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FIFTH REPORT ON INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW

by

Mr. Julio BARBOZA, Special Rapporteur

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I. INTRODUCTION

A. Preliminary considerations

1. The debate on this topic at the latest session of the International Law Commission was extremely fruitful, as was the debate in the Sixth Committee of the General Assembly on the same subject. The present Special Rapporteur believes that, following these two important debates, it will be possible for our Commission to move in the right direction.

B. The concept of risk

2. In the fourth report of the present Special Rapporteur, 1/ the concept of "risk" was proposed as a means of limiting the scope of the draft. It is logical to try to establish limits because, otherwise, the subject might become fragmented into a number of parts to which it would be difficult to apply a single method.

3. A legal text can, nevertheless, mix two different types of liability, provided that the limits of each are clear. This often occurs in domestic law, where two different types of liability may apply to the same conduct, depending on the legal course chosen. In the area of industrial accidents, for instance, some domestic legal systems usually provide for a kind of causal liability on the part of the employer so that, in the event of an accident, the employer must pay a certain maximum amount whether or not he is at fault. Such compensation is sometimes considerably less than the actual injury suffered by the employee, with the result that if the latter thinks he has sufficient evidence to demonstrate that the employer is at fault, he may opt for the usual legal course and claim larger amounts of money. In that case, he would be subject to the burden of proof under common law.

4. The limitation imposed by the concept of "risk" could establish limits which would, in particular, prevent kinds of "absolute" liability from being incurred, in which any and all transboundary injury would have to be compensated. The Special Rapporteur believed, and continues to believe, that this would require a degree of solidarity found only in societies far more integrated than our present-day community of nations.

5. Let us take a closer look at the foregoing. In the area of liability, in the final instance the law faces an inexorable choice: who is to be held responsible for an injury that has occurred? A first answer would be to find out who is to blame, in the broadest sense. That person must pay compensation. Now, if no one is to blame for the specific act which caused the injury, the person who undertook the activity of which that act forms a part must pay compensation, normally because it is he that benefits from the results of that activity or else the person that

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1/ A/CN.4/413, paras. 24-31 and 44-48.

owns the dangerous thing must provide compensation because he created the danger. This is the basis for the theory of "risk", where, as the present Special Rapporteur sees it, there is a kind of "original fault" - "original sin" he called it in one of his reports 2/ - because this "fault" or "sin" is ab initio, in other words, lies at the origin of the activity. According to this theory, the employer assumes responsibility for compensating for accidents in which the risk he created materializes. This has been called "conditional fault" because the fault exists in theory all the time but is only triggered in practice if an accident occurs: the owner is "at fault" because he is responsible for the existence of the activity, even though he is in no way to blame for the actual episode in question.

6. There is a third instance, however: the moment comes when the distinction between the two kinds of fault cannot be made, as would be the case with injury caused not by an activity but by an isolated act beyond the control of the perpetrator or by a thing which is not normally dangerous. In the earlier instance, fault (real or otherwise) in respect of an act is linked to an activity: here that link does not even exist.

7. Some domestic legal systems, however, seek to prevent the innocent victim, the person who did absolutely nothing to deserve the injury, from suffering. One possible solution is to hold liable either the person responsible for the act, even if he acted without fault, or the owner of the thing that caused the injury, even if this thing is not normally dangerous. No matter how tenuous the distinction, and even though it might not be measurable in terms of fault, if it can be made, then liability can be attributed. Now it is this last kind of liability, which we could call "absolute", that we sought to avoid in the fourth report by introducing the concept of "activities involving risk".

8. Now this kind of limitation based on risk involved an unknown quantity: did it or did it not include in the topic activities which cause appreciable transboundary injury by pollution, the effects of which are normally cumulative? This question is dealt with in the fourth report, 3/ to which we refer.

9. The difficulty with these kinds of activities is that their polluting effect and thus the injury they cause is normally foreseeable: it is an inevitable consequence of the activity itself. If an industry uses certain ingredients which are known to be pollutants and if certain conditions exist that are also known, transboundary injury is bound to occur. Since the element of contingency of the injury was lacking, it was difficult to speak of risk.

10. However, the fourth report advocated including these kinds of activities in the scope of the topic, for if activities involving risk, or contingent injury, are included, then it is all the more logical that those which are bound to cause

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2/ In order to avoid using the concept of "fault" which might complicate matters in the area of international liability.

3/ A/CN.4/413, paras. 8-15.

injury should be included. That was the logic underlying their inclusion, assisted by the broad wording of the topic ("activities not prohibited ...") which lent itself to including them even though they might not strictly "involve risk"; it was also thought that general international law did not impose a prohibition which might exclude them from the topic. 4/

11. The Commission and the Sixth Committee were, however, reluctant to accept the concept of "risk" in the form in which it was used in the fourth report. 5/ That concept was retained for prevention, however, since, if an activity does not have

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4/ See A/CN.4/413, para. 10.

5/ The view expressed by the delegation of Austria in the Sixth Committee is illustrative of this reluctance:

> "It should be borne in mind that the concept of liability for acts not prohibited by international law in reality relates to two fundamentally different situations which require a different approach: one situation relates to hazardous activities which carry with them the risk of disastrous consequences in case of accident, but do not have an adverse impact on other States or on the international community as a whole in their normal operation. It is thus only the accident that needs to be covered by liability - which might be called the premium for the tolerance of such an activity by other States. By its very nature this liability must be absolute and strict, permitting no exceptions.
>
> "The task of the International Law Commission, however, also relates to a fundamentally different situation, that is, transboundary and long-range impacts on the environment. In this case the risk of accident is only one, and even a minor, aspect of the problem. It is through their normal operation that some industrial and energy-producing activities, but also for instance the driving of cars and the heating of houses, cause prejudice to the environment of other States. Moreover, this harm is not caused by a single, identifiable source as in the case of hazardous activities; there is a multitude of sources which produce harmful effects through accumulation. For a long time these emissions have been generally accepted because every State was producing them and their nefarious consequences were neither well known nor obvious. The growing awareness of their harmful influence has, however, reduced the level of tolerance to a limit that is formed by the highest state of the art in technology, on the one hand, and economic feasibility, on the other. In respect of this situation liability has two distinct functions: as with hazardous activities, it should on the one hand cover the risk of an accident, such as a fortuitous emission exceeding the generally accepted limits; on the other hand, it must also cover - and that is its essential function - significant harm caused in the territory of other States through a normal operation. Liability for risk must thus be combined with liability for a harmful activity." (Statement by Ambassador Helmut Tuerck to the Sixth Committee on 2 November 1988, provided to Sixth Committee delegations by the Permanent Mission of Austria to the United Nations.)

dangerous characteristics, a State can hardly be asked to take precautionary measures against it.

12. The present Special Rapporteur cannot in this case disregard the important body of opinion in the Commission which prefers not to use the concept of "risk" as a limiting factor, and believes that such thinking can be incorporated in the draft articles. He also believes that not all injury would be compensable under this draft (although it might be under another instrument), nor would we incur the dreaded "absolute liability" if we adhered to certain concepts existing in our articles. To start with, we have the concept of "activity" as opposed to "act". Already in connection with the second report of the present Special Rapporteur, 6/ the Commission had shown a preference for adopting the terminology of the French version of the title and referring to "activities" instead of "acts". 7/

13. This attitude is important for limiting the scope of the draft because, in one of its meanings, liability refers to the consequences of certain conducts. 8/ According to this meaning, "liability" relates only to acts, to which legal consequences can be attributed, and not to activities, because causality originates in specific acts, not activities. A certain result in the physical world which amounts to injury in the legal world can trace the chain of causality back to a specific human act which gave rise to it. 9/ It cannot, however, be attributed quite so strictly to an "activity", which consists of a series of acts, one or more successive episodes of human conduct aimed in a certain direction.

6/ Yearbook of the International Law Commission 1986, vol. II (Part One), document A/CN.4/402.

7/ Ibid., (Part Two), p. 61, para. 216.

8/ Either a breach of an obligation (wrongfulness) or fulfilment of the condition specifically triggering liability (injury in causal liability).

9/ See paragraph 68 of the second report of the present Special Rapporteur (see footnote 6): "So we return to the complexities of the title of the topic and to the distinction between 'acts' and 'activities'. The Special Rapporteur believes, as stated earlier, that the French version is the right one and that it gives the topic its real scope. According to the terms of reference given it by the General Assembly, the Commission must deal with injurious consequences arising out of activities not prohibited by international law. Activities are shaped by complex and varied components which are so interrelated that they are almost indistinguishable from one another". Within a lawful activity there are lawful acts which might give rise to injury and certain consequences, and there may also be wrongful acts which give rise to a breach of obligations, as could happen with lawful acts or activities which breach obligations of prevention. This is another story, however.

