravo had tendered his resignation from the Commission in order to take up a seat on a European body. He offered him the Commission’s congratulations and thanks.

The meeting rose at 5.55 p.m.

2561st MEETING

Thursday, 13 August 1998, at 10.15 a.m.

Chairman: Mr. João BAENA SOARES

Present: Mr. Addo, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Bennouna, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Illueca, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Operti Badan, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Yamada.

International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities) (*continued*) (A/CN.4/483, sect. D, A/CN.4/487 and Add.1,¹ A/CN.4/L.556, A/CN.4/L.568)

[Agenda item 3]

CONSIDERATION OF DRAFT ARTICLES 1 TO 17 PROPOSED BY THE DRAFTING COMMITTEE AT THE FIFTIETH SESSION (*continued*)

1. The CHAIRMAN invited the Commission to continue its consideration of draft articles 1 to 17 on prevention of transboundary damage from hazardous activities adopted by the Drafting Committee (A/CN.4/L.568).

ARTICLE 6 (Relationship to other rules of international law)

Article 6 was adopted.

ARTICLE 7 (Prior authorization)

2. Mr. PELLET, concerned that paragraph 2 seemed too rigid, questioned whether the provisions of the draft articles should be made retroactive. He asked whether any safeguards had been provided to protect the interests of those engaged in pre-existing activities.

3. Mr. Sreenivasa RAO (Special Rapporteur) said that the provisions of article 7 did not alter the international obligations of States. States must be presumed to authorize activities on their territory with due regard for safeguards and international law. Paragraph 2 simply obligated States to implement the requirement of authorization with respect to pre-existing activities. A constant review of activities in the light of new information or changing realities was in any case a normal part of

¹ Reproduced in *Yearbook . . . 1998*, vol. II (Part One).