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Summary record of the 2874th meeting

Topic:
International liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from transboundary harm arising out of hazardous activities)

Extract from the Yearbook of the International Law Commission:-
2006, **vol. I**

46. It might be preferable for the Commission to draw up draft articles, but to leave any decision on their final form to the General Assembly—the procedure that had been followed with respect to the draft articles on the responsibility of States for internationally wrongful acts.[74] In his view, the Special Rapporteur had not been bold enough. He had greatly diminished the force of the text by couching it in a recommendatory form throughout, even when the issues in question were covered by customary law, and by drafting a non-binding text which could be consigned to a drawer and forgotten.

47. Mr. Sreenivasa RAO (Special Rapporteur), replying to members' comments, concurred with Ms. Escarameia that the topic under consideration was an emotive issue. The difficulty was to know how to translate emotion into forward motion. Caution must be exercised in order to produce a text which would not suffer the same fate as the excellent draft articles proposed by Mr. Barboza,[75] which had been rejected by the Sixth Committee in 1996.[76] With all due respect to Mr. Economides, who was a highly experienced legal adviser and negotiator, he personally believed that it was vital to ascertain whether States actually wished to have a formal convention, and to ensure that such a convention would not simply be ignored once it had been adopted.

48. He had not wilfully or maliciously set out to water down a draft text which was the product of 27 years of scholarly debate. Nevertheless, good intentions were not enough; experience had shown that, in the past, even after major disasters, compensation had not been forthcoming, or only *ex gratia* payments had been made. Although nuclear warships roamed the seas, no financial safety net had been provided to deal with the consequences of any potential accidents. The immediate compensation for which Ms. Escarameia yearned did not exist and the only remedy available to victims of transboundary harm was court action, which could drag on for years. Be that as it might, there was reason to hope that slow and steady action would ultimately lead to progress. The Commission would continue to face the paradox to which Mr. Koskenniemi had referred: the survival of the fittest had been the rule throughout history.

49. Legal writings about compensation raised many questions concerning the form that compensation should take, its quantification, the promptness with which it was to be paid, the amount which might be deemed adequate, and forum shopping. As Mr. Gaja had pointed out, some of those matters were outside the scope of the topic, but, as Special Rapporteur, it was his duty to endeavour to provide an answer to at least some of the queries raised by States. Many of those issues would, however, have to be decided at the national level and were not amenable to international harmonization.

50. Initially he had favoured a very strongly worded convention, but he had been warned that there was no likelihood of such a convention ever being ratified. While he would not stand in the way of the Commission if it nonetheless wanted to adopt a convention of that kind, he had found ample evidence in his own country that national courts were more likely to apply principles and to incorporate them in their decisions, than to pay any heed to a convention which had not been ratified. The precautionary approach, the "polluter pays" principle and the principles of compensation which he had discussed in his report had all been applied by national courts. The adoption of a good set of draft principles accompanied by an excellent commentary was therefore the right way to deal with the topic.

51. He fully agreed with the scholarly analysis put forward by Mr. Momtaz of the implications of international humanitarian law concerning armed conflict with regard to liability principles. If any aspects of the issue were not already covered in the footnote to paragraph 10 in his report, he would be pleased to rectify the omission.

The meeting rose at 11.35 a.m.

2874th MEETING

Thursday, 11 May 2006, at 10 a.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Addo, Mr. Baena Soares, Mr. Candioti, Mr. Chee, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Valencia-Ospina, Ms. Xue, Mr. Yamada.

International liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from transboundary harm arising out of hazardous activities) (*continued*) (A/CN.4/562 and Add.1, A/CN.4/566, A/CN.4/L.686 and Corr.1)

[Agenda item 3]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. FOMBA said that, as stated in paragraph 2 of the report, the Special Rapporteur had not included specific drafting suggestions offered by Governments, but instead proposed leaving them to be considered by the Drafting Committee. However, the Special Rapporteur should perhaps have first submitted those suggestions to the Commission so as to give members who were not on the Drafting Committee some idea of the proposals that had been made. Nonetheless, by producing a synthesis of significant trends on the basis of the comments from Governments, the Special Rapporteur had performed a useful task. The fact that, despite some differences of

[74] See footnote 8 above.