14. This reference to consequences is, if you like, the traditional meaning of the word "liability". 10/ But in speaking of "liability for activities" we wish to refer to something very different from the consequences of acts. 11/ Liability is linked to the nature of the activity, and the isolated acts referred to in the third instance above would thus not be included in the scope of our topic. In order for the régime of our articles to apply to certain acts, these acts must be inseparably linked to an activity which, as we shall see, has to involve risk or

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10/ What is more, one allegedly strict approach classifies under the heading "liability" only that chapter of the law which is concerned with the consequences of breaches of obligations, and prefers to describe as the "guarantees" given by enterprises the obligations imposed by law on their activities involving risk. We believe that this is what prompted some members of the Commission in the past to say that liability related only to wrongfulness. If this were so, however, all chapters of the domestic law of innumerable countries dealing with liability for risk, causal liability, objective liability, strict or absolute liability, etc., would be gross errors. They would not in fact be dealing with liability, despite their title, because of course no breach of obligation exists that would give rise to such liability.

11/ There is another meaning of the Spanish term "responsibilidad" which is vital to our topic. In discussing the various meanings of the English term "responsibility", Goldie says: "The term responsibility thus includes the attribution of the consequences of conduct in terms of the duties of a man in society. Secondly, it can denote the role of the defendant 'as the party responsible' for causing a harm." Yearbook ... 1986, vol. II, (Part One) document A/CN.4/402, p. 146, footnote 10.

Both these meanings are used for the word "responsibility" in article 139, paragraphs 1 and 2, of the 1982 United Nations Convention on the Law of the Sea. There, the English term "responsibility" was used in parallel with the French "responsabilité" in the expression "responsabilités et obligations qui en découlent", while "liability" was used for "obligation de réparer". The expression "responsibility and liability" was used in parallel with the French: "obligation de veiller au respect de la convention et responsabilité en cas de dommages". See the preliminary report of Professor Quentin-Baxter, Yearbook ... 1980, vol. II, (Part One), document A/CN.4/334 and Add.1 and 2, page 251, footnote 17.

The first meaning refers to all the primary obligations governing an activity.

It is not surprising therefore that in the area of "causal" liability, it should be preferable to take as the unit of reference the activity rather than the act, in order to endow it with regulations permitting its continuation. The latter is done by establishing primary obligations for the person carrying out the activity. These primary obligations come into play, as we have seen repeatedly, when injury is caused.

have harmful effects (art. 1). Injury caused by isolated acts is not covered by our draft and so we avoid the dreaded absolute liability described in our third instance.

15. The title of our topic, then, means: "obligations with regard to the injurious consequences of activities not prohibited by international law" and covers both meanings of the word "laibility". For their continuation, such activities require that agreement be reached on a régime establishing, between source States and affected States, obligations and guarantees designed to strike a balance between the interests at stake. In the absence of a specific régime for a specific activity, a general régime would be required which would be that contained in our articles, which establishes obligations to inform, notify, negotiate a régime and negotiate with a view to possible reparation, according to certain criteria, for the injury caused.

II. NEW ARTICLES PROPOSED FOR CHAPTERS I (GENERAL PROVISIONS) AND II (PRINCIPLES) OF THE DRAFT

16. The present Special Rapporteur therefore proposes, as an alternative to the first 10 articles submitted to the Drafting Committee, other articles which incorporate what he believes were the most important comments made in the above-mentioned debates.

CHAPTER I

GENERAL PROVISIONS

Article 1

Scope of the present articles

The present articles shall apply with respect to activities carried out in the territory of a State or in other places under its jurisdiction as recognized by international law or, in the absence of such jurisdiction, under its control, when the physical consequences of such activities cause, or create the risk of causing, transboundary injury throughout the process.

Article 2

Use of terms

For the purposes of the present articles:

(a) "Risk" means the risk occasioned by the use of things whose physical properties, considered either intrinsically or in relation to the place, environment or way in which they are used, make them likely to cause transboundary injury throughout the process, notwithstanding any precautions which might be taken in their regard.

"Appreciable risk" means the risk which may be identified through a simple examination of the activity and the substances involved, in relation to the place, environment or way in which they are used, and includes both the low probability of very considerable (disastrous) transboundary injury and the high probability of minor appreciable injury.

(b) "Activities involving risk" means the activities referred to in the preceding paragraph, in which injury is contingent, and "activities with harmful effects" means those causing appreciable transboundary injury throughout the process.

(c) "Transboundary injury" means the effect which arises as a physical consequence of the activities referred to in article 1 and which, in the territory or in places under the jurisdiction or control of another State, is

appreciably detrimental to persons or objects, to the use or enjoyment of areas or to the environment, whether or not the States concerned have a common border. Under the régime of these articles, "transboundary injury" always refers to "appreciable injury".

(d) "State of origin" means the State of the territory which exercises the jurisdiction or the control referred to in article 1.

(e) "Affected State" means the State in whose territory or under whose jurisdiction persons or objects, the use or enjoyment of areas, or the environment, are or may be appreciably affected.

Article 3

Assignment of obligations

The State of origin shall have the obligations established by the present articles, provided that it knew or had means of knowing that an activity referred to in article 1 was being, or was about to be, carried out in its territory or in other places under its jurisdiction or control.

Unless there is evidence to the contrary, it shall be presumed that the State of origin has the knowledge or the means of knowing referred to in the preceding paragraph.

Article 4

Relationship between the present articles and other international agreements

Where States Parties to the present articles are also parties to another international agreement concerning activities referred to in article 1, in relations between such States the present articles shall apply, subject to that other international agreement.

Article 5

Absence of effect upon other rules of international law

[The fact that the present articles do not specify circumstances in which the occurrence of transboundary injury arises from a wrongful act or omission of the State of origin shall be without prejudice to the operation of any other rule of international law.]

[The present articles are without prejudice to the operation of any other rule of international law establishing liability for transboundary injury resulting from a wrongful act.]

CHAPTER II

PRINCIPLES

Article 6

Freedom of action and the limits thereto

The sovereign freedom of States to carry out or permit human activities in their territory or in other places under their jurisdiction or control must be compatible with the protection of the rights emanating from the sovereignty of other States.

Article 7

Co-operation

States shall co-operate in good faith among themselves, and request the assistance of any international organizations that might be able to help them, in trying to prevent any activities referred to in article 1 carried out in their territory or in other places under their jurisdiction or control from causing transboundary injury. If such injury occurs, the State of origin shall co-operate with the affected State in minimizing its effects. In the event of injury caused by an accident, the affected State shall, if possible, also co-operate with the State of origin with regard to any harmful effects which may have arisen in the territory of the State of origin or in other places under its jurisdiction or control.

Article 8

Prevention

States of origin shall take appropriate measures to prevent or, where necessary, minimize the risk of transboundary injury. To that end they shall, in so far as they are able, use the best practicable, available means with regard to activities referred to in article 1.

Article 9

Reparation

To the extent compatible with the present articles, the State of origin shall make reparation for appreciable injury caused by an activity referred to in article 1. Such reparation shall be decided by negotiation between the State of origin and the affected State or States and shall be guided, in principle, by the criteria set forth in these articles, bearing in mind in particular that reparation should seek to restore the balance of interests affected by the injury.

III. COMMENTARY TO THE NEW ARTICLES PROPOSED FOR CHAPTERS I (GENERAL PROVISIONS) AND II (PRINCIPLES) OF THE DRAFT

17. The main purpose of the commentary to the articles reproduced above is to explain the changes that have been made.

A. Article 1

18. With the words "in the territory of a State", we have returned to the concept of territory, adding to it the concept of jurisdiction and control. This is not strictly necessary because, if an activity occurs in the territory of a State, it will normally be under its jurisdiction. It may, however, be useful for emphasizing that the concept of "jurisdiction" that we are using refers also to other places outside the territory of the State.

19. The expression "jurisdiction as recognized by international law" was adopted to accommodate the position that jurisdiction in the territory is not "vested" by international law but is a result of the sovereignty originating in the State. Although the view was expressed that it was unnecessary to state specifically that jurisdiction must be in conformity with international law, we preferred to retain this expression in order to make a clear distinction between this case and the following one in which, in the absence of lawful jurisdiction, all or part of the territory of a State is under the control of another State.

20. The word "places" has been substituted for the original word "spheres" primarily because "spheres" is not an usual expression. "Places" may be closer to the real meaning and in any case is sufficiently broad to include small areas such as a boat, aircraft or spaceship from which an activity can cause transboundary injury.

21. The word "effective" was deleted before the word "control" because it was felt that unless control was effective it was not control.

22. The words "throughout the process", which previously appeared only in article 2 (a) in connection with risk, have been introduced into this article because they are consistent with the idea of liability for activities rather than acts. In the case of activities involving risk, there is virtual certainty that some appreciable injury may occur within a given period, and in the case of activities with harmful effects, the expression used gives the desired meaning of an injury which may begin at the beginning and continue, or be cumulative and arise not immediately but "throughout the process" of the activity.

23. The words "cause, or create an appreciable risk of causing, appreciable transboundary injury" represent an attempt to cover activities involving risk and activities with harmful effects. The idea of "appreciable risk", which is accepted in international practice, is retained. 12/ We would refer here to

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12/ This idea is developed somewhat more fully in footnote 8 to document A/CN.4/413.

paragraphs 24-31 of the fourth report of the present Special Rapporteur. It is difficult to understand the demand for prevention if the risk is not "appreciable" as defined in the article. Moreover, in the case of activities which normally have harmful effects, it is understood that such effects are easily foreseeable.

24. It should be pointed out that, in activities involving risk, the "appreciable risk" mentioned must be that of causing "appreciable injury" if prevention is to be demanded. While we cannot be overly strict in dealing with the question of "appreciable" risk and injury, the limits of which are somewhat blurred, in principle this adjective must be applied to both concepts.

25. The concept of "appreciable injury", the only one which has significance for this draft, is introduced as early as article 1. We had seen that any lesser injury was not relevant to our topic. The word "appreciable" is used to describe both the risk and the injury because it seems to denote an appropriate threshold of tolerance, although one obviously cannot be certain as to its exact limits. With the same proviso, the words "significant", "important" or "substantial", which give an idea of higher thresholds, might be preferred; while the Special Rapporteur feels that such higher thresholds might not be desirable, it is of course up to the Commission to choose.

26. The word "appreciable" is also used to qualify the term "harm" in the draft on international watercourses and, while uniformity is not obligatory, we believe that the similarities between the two topics justify the view that the terms used in both should be harmonized.

B. Article 2

27. In paragraph (a), the phrase: "... notwithstanding any precautions which might be taken in their regard ..." seeks to describe the basic characteristic of liability for risk, namely, the absence of fault and the irrelevance of "due diligence" in such cases. The comments made in the debates, to the effect that activities with low probabilities of causing disastrous injury should be included, are accommodated in the paragraph on "appreciable risk". The expression "minor appreciable injury" is used to indicate that injury, although minor, must also be appreciable. The Special Rapporteur has an open mind as to whether major injury should be described as "very considerable", "disastrous" or even "catastrophic", provided that the term used conveys the idea of an injury of great magnitude. It should also be mentioned that there are activities, such as nuclear activities, which offer both possibilities: a high risk of ongoing injury during their normal operation and a low risk of disastrous accidents.

28. Paragraph (b) introduces the qualification "with harmful effects" ("de efectos nocivos") for certain activities, such as polluting activities, which cause injury. It is understood that such activities are not totally harmful: they are permitted because their usefulness outweighs the injury they cause.

29. A number of clarifications are also required with regard to paragraph (c).

30. "Transboundary injury" is the injury suffered by a State as a physical consequence of activities referred to in article 1. The expression "is appreciably detrimental" conveys the idea that the only injury relevant to our topic is that exceeding the threshold of tolerance established by the word "appreciable".

31. The word "places" is used again to indicate that transboundary injury may affect not only the territory of a State but also other areas - which may be small as we said earlier - where this State exercises jurisdiction as recognized by international law. In the exclusive economic zone, for instance, a rig or artificial island or the actual vessels of the coastal State could be damaged as a result of an activity carried out by vessels of another State or from land (from the territory of another State, of course) or from an aircraft registered in another State, etc. One apparently tenuous but none the less valid case of transboundary injury would be that of a vessel of one State whose activity causes injury to the vessel of another State while the two vessels are on the high seas. The important element here is the "interjurisdictional" one.

32. The case of the place or territory "under the control" of another State presents certain difficulties. One initial reaction would be to deny the status of affected State to the State that is exercising control over that territory in violation of international law, in order to prevent such control from being equated with legal jurisdiction. The result, however, would be to leave the inhabitants of the territory without international protection in the event of injury to their health, their heritage, the use and enjoyment of certain regions or their environment. Two courses are possible here: either to accord the status of affected State to the State exercising control over the territory only in so far as it is responsible for fulfilling certain international duties towards the population, for instance, protecting their human rights, or to accord this status to the entity which has legal jurisdiction over the territory: either the State lawfully entitled to the territory or the body appointed to represent it, as with the Council for Namibia in the case of the Territory of former South West Africa.

33. "The environment" has been added after the persons or objects and the use or enjoyment of areas to which injury may be caused. Although it could be considered covered by the earlier definition, it was felt that the environment has become such a major concern that it must be included in the definition of injury in order to leave no room for doubt that this draft seeks to protect the environment.

34. Paragraph (d) attributes liability not only to the State of the territory but also to the State exercising jurisdiction or, in its absence, control over another place. This is only natural since the State which is at fault, cannot, by very reason of its fault, be excluded from liability.

C. Article 3

35. The title has been changed from "Attribution" to "Assignment of obligations". It was observed that to use the word "attribution" here would be to equate it with the attribution made in the draft on State responsibility, and that a distinction must be made between the two.

36. The observation may be correct. "Attribution" is used in part I of the draft on State responsibility to refer to the attribution of an act to a State. In part II, where the protagonist is the affected State and it is to that State that certain rights and powers are attributed, the word "attribution" is not used. That being so and since "attribution" simply means "imputation of acts", it would be inappropriate to use it in our topic because it is not exactly an activity, much less an act, that is being imputed or attributed to a State, but rather certain obligations deriving from the fact that a given activity is being carried out in its territory or in places under its jurisdiction or control. Moreover, these obligations are primary, unlike the secondary obligations of the draft on State responsibility (part I).

37. The second paragraph contains the presumption that a State has knowledge or means of knowing that an activity referred to in article 1 is being carried out in its territory or in places under its jurisdiction or control, and that the burden of proof to the contrary rests with that State. Although in trial law it is very difficult to prove that a certain act did not take place or that a certain thing or quality does not exist, in this case it is not so difficult: a State has only to show, for instance, how many and what kind of vessels and aircraft it has in relation to the areas which it must monitor in order for one to judge whether these are sufficient to disprove the presumption to the contrary. It must not be forgotten, after all, that attributing to a State knowledge of everything that goes on in its territory is itself only a presumption.

D. Article 4

38. This is one of the original five articles drawn up by Professor Quentin-Baxter. It aroused no major objections and refers to the relationship between our framework convention and conventions regulating specific activities, which are governed by principles very similar to those on which our articles are based. The formulation "subject to that other international agreement" is based on article 30 (2) of the Vienna Convention on the Law of Treaties, concerning the application of successive treaties relating to the same subject-matter.

E. Article 5

1. Preliminary considerations

39. The original wording of article 5 also came from Professor Quentin-Baxter and has elicited no major comment. However, the wording suggested at the Commission's most recent debate on the topic 13/ would seem to express the same idea more clearly and we thought it appropriate to hear the Commission's views on the subject. In any event, the relationship between causal liability and

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13/ See the statement by Mr. Eiriksson at the meeting on 27 May 1988, A/CN.4/SR.2048, p. 5.

responsibility for wrongful acts warrants closer consideration, especially in the light of last year's interesting debate on the topic of international watercourses, as can be seen from the next paragraph.

(2) Applicability of the two régimes of causal liability and responsibility for wrongfulness

40. We have already seen that it is perfectly conceivable that a régime of responsibility for wrongfulness might coexist with one of causal liability within one and the same system. Aside from the example of industrial accidents already mentioned, we should mention the case of the Trail Smelter judgement, which imposed on Canada a twofold régime of responsibility and liability. On the one hand, it established certain preventive measures which the Smelter must take and which the tribunal presumed would be sufficient to prevent further injury caused by fumes in the State of Washington; on the other, it determined that, should appreciable injury occur even though Canada took such measures, Canada would have to provide compensation.

41. One article of the chapter on pollution in the draft articles on international watercourses was discussed at length at the latest session of the Commission. Paragraph 2 of article 16 (article 17 according to other numbering) in fact read:

> "Watercourse States shall not cause or permit the pollution of an international watercourse [system] in such a manner or to such an extent as to cause appreciable harm to other watercourse States or to the ecology of the international watercourse [system]." 14/

In the debate, this wording prompted the question whether what was involved was in fact causal, or strict, liability and the comment that in any case the dividing line in law between the two régimes was not clearly defined.

42. We disagree. Although the dividing line between the two régimes is sometimes a fine one, it is still clearly distinguishable: one has simply to consider the concepts underlying the two régimes, which are clearly different. In the present case, we have an obligation to prevent a given event as defined in article 23 of part I of the draft articles on State responsibility. According to the same article, there is a breach of that obligation only "if, by the conduct adopted, the State does not achieve that result". Of course, if the event (namely, appreciable injury as a result of pollution of a watercourse) does not occur, no one will go and check whether the means used to prevent it were or were not adequate. If the result (prevention of the event in question) is achieved, there is no breach of the obligation and thus no review of the means used or the conduct adopted.

43. If the event is not prevented and appreciable injury is caused, however, what happens? And here we have the fine but firm dividing line between the two régimes. In this case, according to the commentary quoted in the footnote, in

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14/ A/CN.4/412/Add.2, sect. III C.

order to be able to determine whether there has been a breach of the obligation and thus a wrongful act, the means used to prevent the event in question will have to be considered. If it is found that the State, had it acted differently, could have prevented the event, then there is a breach of the obligation. Otherwise, there is not. "The State can be required only to act in such a way that the possibility of the event is obstructed, i.e. to frustrate the occurrence of the event as far as lies within its power". 15/

44. This is fundamental and it is here that the difference between responsibility for wrongful acts and causal liability lies: under the latter régime, no matter what the degree of diligence used, even maximum diligence, compensation is the evitable consequence of the injury caused. That is why Anglo-Saxon law calls it "strict" or "absolute" liability (although we know that there are subtle differences between these two terms). And even though it is very dangerous to talk of "fault" in this field, domestic legal systems also tend to call this régime of liability "no fault" (lato sensu) liability. In other words, the attribution of liability is the same whether or not the party liable acted in accordance with the rules of prevention.