[75] *Yearbook … 1996*, vol. II (Part Two), annex I, p. 100.

[76] Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-first session, prepared by the Secretariat (A/CN.4/479), p. 15, para. 64 (mimeographed; available on the Commission's website, documents of the forty-ninth session).

opinion on the final form the draft principles should take, States had endorsed the general considerations on the basis of which the Commission had adopted the draft principles on first reading, clearly showed that the Commission was moving in the right direction and that a final consensus on the matter was within reach.

2. Turning to the Special Rapporteur's clarification of various points raised by States, he said he was persuaded by the Special Rapporteur's conclusion that there was no compelling reason for reconsidering the threshold of "significant damage" in respect of the liability aspects of the topic, despite the concern expressed, rightly or wrongly, that such a definition might violate the principle of non-discrimination. He supported the Special Rapporteur's argument, cogently set out at the end of paragraph 9 of the report, that the Commission should refrain from embarking on the sensitive and risky task of drawing up a list of activities that might be considered as coming within the scope of the draft principles. He also found himself in sympathy with the Special Rapporteur's conclusions concerning the possibility of broadening the scope of the draft principles to include liability for transboundary damage caused to neutral States in case of war between two or more States, transboundary damage caused by terrorism and transboundary damage caused by benign activities such as storage of water in dams. As for the scope of the term "damage to the environment", he concurred with the view expressed by the Special Rapporteur in connection with the three different sets of issues raised by Governments in that regard—namely, global commons, the broad definition of the word "environment" and the admissibility of claims for so-called "pure environmental damage"—that a broader definition of the term "environment" in the context of the draft principles opened up possibilities for further development of the law of liability. Noting that the Special Rapporteur rightly saw a real possibility of a case of multiplicity of claims arising, he welcomed the fact that important issues such as the applicability of the "most favourable law principle" were dealt with in the report. As for the legal status of the draft principles, the Special Rapporteur was right to conclude that, despite the provisions of article 15 of its Statute, the Commission did not, in practice, make any distinction between recommendations that it adopted as an exercise in the codification of existing international law and those relating to its progressive development. He also concurred with the view that the legal value of the draft principles should not in any case be underestimated.

3. With regard to the review of some of the salient features of the draft principles, he found the Special Rapporteur's conclusions concerning the precautionary principle (para. 26) and the "polluter pays" principle (para. 27) fair, logical and acceptable. As for the section on "Notable obligations of State", it was significant that the issue of State liability for transboundary damage arising out of either ultrahazardous or hazardous activities did not appear to have gained any support, even as a measure of progressive development of law, and that the Special Rapporteur cited the case law established by the ICJ in *Gabčíkovo–Nagymaros Project* to illustrate the principle of international law whereby the State had an obligation to exercise due diligence, both at the stage of authorization and monitoring of hazardous activities, and also in the phase when damage might actually materialize, in spite of best efforts to prevent it. He shared the view, cogently set out by the Special Rapporteur, that such an obligation of due diligence carried with it some ancillary duties. He also concurred with the Special Rapporteur's assertion that equal compliance with the obligation of due diligence should not be expected of all States, for the reasons given at the end of paragraph 32. On the principle of non-discrimination and minimum standards, he believed that the principle of equal treatment of nationals and transboundary victims, which was firmly established in customary international law, should be paramount. The obligation to ensure prompt and adequate compensation was clearly the key issue, and he found the Special Rapporteur's interpretation of the concept of "adequate" compensation in paragraph 37 of the report correct and acceptable.