45. What would happen if there were watercourse States which were parties to the corresponding convention and also parties to our articles? If injury occurred, then we would have to see whether the means normally covered by the term "due diligence" had been used. If such means had not been used, there would have been a breach of the obligation and thus a wrongful act. Reparation would therefore be required.

46. On the other hand, if the best means available to the State were used, there is no breach of obligation and thus no wrongful act. Causal liability might then apply and, since under that régime compensation depends on the nature of the costs allocation rather than on restitutio in integrum, the amount payable would have to be reduced bearing in mind, in particular, the costs incurred. In our draft, these matters can be decided by negotiation, the mechanism provided for such situations.

47. In fact, in normal cases of pollution we had seen that the defence of "due diligence" is virtually unthinkable; it would be very rare for a result that was clearly attributable to a given activity whose existence was known to the source State to occur as a result of ignorance of the causes giving rise to the injury. Normally, we know that certain elements used in certain ways cause pollution. As a result, two possibilities would exist in practice in cases such as these involving watercourses: (a) either the due diligence that would keep the polluting effects of an activity below the threshold of tolerance (appreciable injury) is not used, in which case there would be a breach of the obligation and thus wrongfulness; or (b) all advisable means are used to prevent injury but an accident, and hence appreciable injury detrimental to an affected State or States on the watercourse [system], still occurs, in which case there would be causal liability and the corresponding compensation.

15/ See Yearbook ... 1978, vol. II (Part Two), document A/38/10, para. 94, p. 82, commentary to article 23 (6).

48. This may be illustrative of what would happen with our own convention, in the absence of another convention imposing responsibility for wrongfulness in certain cases, depending on the form given to the obligation under article 8 (prevention). If the obligation is one of result, the effect would be similar to that of the existence of two conventions, except that the two régimes (one of responsibility for wrongfulness and the other of causal liability) would coexist in the same instrument. The result would be that, if injury occurred as a result of a breach of obligations of prevention, responsibility for wrongfulness, with all that this involves, would apply, while if those obligations were fulfilled, causal liability, also with all its attendant laws, would apply.

49. It was pointed out that there was an inconsistency here with our mandate of dealing with liability for acts "not prohibited". Aside from the indifference shown by many members to this apparent contradiction, it can be argued that this reasoning is applicable to a topic which deals with "acts", not "activities": our mandate involves dealing with the consequences of certain wrongful acts which are inextricably linked to an activity which is not prohibited. The activity would continue to be allowed and only the injurious "act" would have to cease.

50. Ironically, the least harsh solution for the State of origin would be the existence of a single régime: that of causal or strict liability. Such a régime would function as follows: prevention would not be required as a separate obligation but would simply arise from the deterrent effect of reparation under the régime of strict liability. Article 8 would simply be an appendix to the obligations to co-operate and would be without consequences in the event of a breach (except that, if injury occurred, compliance with obligations of prevention would entitle the State of origin to pay reduced compensation). It would also offer the following advantages: (a) State conduct would not be qualified as wrongful; (b) an easy mechanism for assigning obligations would be established; (c) reparation would be required which sought only to restore the balance of interests, instead of being guided by the principle of total restitution; and (d) lastly, the act would not have to cease, although its effects would be the subject of reparation, and this could sometimes produce a more flexible solution.

51. Although this last advantage could appear to give the State of origin licence to continue to cause injury in return for paying a certain amount of money, let us remember, first, that the obligation to compensate is going to impose certain restrictions on the State and, secondly, that our articles also provide for a system of consultations and the creation of a specific régime for the activity in question, which may eventually lead even to prohibition of the activity based on the balance of interests test.

52. Let us suppose that, instead of an obligation of "due diligence", which seems to be what is envisaged in article 16 [17] of the fourth report by Mr. Stephen McCaffrey on the law of the non-navigational uses of international watercourses (see para. 41), an obligation of conduct had been imposed. It is conceivable that accepted international standards would have been required, if such standards exist, or that the introduction of certain toxic elements, for instance, in the form of industrial waste, into a watercourse system would have been

regulated, as happens with other issues in a number of international instruments. 16/

53. Although practice might point to a different situation with regard to consequences, in theory at least the breach of that obligation of conduct would entail, even before injury was caused, all the consequences of wrongfulness and, therefore, cessation of the act giving rise to it, elimination of its consequences, restoration of the situation existing prior to the event and, lastly, all the conditions required by article 6 of part II of the draft on State responsibility.

54. It is also possible that affected States might use certain measures to force compliance with the obligation of conduct - before, of course, any material injury is caused. Nor would the imposition of such a régime be incompatible with another one of strict liability, which could arise if accidents occurred despite compliance with accepted international standards.

F. Article 6

55. A way was sought of simply referring to the freedom of the State to permit the activities mentioned in article 6 rather than actually enunciating that freedom, since some members thought that that would be stating the obvious. The earlier reference only to territory was expanded to include "places" under the jurisdiction or control of the State, although in the fourth report this was considered implicit in the concept of territory, which is a very general principle. The second part of the article remained unchanged.

56. Article 6 is based on principle 21 of the Stockholm Declaration, 17/ except that a broader form was sought which was not tied to the concept of the exploitation of natural resources. Basically, principle 21 enunciates a certain freedom and its limits. Article 6 does the same and thus gives expression to the two sides of sovereignty: on the one hand, the freedom of a State to do as it wishes within its own territory; on the other, the inviolability of its territory with regard to effects originating outside it. The key element here is that the two must be compatible. In other words, there is neither absolute freedom nor absolute inviolability: the two must be balanced and compatible.

57. This is the basis for the minimum threshold below which injury must be tolerated; it represents a concession to States' freedom of action within their territory, at the expense of the inviolability of that territory, but this freedom

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16/ For example, the Montreal Protocols to the Vienna Convention for the Protection of the Ozone Layer.

17/ Report of the United Nations Conference on the Human Environment, Stockholm, 5-6 June 1972. (United Nations publication, Sales No. S.73.II.A.14,

must not exceed the limit fixed by the nature of a mere nuisance or insignificant injury. This is one way of making these concepts compatible.

58. The obligations imposed on the State of origin are another way of making the same elements compatible: the freedom to carry out or permit activities in the territory must be balanced by certain obligations of prevention and reparation.

59. It is also understood that the rights emanating from the sovereignty of States include those of the integrity of persons and objects, the use or enjoyment of areas, and the environment of the territory.

G. Article 7

60. This article seeks to enunciate, in a more specific manner than in the fourth report, the obligations emanating from the principle of co-operation: there is an obligation to co-operate in preventing the harmful effect and in controlling and minimizing it once it has occurred. There is no mention of the obligation to make reparation, because this does not arise from the obligation to co-operate but from the obligation to restore the balance of interests that has been upset.

61. The article refers to both types of activities referred to in article 1. In the case of activities involving risk, co-operation must be aimed at minimizing the risk in order to try to prevent the accident which would give rise to injury. In the case of activities with harmful effects, co-operation must be aimed at keeping those effects below the threshold of appreciable injury. A text enunciating the principle of co-operation would be incomplete without a reference to international organizations, whose main purpose is to promote co-operation among States for the purposes for which they were established. It is well known that a number of such organizations, or programmes within them, would be particularly well-equipped to assist States on matters within their sphere of competence. We could mention as examples such organizations as the International Maritime Organization (IMO), the International Atomic Energy Agency (IAEA), the World Health Organization (WHO), the World Meteorological Organization (WMO), the United Nations Environment Programme (UNEP) (within the United Nations), the Organisation for Economic Co-operation and Development (OECD) and many others whose co-operation it should be compulsory for the source State to request. Of course, such an obligation would not be automatic in all cases, but only in those that required it. That is why we preferred to introduce this reference into a broad principle such as co-operation rather than into more specific obligations.

62. In short, a State of origin could not be considered to have complied with its obligation to co-operate in seeking to prevent the occurrence of appreciable injury if, in a particular case in which the assistance of a given organization might have been useful, it did not request such assistance. Co-operation will also have to be aimed at mitigating the effects of appreciable injury once it has occurred. Wherever possible, such co-operation will have to be extended by the State of origin to the affected State and vice versa. This means that if the affected State has the means to do so, for instance, if it has more advanced technology, it will also have to help the State of origin to mitigate the harmful effects in its territory. It is understood that, as indicated in the fourth report, such

co-operation will not necessarily be provided free of charge. The important thing is not to deny the State of origin, simply because it is the State of origin, the means to remedy or minimize the injury caused by the accident in its own territory. Of course, such co-operation also means not using the occasion to seek political advantage or to air rivalries of any kind.

63. The first part of the article lays the basis for the obligations to inform, notify and consult the affected State contained in article 10. As we said earlier, these obligations serve the purpose of prevention, for the participation of the affected State will mean that the two parties will co-ordinate their efforts in this area. However, they also, and perhaps more so, serve the purpose of creating a possible régime for the activity in question. Informing and notifying means involving the presumed affected State in jointly assessing the nature of the activity and its effects. This in turn will make it possible to determine whether a régime is needed to restore the balance of interests. These are obligations "towards" a régime, should such a régime be needed to prevent one party from being injured and the other from benefiting from the transfer (externalization) of the "internal" costs of an enterprise: the costs necessary to prevent injury.

H. Article 8

64. This article (which was previously article 9) enunciates the principle of prevention. 18/ The previous version said that States must take "all reasonable preventive measures to prevent or minimize injury ...". The present wording requires the State to take "appropriate measures to prevent or, where necessary, minimize the risk of transboundary injury".

65. This duty is not absolute, for the next sentence reads: "To that end they shall, in so far as they are able, use the best practicable, available means ...". Those who will have to use the best available means are those carrying out the activity, whether they are private individuals or the State. This sentence replaces the phrase "reasonable preventive measures", which was considered vague or not sufficiently demanding.

66. The State will also have to enact the necessary laws and administrative regulations to incorporate this obligation into its domestic law, and will have to enforce these domestic norms. In other words, if an activity is carried out by the State or one of its agencies or enterprises, it is the State or its enterprises that will have to take the corresponding preventive measures. If these activities are carried out by private individuals or corporations, however, it is not the State but those private individuals or corporations that will have to institute the actual means of prevention, and the State will have to impose and enforce the corresponding obligation under its domestic law.

18/ Similar language is used in article 194 (1) of the United Nations Convention on the Law of the Sea; article 1 (1) of the Vienna Convention for the Protection of the Ozone Layer; and article 3 of the Aix-les-Bains draft of the Institut International de Gestion et de Génie de l'Environnement.

67. Last, but not least, account must be taken of the special situation of developing countries, who so far have suffered most from and contributed least to the global pollution of the planet. That is why, in referring to the means to be used, the article says that States shall use them "in so far as they are able" and that such means must be "available" to those States.

68. We already saw in the commentary to article 5 that our draft offers three possibilities with regard to prevention. If we adopt an approach based exclusively on strict liability, obligations of prevention will be subsumed in those of reparation. In that case, article 8 would have to remain as a form of co-operation, without a breach of such obligations implying any right of jurisdictional protection.

I. Article 9

69. This article reproduces the content of previous article 10. Without altering its meaning, it drops the reference to the fact that "injury ... must not affect the innocent victim alone". The appropriateness of this phrase was questioned, since it gave the impression that the innocent victim must bear the major burden of the injury. Of course, this was not what it meant. What it sought to convey was the notion that reparation did not strictly follow the principle of restitutio in integrum which applies in responsibility for wrongfulness, or at least did not follow it with regard to injury considered in isolation in each case.

70. This is because, first of all, as we have seen, injury is not the result of a wrongful act but the expected result of a lawful activity, the assessment of which involves complex criteria. One such criterion is the benefit which the affected State itself may derive from this activity in particular or in general. Another criterion is the interdependence of the modern world which makes us all victims and perpetrators. Yet another criterion is the costs of prevention which the State of origin may have incurred. Lastly, we have all the factors enumerated, although not exhaustively, in section 6 of the schematic outline, which might perhaps require further elaboration. In these articles, as we had seen, reparation appears to be governed by the nature of the "costs allocation" designed to prevent a State from benefiting unduly by "externalizing" the costs of an activity of which it is the main beneficiary and making those costs fall on the innocent victim.

71. Reparation will have to be the subject of negotiation in which all these factors are weighed and agreement is then reached on the sum of money that the State of origin is to pay the affected State or the measures that it is to take for the latter's benefit. It may be found that it is correct to say that reparation should "seek to restore the balance of interests affected by the injury", because this may be the most accurate definition of injury in our topic: a certain effect which, being inordinately detrimental to the affected State, upsets the balance of interests involved in the activity which caused it, with the result that reparation, without necessarily being equivalent to all the injury considered in isolation in each case, must be such as to restore the balance of interests involved.

IV. CHAPTER III OF THE DRAFT ARTICLES (NOTIFICATION, INFORMATION AND WARNING BY THE AFFECTED STATE): ARTICLES 10 TO 12 (FIRST STAGE OF THE PROCEDURE TOWARDS PREVENTION AND THE FORMULATION OF A REGIME)

72. The Special Rapporteur proposes the following articles:

CHAPTER III

NOTIFICATION, INFORMATION AND WARNING BY THE AFFECTED STATE

Article 10

Assessment, notification and information

If a State has reason to believe that an activity referred to in article 1 is being, or is about to be, carried out in its territory or in other places under its jurisdiction or control, it shall:

(a) Review that activity to assess its potential transboundary effects and, if it finds that the activity may cause, or create the risk of causing, transboundary injury, determine the nature of the injury or risk to which it gives rise;

(b) Give the affected State or States timely notification of the conclusions of the aforesaid review;

(c) Accompany such notification by available technical data and information in order to enable the notified States to assess the potential effects of the activity in question;

(d) Inform them of the measures which it is attempting to take to comply with article 9 and, if it deems appropriate, those which might serve as a basis for a legal régime between the parties governing such activity.

Article 11

Procedure for protecting national security or industrial secrets

If the State of origin invokes reasons of national security or the protection of industrial secrets in order not to reveal some information which it would otherwise have had to transmit to the affected State:

(a) It shall inform the affected State that it is withholding some information and shall indicate which of the two reasons mentioned above it is invoking for that purpose;

(b) If possible, it shall transmit to the affected State any information which does not affect the areas of reservation invoked, especially information on the type of risk or injury it considers foreseeable and the measures it proposes for establishing a régime to govern the activity in question.

Article 12

Warning by the presumed affected State

If a State has serious reason to believe that it is, or may be, affected by an activity referred to in article 1 and that activity is being carried out in the territory or in other places under the jurisdiction or control of another State, it may request that State to apply the provisions of article 10. The request shall be accompanied by a technical, documented explanation setting forth the reasons for such belief.

V. GENERAL COMMENTARY TO ARTICLES 10 TO 12 OF CHAPTER III OF THE DRAFT

A. General considerations

73. It is clear that the kind of procedure which we are considering here involves three functions that are closely linked, no one of which can be divorced from the other two. They are assessment, notification and information concerning an activity referred to in article 1. In some cases, one of the functions is implicitly assumed. How, for example, can a State be notified of certain risks or the harmful effects of an activity unless the State of origin has first made an assessment of the activity's potential effects in other jurisdictions? How can information on the activity be provided without at the same time notifying or without having previously notified the affected State about what is involved? How can one notify someone of certain dangers without providing any information which one may have about it?

74. Furthermore, consultation with affected States is also linked to these three functions. What is the use of assessment, notification and information if the opinion of the affected State is not to be consulted? As we have already seen, there are limits to the freedom which a State of origin has with respect to activities referred to in article 1, and the limit is to be found at the point where appreciable injury occurs to the rights emanating from the sovereignty of other States, specifically affected States. To the extent that those rights are, or may be, infringed, affected States have some say in respect of activities such as those referred to in article 1. Moreover, what consultations would be possible unless the preceding steps were taken first?

75. Similar considerations apply to negotiation, which is frequently confused with consultations. The case law, treaty provisions, resolutions of international organizations, and the like, which are cited as a basis for the obligation to negotiate, also confirm the obligations to assess, notify, inform and consult. This point should be taken into account in assessing to what extent the proposed articles have a basis in practice.

76. It would seem from the foregoing that one of the basic principles, perhaps the most important, on which the obligations in question rest is the obligation to co-operate laid down in article 7, especially its reference to participation. From the duty to co-operate flows, in the first place, a duty for the State to ascertain whether an activity which appears to have features that may involve risks or produce harmful effects actually causes such risks or effects. This means that the activity must be subjected to sufficiently close scrutiny to allow for definite conclusions to be reached. If, on the other hand, the activity does not appear to be of such a nature, or if, judging from appearances, there is no "appreciable" risk that the activity may cause transboundary injury and no warnings to that effect are received from other States, and - needless to say - it is not known from any other source that such risk may exist, then the activity would be below the threshold at which the provisions of the draft with regard to prevention come into play.

77. We say that notification flows from the general obligation to co-operate because in some cases there is a need for joint action by both States, the State of origin and the affected State, if prevention is to be effective. Perhaps some measures taken from the territory of the affected State can provide protection and prevent effects arising in the State of origin from being transmitted to its own territory. Or perhaps the co-operation of the other State is helpful for the exchange of information that may take place between the parties, especially if the other State possesses technology that is relevant to the problem at hand. Perhaps it is because a joint investigation is usually more productive than individual efforts. What this means then is that the participation of the affected State is necessary if prevention is to be genuine and effective and, consequently, it may be argued that the obligations of the State of origin to agree to such participation have the same purpose.

78. The duty to co-operate is one basic principle, therefore; the other is expressed in the general rule emerging from the international case law frequently cited in this connection, namely, that the conscious use by a State of its territory to cause injury to another State is impermissible under international law. Let us recall, firstly, the Trail Smelter case: "No State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein." 19/ In the Corfu Channel case, the court referred to: "... every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States". 20/

B. International practice

79. It would take up too much space to list here the many multilateral and bilateral agreements which, in circumstances similar to those obtaining in connection with the topic under consideration, lay down the obligations of assessment, notification and information established in article 10. A number of specific precedents may be cited in this connection.