4. Lastly he said that, since prevention and liability were so closely interrelated, he would prefer to see the draft principles ultimately adopted in the form of a convention proper or, failing that, a framework agreement. They should be adopted as guidelines only as a last resort.

5. Mr. DAOUDI, referring first to the comments by Governments examined in the beginning of the report, said that the Commission should retain the threshold of damage provided for in the current text of the draft, since non-significant damage could, if repeated, become significant. At the very least, any raising of the threshold should be considered on a case-by-case basis. As for the question of broadening the scope of the topic, he noted that military operations undertaken pursuant to a Security Council resolution using unenriched uranium-based weapons, which were not yet prohibited by international law, could cause damage to the population, property or environment of a third State and to its own forces. Damage caused by a burst dam, as envisaged by the Special Rapporteur, was entirely relevant to the topic. In his own view, damage caused to the global commons should be treated separately, because of the special nature of the questions it raised. The two scenarios envisaged by the Special Rapporteur in relation to multiplicity of claims also raised sensitive questions, to which, as matters currently stood, there were only theoretical solutions.

6. With regard to the main objective of the draft principles, namely, to ensure "prompt and adequate compensation to natural or legal persons, including States, that are victims of transboundary damage, including damage to the environment", he thought that the obligation to provide compensation should be couched in stronger terms, given that the obligation of the State to exercise due diligence and the liability of the operator were elements of customary law, as was stated in several paragraphs of the report. He also wondered whether the wording of draft principle 4, paragraph 3, should be amended in line with the Special Rapporteur's comments on strict liability and reversing the burden of proof in paragraphs 3 (*c*), 26, 27 and 29 of his report.

7. The report linked the performance of obligations by States to prevent environmental damage with the notion of "good governance", at the same time stressing that not all States—particularly developing countries—had the

economic resources to discharge such obligations. The prevention of environmental damage was surely reason enough to justify a concomitant obligation to engage in the necessary technology transfer. It was regrettable that draft principle 5 did not reflect those important concerns, and he hoped that it would be possible to rectify that omission on second reading.

8. With regard to the form that the draft principles should take, he said that it was difficult to combine provisions of different kinds—some pertaining to public international law, others to customary rules—in a set of codifying draft articles or to incorporate binding customary rules into a set of draft principles. He therefore supported the suggestion in paragraph 45 of the report that the Sixth Committee should appoint a working group that would include in the draft articles on the prevention of transboundary harm from hazardous activities[77] an obligation of States to ensure effective judicial access and remedies and prompt and adequate compensation to victims of transboundary damage. The draft articles could contain a provision stating that the obligation to ensure compensation should be in line with the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities.

9. In conclusion, he said he was in favour of referring the draft principles to the Drafting Committee.

10. Mr. KEMICHA congratulated the Special Rapporteur on his third report and welcomed the fact that the draft principles had been favourably received by States. As noted by the Special Rapporteur in paragraph 4 of the report, the question of the final form that the draft should take remained undecided. However, the emotional exchanges to which the question had given rise suggested that, whatever the solution adopted, it should respect the Commission's mandate. In that regard, he shared the concern expressed by Mr. Economides and others that, by restricting itself to a set of draft principles, the Commission might fail in its mission of codification and progressive development of international law.

11. Turning to specific points raised in this part of the report, he said that the precautionary principle should play a role in the implementation of the draft principles. The Special Rapporteur seemed to suggest that the principle should be mentioned, but did not expand on that suggestion. The question was therefore whether it should appear in the main body of the text, thus shifting the burden of proof to the operator, or in the commentary. The same applied to the "polluter pays" principle, which established the operator's liability for damage arising out of hazardous activities. The course of action outlined in paragraph 29 of the report, namely, that a proper definition of the word "damage" should be adopted, should be explored further. The Special Rapporteur was also right to dwell on the question of State liability for transboundary damage arising out of hazardous activities and to require States to exercise due diligence, although the former proposal did not seem to have enjoyed any support, even as a measure of progressive development of international law.