80. With regard to assessment, the Kuwait Regional Convention, in article XI, provides:

"Environmental assessment

"(a) Each Contracting State shall endeavour to include an assessment of the potential environmental effects in any planned activity entailing projects

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19/ United Nations, Report of International Arbitral Awards, Vol. III, p. 1965.

20/ I.C.J. Reports 1949, p. 22.

within its territory, particularly in the coastal areas, which may cause significant risks of pollution in the Sea Area;". 21/

81. The Convention on Long-Range Transboundary Air Pollution, in article 8, provides that:

"The Contracting Parties, within the framework of the Executive Body referred to in article 10 and bilaterally, shall, in their common interests, exchange available information on:

"...

"(b) Major changes in national policies and in general industrial development, and their potential impact, which would be likely to cause significant changes in long-range transboundary air pollution". 22/

82. Article 200 of the United Nations Convention on the Law of the Sea provides that: "States ... shall endeavour to participate actively in regional and global programmes to acquire knowledge for the assessment of the nature and extent of pollution, exposure to it, and its pathways, risks and remedies."

83. The 1983 bilateral agreement between the United States and Mexico on co-operation for the protection and improvement of the environment in the border area states, in article 7:

"The Parties shall assess, as appropriate, in accordance with their respective national laws, regulations and policies, projects that may have significant impacts on the environment of the border area, so that appropriate measures may be considered to avoid or mitigate adverse environmental effects."

84. As regards notification and information, it should be pointed out that there are numerous examples of instruments which embody the obligations of notification, information and consultation concerning new uses of international watercourses, which are applicable, mutatis mutandis, to our topic and which can be consulted in the third report on that subject by the current Special Rapporteur, Mr. McCaffrey. 23/ Attention should be drawn to two cases in that report which do not relate specifically to watercourses but rather are broader in scope.

85. Particularly noteworthy is the case dealt with in paragraph 78, which embodies the principle of information and consultation, under that very heading, set forth in a resolution of the OECD Council, which reads:

21/ Document A/CN.4/384, para. 70.

22/ See A/CN.4/384, para. 71.

23/ See A/CN.4/406, chap. III.

"6. Prior to the initiation in a country of works or undertakings which might create a significant risk of transfrontier pollution, this country should provide early information to other countries which are or may be affected. It should provide these countries with relevant information and data, the transmission of which is not prohibited by legislative provisions or proscriptions or applicable international conventions, or should invite their comments.

"7. Countries should enter into consultation on an existing or foreseeable transfrontier pollution problem at the request of a country which is or may be directly affected and should diligently pursue such consultations on this particular problem over a reasonable period of time.

"8. Countries should refrain from carrying out projects or activities which might create a significant risk of transfrontier pollution without first informing the countries which are or may be affected and, except in cases of extreme urgency, providing a reasonable amount of time in the light of circumstances for diligent consultation. Such consultations held in the best spirit of co-operation and good-neighbourliness should not enable a country to unreasonably delay or to impede the activities or projects on which consultations are taking place." 24/

86. We would also mention, in passing, the reference to "significant risk" in paragraphs 6 and 8, which supports our use of the similar concept of "appreciable risk".

87. The other precedent which is of special interest is to be found in paragraph 86 of the same report, concerning the "Draft Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Exploitation of Natural Resources Shared by Two or More States". Paragraph 86 recalls that:

"The Draft Principles were subsequently approved by the Governing Council, which referred them to the General Assembly for adoption. They were then submitted by the Secretary-General to Member States for comment, discussed in the Second Committee and, finally, addressed by the General Assembly in resolution 34/186, which was adopted without a vote on 18 December 1979. That resolution states that the General Assembly "takes note" of the report of the Intergovernmental Working Group of Experts, and of the Draft Principles, and that it:

"Requests all States to use the principles as guidelines and recommendations in the formulation of bilateral or multilateral conventions regarding natural resources shared by two or more States, on the basis of the principle of good faith and in the spirit of good-neighbourliness. ..." 25/

24/ A/CN.4/406, para. 78.

25/ See A/CN.4/406, para. 86.

88. Principle 6 of the Draft Principles referred to in the preceding paragraph is especially relevant and reads as follows:

> "1. It is necessary for every State sharing a natural resource with one or more other States:
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> "(a) To notify in advance the other State or States of the pertinent details of plans to initiate, or make a change in, the conservation or utilization of the resource which can reasonably be expected to affect significantly the environment of the other State or States; and
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> "(b) Upon request of the other State or States, to enter into consultations concerning the above-mentioned plans; and
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> "(c) To provide, upon request to that effect by the other State or States, specific additional pertinent information concerning such plans; and
>
> "(d) If there has been no advance notification as envisaged in subparagraph (a) above, to enter into consultations about such plans upon request of the other State or States.
>
> "2. In cases where the transmission of certain information is prevented by national legislation or international conventions, the State or States withholding such information shall nevertheless, on the basis, in particular, of the principle of good faith and in the spirit of good-neighbourliness, co-operate with the other interested State or States with the aim of finding a satisfactory solution." 25/

89. Principle 7 relates to timeliness in complying with the principle and the spirit in which it should be fulfilled. It reads as follows:

> "Exchange of information, notification, consultations and other forms of co-operation regarding shared natural resources are carried out on the basis of the principle of good faith and in the spirit of good-neighbourliness, and in such a way as to avoid any unreasonable delays either in the forms of co-operation or in carrying out development or conservation projects." 25/

90. Apart from these precedents already cited by Mr. McCaffrey in his third report, there are others relating to the obligation to consult, which obviously implies some form of notification and information, without which there can be no consultation.

91. One of these precedents is article 5 of the Convention on Long-Range Transboundary Air Pollution, which provides that:

> "Consultations shall be held, upon request, at an early stage between, on the one hand, Contracting Parties which are actually affected by or exposed to a significant risk of long-range transboundary air pollution and, on the other hand, Contracting Parties within which and subject to whose jurisdiction a significant contribution to long-range transboundary air pollution originates,

or could originate, in connection with activities carried on or contemplated therein." 26/

Here again, we would point to the use of the concept of "significant risk" which is in line with the "appreciable risk", which we have used in other articles.

92. Another precedent is article 9 (1) of the Convention for the Prevention of Marine Pollution from Land-based Sources, which reads as follows:

"When pollution from land-based sources originating from the territory of a Contracting Party by substances not listed in part I of Annex A of the present Convention is likely to prejudice the interests of one or more of the other Parties to the Convention, the Contracting Parties concerned undertake to enter into consultation, at the request of any one of them, with a view to negotiating a co-operation agreement." 27/

93. Article 142, paragraph 2, of the United Nations Convention on the Law of the Sea, which relates to the exploitation by a State of mineral deposits of the sea-bed across limits of national jurisdiction of a coastal State, and to that State's obligations vis-à-vis the coastal State, provides:

"2. Consultations, including a system of prior notification, shall be maintained with the State concerned, with a view to avoiding infringement of such rights and interests. In cases where activities in the Area may result in the exploitation of resources lying within national jurisdiction, the prior consent of the coastal State concerned shall be required."

94. Mention should also be made of article III of the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, which reads as follows:

"When a coastal State is exercising the right to take measures in accordance with article I, the following provisions shall apply:

"(a) Before taking any measures, a coastal State shall proceed to consultations with other States affected by the maritime casualty, particularly with the flag State or States;

"(b) The coastal State shall notify without delay the proposed measures to any persons physical or corporate known to the coastal State, or made known to it during the consultations, to have interests which can reasonably be expected to be affected by those measures. The coastal State shall take into account any views they may submit." 28/

26/ A/CN.4/384, para. 99.

27/ Ibid., para. 100.

28/ Ibid., para. 102.

95. Mention may also be made of article IV (1) and article V of the Agreement between the United States of America and Canada Relating to the Exchange of Information on Weather Modification Activities, which reads as follows:

"Article IV, paragraph 1

"In addition to the exchange of information pursuant to article II of this Agreement, each Party agrees to notify and to fully inform the other concerning weather modification activities of mutual interest conducted by it prior to the commencement of such activities. Every effort shall be made to provide such notice as far in advance of such activities as may be possible, bearing in mind the provisions of article V of this Agreement.

"Article V

"The Parties agree to consult, at the request of either Party, regarding particular weather modification activities of mutual interest. Such consultations shall be initiated promptly on the request of a Party, and in cases of urgency may be undertaken through telephonic or other rapid means of communication. Consultations shall be carried out in the light of the Parties' laws, regulations and administrative practices regarding weather modification." 29/

VI. SPECIFIC COMMENTARY TO ARTICLES 10 TO 12 OF CHAPTER III OF THE DRAFT

A. Article 10

96. Article 10 begins by raising the case of a State which realises that an activity referred to in article 1 is about to be carried in its territory or in other areas under its jurisdiction or control.

1. Paragraphs (a), (b) and (c)

97. As we said earlier, there is hardly any need to establish the basis for the obligation of a presumed State of origin to review such an activity. This is because States normally scrutinize such activities as a precaution for the protection of their own inhabitants, and, as a rule, activities of the kind under consideration, require authorization.

98. Where, as a result of its review of the activity, the State of origin comes to the conclusion that the activity may give rise to transboundary injury, the obligation to notify the affected State or States of this circumstance and the

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29/ Ibid., para. 104.

obligation to accompany such notification by any information which it may have on the activity involving risk follow from the basic principles to which reference was made earlier (co-operation, and the requirement that a State refrain from knowingly causing injury to another State from its own territory). It will be noted that the words "available technical data and information" are used, the intention being to indicate that the State of origin will not be required to conduct any further investigation or make a more thorough review than it has already done in assessing the effects of the activity in question.

2. Paragraph (d)

99. We had seen that the obligation of notification also serves other purposes, such as to invite a potentially affected State to participate in working out a régime for the activity in question. The expression "legal régime" should not be taken to mean that this will be a complex legal instrument in every case. When the situation is straightforward, it may be enough for the State of origin to propose certain measures which either minimize the risk (in the case of activities involving risk) or reduce the transboundary injury to below the level of "appreciable injury". The State of origin may, of course, also propose some legal measures, for instance, the principle that it is prepared to compensate for any injury which may be caused. Such proposed measures and their acceptance by the affected State may give shape to a legal régime between the Parties to govern the activity in question.

100. The first step towards a régime has been taken, therefore, with notification and the proposal of measures to which reference has just been made. The participation of the affected State in this process is also desirable from the standpoint of the State of origin, which presumably has an interest in finding a legal régime to govern an activity involving risk or harmful transboundary effects for which it is responsible. In any event, the State of origin would have such an interest if the current uncertainty of general international law were to give way to the certainty that any transboundary injury that occurs must be compensated for.

101. The purpose of the régime towards which we are moving with the obligation of notification would be not only to prevent accidents but also to strike a balance between the interests of the parties by introducing order into a whole array of factors. For example, a decision could be taken on preventive measures which weighed their costs against the costs of accidents and the benefits of the activity, the magnitude of the risks involved in the activity, the economic and social importance of the activity, possible sharing by each of the States of the costs entailed by the operations - where there is agreement that certain costs are to be shared - the objections which might be raised to these obligations, and so on.

B. Article 11

102. Provision should be made for cases where, for reasons of national security or the protection of industrial secrets, transmitting all the information it has to the affected State would create a situation detrimental to the State of origin.

What we have here is a problem of balance of interests typical of this subject-matter. It does not seem fair to force a State to divulge industrial processes which may have cost it a great deal to acquire so that the competition can benefit from them free of charge. In other cases, national security may dictate that some information not be provided. But how far can one go in affording legal protection to such interests? The answer no doubt, is: up to the point where upholding those interests causes injury to third States. Where such injury occurs, it will be necessary to restore the balance by taking a weight from one side of the scale and putting it on the other.

103. Another question is how to prevent the pretext of industrial secrecy or national security from being used as a cover for bad faith or some expedient other than national security or industrial secrecy, or simply for the desire to avoid participation by the affected State with the control which that entails.

104. Therefore, while respecting the right of the State of origin in such cases not to provide all the information that it normally should, the duty of that State to provide the affected State with any information not affecting its national security or the industrial secrets involved must be maintained.

105. In cases where, owing to lack of information about the source of the injury, it is difficult to trace the causes of the injury that has occurred, the affected State should be allowed to draw on presumptions and circumstantial evidence to show that the injury was caused by the activity in question - a rule based, moreover, on grounds similar to those of the oft-cited Corfu Channel case, where the affected State was allowed to use such procedural devices to demonstrate that the State of origin knew what was going on in its territory that caused injury to the affected State.

C. Article 12

106. This article contains provisions that complement the situation covered by article 10. It is possible that a State may not have realized that, in the circumstances envisaged in article 1, an activity involving risk or with harmful effects is being carried out. It is also possible that the State of origin may have, in principle, underestimated these characteristics of the activity. Whatever the reason, if a State becomes aware of the danger posed to its own territory by a given activity in another State, it has the right to alert that State, accompanying such warning by a detailed, technical explanation setting forth the reasons on which it is based. In short, the provision in question gives the affected State the right to request the State of origin to comply with the obligations set out in article 10, i.e., that it (a) review the activity to assess its effects; (b) transmit its conclusions to the affected State; and (c) furnish the relevant technical data, and likewise, if the State of origin finds that the activity is indeed an activity covered by article 1, that it inform the affected State of any unilateral measures it plans to take in pursuance of article 8 and, where appropriate, of any measures which might serve as a basis for a legal régime between the parties to govern the activity in question.

VII. CHAPTER III OF THE DRAFT ARTICLES: ARTICLES 13 TO 17 (STEPS FOLLOWING NOTIFICATION)

107. The Special Rapporteur proposes the following articles:

Article 13

Period for reply to notification. Obligation of the State of origin

Unless otherwise agreed, the notifying State shall allow the notified State or States a period of six months within which to study and evaluate the potential effects of the activity and to communicate their findings to it. During such period, the notifying State shall co-operate with the notified State or States by providing them, on request, with any additional data and information that is available and necessary for a better evaluation of the effects of the activity.

Article 14

The State which has been notified shall communicate its findings to the notifying State as early as possible, informing the notifying State of whether it accepts the measures proposed by that State and transmitting to that State any measures that it might itself propose in order to supplement or replace such proposed measures, together with a documented technical explanation setting forth the reasons for such findings.

Article 15

Absence of reply to notification

If, within the period referred to in article 13, the notifying State receives no communication under article 14, it may consider that the preventive measures and, where appropriate, the legal régime which it proposed at the time of the notification are acceptable for the activity in question.

If it did not propose any measure for the establishment of a legal régime, the régime imposed by the present articles shall apply.

Article 16

Obligation to negotiate

[Beginning identical in both formulations]

If the notifying State and the notified State or States disagree on:

(a) The nature of the activity or its effects; or

(b) The legal régime for such activity:

Alternative (A): They shall hold consultations without delay with a view to establishing the facts with certainty in the case of paragraph (a), and with a view to reaching agreement on the matter in question in the case of paragraph (b);

Alternative (B): They shall, unless otherwise agreed, establish fact-finding machinery, in accordance with the provisions laid down in the annex to the present articles, to determine the likely transboundary effects of the activity.

The report of that fact-finding machinery shall be of an advisory nature and shall not be binding on the States concerned.

Once the report has been completed, the States concerned shall hold consultations with a view to negotiating a suitable legal régime for the activity.

[End identical in both formulations]

Such consultations and negotiations shall be conducted on the basis of the principle of good faith and the principle that each State must show reasonable regard for the rights and legitimate interests of the other State or States.

Article 17

Absence of reply to the notification under article 12

If the State notified under the provisions of article 12 does not give any reply within six months of receiving the warning, the presumed affected State may consider that the activity referred to in the notification has the characteristics attributed to it therein in which case the activity shall be subject to the régime laid down in the present articles.

VIII. GENERAL COMMENTARY TO ARTICLES 13 TO 17 OF CHAPTER III OF THE DRAFT

A. General considerations

108. So far, we have been dealing with a clear-cut situation, with considerable support from legal theory and international practice. The problems start here, and there are essentially two of them:

(a) Should the State of origin postpone initiation of the activity until satisfactory agreement has been reached with the affected State or States?

(b) What is the situation regarding activities that have already been in existence for some time? What would the situation be regarding certain types of industrial wastes, the use of certain fertilizers in agriculture, car and lorry exhausts, domestic heating, etc., which have harmful effects but have so far been tolerated?

B. Postponement or non-postponement of the initiation of the new activity

109. As to the postponement or non-postponement of the activity, let us begin by drawing a comparison with the similar, but not always identical, situation pertaining to new planned works under the topic of international watercourses, which is dealt with in articles 11 et seq. of the corresponding draft.

110. There are some similarities between our topic and that of watercourses. An activity may call for considerable investment, as usually happens in the case of planned works involving watercourses. It is only natural to have to await the corresponding authorization before embarking upon works that are often on quite a large scale, since it might be necessary to make changes in the plans or in other major, costly technical aspects of a given project. The same would be true, turning now to our draft, of a new production technique requiring, for example, the adaptation of existing plant, the construction of new plant, or changes in production processes. Once the expenditure in question has been made, it is more difficult to prohibit the initiation of an activity or to prescribe methods for it that could have been adopted with fewer problems if they had been foreseen from the outset. Likewise, if any harm may be caused by the execution of the new works or by the carrying out of the new activity, in principle it is better to wait until the affected State's consent is obtained before embarking upon the activity.

111. However, the similarity becomes somewhat less obvious when account is taken of the fact that, although there is a variety of activities that can involve watercourses, there is not an infinite variety, and such activities are well defined. A riparian State may accept the restriction in question without its freedom of action in its own territory being unduly affected. It is an entirely different matter, however, to subject the changing and complex flow of human activities to the Procustean bed of an international authorization, to say nothing of the fact that, as already indicated, in most cases the transboundary effect will begin to have an impact on the population of the State of origin, and that activities involving risk or having harmful effects must normally be scrutinized before being authorized by the national authorities. 30/

30/ On the other hand, it could be argued that a potentially affected State is not obliged to rely on another State's assessment of risks for and injury to its own population, since each State may take a different attitude towards the treatment of its own nationals, as is proved by the variety of attitudes towards the applicability and implementation of human rights, for example. In any event, the argument is not without weight and must be considered on its merits.