12. He also noted that, according to the report, the principle of non-discrimination referred to in draft principle 6, paragraph 3, assumed that suitable remedies and adequate compensation would be available to nationals in the first instance in case of any damage arising from hazardous activities, but would also be available to transboundary victims. The main contribution of the draft principles, however, was the assurance contained in draft principle 3 of prompt and adequate compensation for victims of transboundary damage, based firmly on State practice and judicial decisions and considered to constitute a general rule of international law in the same way as the other principles, as stated in paragraph 23 of the report. In that context, it was understandable that there should be a temptation to extend to the international community as a whole the possibility of adopting the principles, to which an ever increasing number of States subscribed, in the form of a framework convention, a possibility that the Commission had by no means rejected, since all that was needed was to amend the text of draft principles 4 to 8. According to the Special Rapporteur, however, draft principles were preferable to a convention or "framework arrangement", in that, as he said, "[t]here is value in couching the entire end-product in a more prescriptive form only if it is possible and feasible". He himself supported that approach and understood the Special Rapporteur's decision to look to the long term, allowing the draft principles time to mature and acquire legitimacy, without ruling out the possibility of "reflecting the basic obligation on the duty to pay compensation and the right to seek remedies in language that is more prescriptive".

13. Mr. YAMADA commended the quality of the third report on the legal regime for the allocation of loss in case of transboundary harm arising out of hazardous activities and welcomed the prospect of the Commission finally completing its work on the topic after 27 years.

14. The Commission had long struggled to conceptualize that broad topic, before deciding in 1997 to focus on activities with a risk of causing significant transboundary harm and to concentrate first on the issue of prevention and then on liability.[78] Thereafter, within a short period of five years, the Commission had been able to produce in 2001 draft articles on prevention of transboundary harm arising out of hazardous activites, on which the General Assembly had regrettably not yet acted but which, it was to be hoped, would be adopted as a convention. Then, again in a very short span of time, the Special Rapporteur had produced an excellent set of draft principles on the very complex subject of liability, principles that enjoyed general support.

15. Concerning the final form of the draft, some argued that the same treatment as had been given to the draft articles on prevention should be accorded to the draft principles, in accordance with the wish expressed by Member States in General Assembly resolution 56/82 of 12 December 2001 (para. 3). Nevertheless, in 1996 the Commission had clearly stated that the two aspects of the topic, though related, were distinct.[79] A separate decision would therefore have to be made about regarding the final form of the draft principles. Accordingly, he supported

[77] See footnote 56 above.

[78] *Yearbook ... 1997*, vol. II (Part Two), p. 59, para. 168.

[79] *Ibid.*, para. 165.

the conclusion drawn by the Special Rapporteur, who had an unparalleled grasp of the issues, that the end-product should be cast in the form of draft principles.

16. Regarding the threshold for transboundary damage, he was pleased that the Special Rapporteur had maintained the established policy of the Commission. The concept of "significant damage" was relative and flexible. It should be kept in mind that the hazardous activities in question were not undesirable or unnecessary: on the contrary, they were essential for the welfare of peoples and their development.

17. Concerning the widely held perception that polluters were powerful actors and victims weak ones, he said that while that was often the case, the opposite scenario could also arise. In that connection he cited the example of the many foreign ships that came to grief on Japan's coastline every year. Most were from small and weak States. The operators lacked the financial capacity to reimburse Japan for the enormous sums it spent to rescue the crews, clean up the pollution and salvage the abandoned ships. The sole possible solution was to formulate a specific international regime, as described in draft principle 7. While he hoped that a convention could be concluded to cover such situations, he was not so optimistic as to suppose that weak States were ready or able to assume such heavy obligations.

18. Lastly, he pointed out that as the present session was the last in which the Special Rapporteur would participate, the Commission must either support him in completing his work or else risk having to start again from square one. Accordingly, he was in favour of referring the draft principles adopted on first reading[80] to the Drafting Committee for finalization.

19. Mr. KOLODKIN said that he, too, wished to congratulate the Special Rapporteur, not only on his third report but also on all his work on the subject of international liability in case of loss from transboundary harm arising out of hazardous activities. The Special Rapporteur had achieved a breakthrough that would enable the Commission to finish its consideration of the topic much more rapidly. It was likely that an end-product could be submitted to the General Assembly at its next session.

20. He endorsed most of the report's conclusions and positions. Among other things, he favoured retaining the scope of application and the threshold of "significant damage" already adopted by the Commission on first reading and agreed that there was no need to list the activities falling within the scope of the draft principles. During the consideration of the draft on first reading, he had had doubts about the advisability of including damage to environment *per se*, but in the light of the subsequent debate, he now thought it was a wise decision.

21. As the Special Rapporteur pointed out, State liability for transboundary damage arising out of ultrahazardous or hazardous activities did not have support even as a measure of progressive development of law. In that connection it should be noted that such activities, notwithstanding their dangerous character, were not prohibited by international law and were also necessary for the social and economic development of States. On the other hand, a general principle of international law had emerged under which the State had an obligation of due diligence both at the stage of authorization of hazardous activities and in monitoring the activities authorized. However, a breach of that obligation of due diligence entailed the responsibility of the State for an act prohibited by international law, rather than liability for an activity not prohibited by international law. Accordingly, it was justifiable not to oblige the State in whose territory the damage-causing activity was carried out to provide compensation for the victims. On the other hand, due importance was attached to the principle whereby each State should take the necessary measures to ensure that the victims received prompt and adequate compensation, *inter alia* by imputing liability to the operator.

22. The principle of strict but limited operator's liability was already established as a principle of international law in the field of protection of the environment. It was important to specify, as was done in draft principle 4, paragraph 2, that such liability did not require proof of fault. In addition, it should be indicated in the commentary that in the event of fault, the operator's liability could be unlimited. Such unlimited liability of the operator had already been envisaged, for example in the Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes and to the 1992 Convention on the Transboundary Effects of Industrial Accidents. The draft principles allowed for exceptions to operator's liability as long as they were consistent with the objective set forth in draft principle 3, namely, ensuring prompt and adequate compensation to victims. The commentary should emphasize that such derogations were exceptions and examples should be given.

23. Whether or not exceptions were to be included depended on the form to be taken by the end-product. A number of provisions would have to be reviewed, if it was decided to submit to the General Assembly draft articles or a draft international convention. The Drafting Committee must have a clear mandate on that question. He personally thought that it would be best for the Commission to confine itself to recommendations at the present stage, since most of the provisions of the draft principles had not yet become rules of international law. Moreover, a set of recommendations was probably what was expected by States, which could use them in drafting legislation and in the administration of justice in that field.

24. The Commission should not simply submit a set of draft principles to the General Assembly, but should also recommend their adoption in the form of a declaration that could serve as the basis for the future adoption of an international convention.

25. Mr. ECONOMIDES commended the Special Rapporteur's wisdom, experience and talent, which had

[80] See footnote 55 above.

enabled him to deal with an extremely difficult subject in a very short period of time.

26. Like Ms. Xue, he found it encouraging that Governments had welcomed the significant trends to which the Special Rapporteur devoted seven subparagraphs in paragraph 3 of his report.

27. Regarding the threshold of damage, he recalled that for over 20 years he had been fighting a losing battle against the concept of "significant" damage. This time, though, it was clearer than ever that the expression did not fit the situation the Commission wished to address, since it sought to exclude liability for minimal or negligible damage. Obviously, however, "significant" went further. He therefore proposed the replacement of "significant damage" by "damage other than minimal", a negative formulation that was preferable by virtue of its greater flexibility. In addition, the opportunity to place greater emphasis on the principle of non-discrimination between nationals and foreigners gave the Commission a strong reason to lower the bar and lessen the scope of damage to some extent. The Special Rapporteur judiciously raised the question of non-discrimination in paragraph 8 of his report but failed to draw the necessary conclusions.

28. Although he was also in favour of excluding from the draft any questions relating to damage to global commons, he thought that the Commission had a duty to propose officially that such questions, which were of interest to the international community as a whole, should be included in its work programme for consideration at some point in the future.

29. He was in full agreement with Mr. Momtaz regarding the categorical exclusion from the scope of application of the draft of acts of terrorism, acts of war of every type and all acts prohibited under international law—a view that the Special Rapporteur also shared. His reading of paragraph 14 of the report, and particularly the footnote on the F-4 category of environmental and public health claims, brought to mind a question he had never previously considered, namely, whether the recent decisions of the United Nations Compensation Commission concerning environmental damage could be viewed as representative and as a step in the right direction. He would like to hear the Special Rapporteur's opinion on that point.

30. The Special Rapporteur was right to emphasize in paragraph 15 of his report that the international responsibility of the State of origin for failure to discharge obligations of due diligence set out in the draft articles on prevention of transboundary harm arising from hazardous activities could exist alongside the liability of the operator. Although such responsibility and liability were closely connected, they appeared to be independent of one another, particularly since their implementation was subject to differing conditions. In that regard he did not share the view expressed in the footnote according to which affected individuals and States would be estopped from raising issues of State liability if they had not done so within a reasonable time period. A failure to act on the part of the States and persons concerned could indeed reduce the responsibility of the State of origin, but it could not expunge it entirely, at least as a general rule. From that standpoint, the particular circumstances of each case were decisive.

31. Lastly, as he had already stated at the previous meeting, he favoured the submission of a set of draft articles, which would be more useful to States and national and international courts than a mere list of recommendatory principles. Certainly, the Commission should indicate as clearly as possible, in the commentary to each article, whether the provision resulted from codification of customary international law or constituted a new rule in the context of progressive development. That, after all, was in keeping with its Statute and its practice.

32. However, regarding the final form of the draft, he believed that at the present stage of work the Commission should show more flexibility and adopt the same solution as for the draft articles on responsibility of States, by requesting the General Assembly simply to take note of the draft for the time being, and to defer consideration of the final form it should take until a later stage.

33. Meanwhile, he favoured the referral of the draft principles and comments and suggestions made during the general debate to the Drafting Committee at the earliest opportunity. Nevertheless, like Mr. Kolodkin, he thought that the Commission should be more specific about the question of form. The Special Rapporteur himself had not ruled out the possibility that some draft principles might eventually become primary rules. In his own view, that would be a useful interim solution. In any case, the Drafting Committee should be given a good deal of latitude on the matter.

34. Mr. CANDIOTI congratulated the Special Rapporteur on his excellent work and assured him of his full support. He thanked Mr. Yamada for outlining the history of the topic. When he himself had first entered the Commission, a well-nigh funereal atmosphere had attended the debates on the topic, and many eminent members had advocated abandoning it on grounds of a lack of solid theoretical foundations. It was only when Mr. Sreenivasa Rao had been appointed Special Rapporteur on the topic that the Commission had, in a short span of time, been able to develop final draft articles on the obligations of prevention[81] that had won the support of Governments and that was worthy of being set forth in the form of a convention. The Commission should not lose heart: once again, in a short span of time, the Special Rapporteur had elaborated an extremely interesting set of draft principles that introduced a fundamental change of approach.

35. Accordingly, he considered that the Commission should further refine the eight draft principles and submit them to the General Assembly, which should then decide on the most appropriate course to follow. Nevertheless, it was important to respond to the request of the Chairperson of the Drafting Committee by giving the Drafting Committee some guidance. The Commission

[81] See footnote 78 above.

could recommend that the Drafting Committee determine whether certain provisions could be formulated in a more prescriptive fashion, for example by replacing the numerous instances of the word "should" in the English text by "shall".

The meeting rose at 11.20 a.m.

2875th MEETING

Friday, 12 May 2006 at 11.35 a.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Later: Mr. Víctor RODRÍGUEZ CEDEÑO

Present: Mr. Addo, Mr. Baena Soares, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Sreenivasa Rao, Mr. Valencia-Ospina, Ms. Xue, Mr. Yamada.

International liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from transboundary harm arising out of hazardous activities) (*continued*) (A/CN.4/562 and Add.1, A/CN.4/566, A/CN.4/L.686 and Corr.1)

[Agenda item 3]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. Mr. CHEE commended the Special Rapporteur's tenacity and diplomatic skills, which had enabled him to overcome many obstacles. Equipped with his excellent third report on the legal regime for the allocation of loss in case of transboundary harm arising out of hazardous activities, the Commission would undoubtedly bring its work to a successful conclusion.

2. Following the adoption of the draft articles on prevention of transboundary harm from hazardous activities,[82] the Special Rapporteur had produced the draft principles on liability arising from transboundary harm, which were intended to be a soft law instrument. The core of the instrument was the provision of remedies for damage sustained by victims; if compensation for the damage was not adequate, additional financial resources would be provided based on allocation of loss. The formulation in principle 4 seemed to be based upon the Hull formula, articulated by United States Secretary of State Cordell Hull in 1938 in response to the nationalization of United States assets by the Government of Mexico.[83]

3. The preamble to the draft principles referred to the 1992 Rio Declaration,[84] which had followed up on the 1972 Stockholm Declaration.[85] It was significant that both declarations contained a clause on the obligation of States to ensure that "activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction".

4. The Special Rapporteur's report highlighted three principles, namely the precautionary approach, the "polluter pays" principle and the principle of due diligence. In paragraph 42 of his report the Special Rapporteur declared his objective of casting the end-product in the form of draft principles, an approach which had the twofold advantage of not requiring the potentially unachievable harmonization of national laws and legal systems, and of being more likely to meet the goal of widespread acceptance. Paragraph 43 of the report stated that such a course might pave the way for eventual codification of international law on the subject.

5. Principle 21 of the 1972 Stockholm Declaration was also of great relevance to the topic, and a reference thereto should be included in the preamble to the draft principles on allocation of loss. While both developing and developed States continued to seek industrial development, the reality was that environmental pollution had been mainly caused by the developed countries. Their reluctance to regulate environmental pollution was therefore to be expected. Nevertheless, the stakes were high: unless industrial pollution was regulated, the very future of human life on earth could be jeopardized.

6. On the threshold of "significant" harm adopted in draft principle 1, he noted that that criterion needed to be weighed against the extent of the risk of such harm arising. Draft principle 2 provided comprehensive definitions of "damage", "environment", "transboundary damage", "hazardous activity" and "operator". Draft principle 3 was crucial in that it defined the objective of the draft principles as being to provide compensation which was prompt and adequate. Accordingly, pursuant to draft principle 4, paragraph 1, each State should take necessary measures to ensure that prompt and adequate compensation was available for the victims of transboundary damage. Paragraphs 3, 4 and 5 of the same draft principle related to financial security such as insurance to cover claims of compensation, including industrywide funds at the national level where appropriate and, where such measures proved to be inadequate, called upon the State to ensure that additional financial resources were allocated. Draft principle 5, on response measures, provided that States should, *inter alia*, take steps promptly to notify other States affected. Draft principle 6 indicated that States should provide appropriate procedures to ensure that victims received compensation for damage caused by transboundary harm. In draft principle 7, States were urged to cooperate in the development of global, regional or bilateral agreements on prevention and response measures.

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[82] See footnote 56 above.

[83] Cited in A. Cassese, *International Law in a Divided World*, Oxford, Clarendon, 1986, p. 322.

[84] See footnote 72 above.

[85] See footnote 71 above.