112. It would therefore appear to be necessary to consider the matter in greater depth before proposing a solution such as the one provisionally adopted in the case of watercourses, namely, postponement of the initiation of the planned new works. In short, it is a question of bringing to bear in a balanced fashion the principle laid down in article 6, concerning a State's freedom of action in its own territory and the limits to such freedom.

113. The postponement of the activity would be based on an interpretation of the article in question which emphasized limitation; the activity does not begin until the restriction constituted by the rights emanating from the sovereignty of the affected State is lifted. The advantage of this interpretation is that it puts us in the ideal situation where an activity involving risk or harmful effects is not carried out until agreement has been reached on all aspects relating to the balance of the interests at stake, or until maximum preventive measures have been taken which, as we have seen, will occur only if the affected State participates.

114. The other solution, namely, to start the activity without waiting for the affected State's consent, gives priority to freedom of action. Obviously, in this case the State of origin would have to immediately assume responsibility for any injury that it might cause. In short, the articles would represent an interim régime under which the activity could continue; freedom and responsibility would go hand in hand, as in other spheres of life.

115. This solution sanctions the ex post facto effects. If the State of origin had good reason to believe that it was in the right and there are no appreciable effects on the other State, the States concerned will be able to negotiate the most appropriate régime at their leisure. If, on the other hand, the State of origin was wrong, it would pay for its error, which would prompt it to be cautious and not to stand in the way of the early formulation of a specific régime for the activity. All these factors will be considered, then, when we get to the chapter on reparation.

116. We believe that if initiation of the activity in question were permitted, the process of determining the period within which the procedure must be completed might prove less vexing, since it would be in the interest of both States to seek a negotiated solution as soon as possible.

C. Existing activities

117. It is obvious that there are certain activities that have harmful effects and are none the less tolerated at present. This situation is perhaps attributable, for example, to the fact that the injury caused by such activities is common to all States, that the precise origin of the injurious effects cannot be identified, or that the effects have increased gradually and were only noticed when it was already very difficult suddenly to impose a direct ban on them.

118. It is also clear that most of the activities in question are scrutinized and reviewed and are the subject of international negotiations aimed at mitigating

their effects, finding substitutes for some particularly injurious materials used in such activities and, ultimately, progressively freeing the world of their present deleterious effects. This may be the major concern of our day, and it seems somewhat redundant to discuss it in great detail here.

119. The current draft, including the general guidelines given in the schematic outline for the parts that have yet to be developed, would appear to be appropriate for a transitional period, if due account is taken of the fact that its chief advantage is that it lays down an obligation to negotiate - to negotiate an appropriate régime for activities that are crying out for it, and to negotiate reparation in the event of injury. At a later stage in its consideration of this tricky subject, the Commission may decide that some minor changes should be made in the procedure laid down in these articles so as to cover activities long in existence; the Special Rapporteur has therefore deemed it appropriate to include this paragraph in the present report, in the hope that his colleagues will express views on the matter that may be useful.

120. It also seems reasonable that if, as a result of scientific and technological progress, substitute materials and techniques become available for use in certain activities, affected States should be entitled to inform States of origin accordingly and to summon them to the negotiating table in order to agree on possible ways of introducing such materials and techniques so that a balance can be maintained among the interests at stake. Naturally, in that entire process account should be taken of the special situation of the developing countries, which so far have contributed least by their activities to the exacerbation of the problem under consideration and yet have suffered most from its consequences.

121. We hope to be able to tackle this difficult problem at a later stage, but the present Special Rapporteur would be particularly grateful to his colleagues for any views that they might express on the subject with a view to facilitating his task.

IX. SPECIFIC COMMENTARY TO ARTICLES 13 TO 17 OF CHAPTER III OF THE DRAFT

A. Article 13

122. This article is based mutatis mutandis on articles 13 and 14 of the draft on watercourses. It should be pointed out here also that preference was given to a specific period of time rather than a "reasonable" period, since certainty as to the period would be advantageous both for the notifying State and for the notified State. As in the case of the watercourses topic, the expression "unless otherwise agreed" indicates that States can and must grant, in each specific case, a period appropriate to the situation. The six-month period is therefore of a suppletory nature. In most cases, it might be desirable for both parties to expedite the procedure, since a specific régime is better suited to the particular circumstances of the activity that is the subject of negotiation than a general régime intended to be only of a suppletory and interim nature.

123. The latter half of the article is also based on the draft on watercourses and lays down an obligation for the State of origin to co-operate, namely, to provide, at the notified State's request, any information that it has on the new activity. Moreover, the State of origin is not required to conduct subsequent investigations but, rather, to supplement the information already provided with any information "that is available" and necessary for a better evaluation of the effects of the planned activity.

B. Article 14

124. The notified State must reply "as early as possible". In other words, if it reaches its conclusions on the content of the notification before the six-month period is up, it must inform the notifying State accordingly. Although in this case there is not the same urgency as in the equivalent case under the watercourses topic, since the presumed State of origin has begun the activity, the proposed wording is advisable since, for reasons of general expediency, these measures should be carried out within a short period. Of course, if the notified State disagrees with the notifying State's assessment of the nature of the activity or its effects and does not accept the measures proposed for giving it a legal framework, it must provide an adequate technical explanation of its position.

C. Article 15

1. Preliminary considerations

125. This provision deals with the case of the absence of a reply within the period of time envisaged, if, of course, the period in question has not been extended. The absence of a reply is an indication of agreement, and the notifying State is authorized to take it as such since the notified State had an obligation to give a reply, whether positive or negative, concerning the content of the notification and what is being proposed to it. The notifying State may then proceed with the activity, provided that it implements the proposed measures for preventing injury and risk. If there are lacunae and omissions in the proposals put forward by the State of origin, the provisions of the present articles shall be applied on a suppletory basis. If no legal régime was proposed, the present articles shall directly govern the relationship between the parties.

2. Disagreement and the obligation to negotiate

126. We saw that the first step under the procedure was to assess the nature and the effects of an activity and that the second step was to notify and inform (as a duty to prevent and minimize injury and also as a duty to co-operate). At this point, if the affected State agrees with the assessment of the nature and effects of the activity made by the State of origin and accepts the corresponding proposals put forward by that State, agreement has been reached on the régime that is to govern the activity. In this case, the two States should formalize their consensus in an agreement.

127. Another possibility is that the presumed affected State notifies the State of origin that an activity that can be described as an activity referred to in article 1 is being carried out in its territory. In this case, one of two things may happen: either the State of origin accepts this assessment and makes the corresponding proposals, or it does not accept the assessment and therefore does not put forward any proposals.

128. With the first possibility, we are dealing with the case considered above and, in this instance, the affected State may accept the proposals put forward by the presumed State of origin or it may consider the proposals inadequate. In short, if the parties fail to agree either, on the characteristics and effects of the activity or on the proposals put forward with a view to providing the activity with a legal framework, we have the first disagreement.

129. This, then, is where the obligation to negotiate arises in its pure state for the first time, because although notification and information are essential steps prior to negotiation, they do not represent negotiation proper. Much has been said about this obligation in the International Law Commission, the Sixth Committee and in innumerable academic forums. The subject has been considered under our own topic, but the obligation to negotiate was considered earlier and in depth under the watercourses topic. 31/

130. The present Special Rapporteur believes that the task before the Commission here is not to attempt to approach the subject ex novo, which would involve a pointless duplication of effort, but rather to consider whether the many precedents which exist concerning the obligation to negotiate apply to our field, in other words, whether the rules applicable in such cases as the Railway Traffic between Lithuania and Poland, Lake Lanoux and North Sea Continental Shelf cases and the Fisheries Jurisdiction case between the United Kingdom and Iceland are applicable to the topic of injurious consequences arising out of acts not prohibited by international law.

131. However, although there is a wide variety of international practice in this connection, judicial and arbitral settlements, multilateral and bilateral agreements laying down the obligation to negotiate in cases similar to those dealt with in such settlements, and all the resolutions of international organizations and all the recommendations of scientific institutions have a lowest common denominator: they all refer to situations where there is a clash of interests.

132. In short, negotiation is the first way of tackling any international dispute. Let us recall the oft-cited paragraph of the Judgment of the International Court of Justice in the North Sea Continental Shelf cases:

31/ Yearbook ... 1980, vol. II (Part Two),document A/35/10, pp. 114-117, paras. 17-35.

> "The Court would recall ... that the obligation to negotiate ... merely constitutes a special application of a principle which underlies all international relations, and which is moreover recognized in Article 33 of the Charter of the United Nations as one of the methods for the peaceful settlement of international disputes. There is no need to insist upon the fundamental character of this method of settlement, except to point out that it is emphasized by the observable fact that judicial or arbitral settlement is not universally accepted." 32/

133. While it is true that Article 33 of the Charter refers to disputes likely o endanger international peace and security, the Charter of the United Nations does not provide an adequate basis for establishing an obligation to negotiate only in connection with such disputes. To start with, the principle of the sovereign equality of States, upon which the Organization is based (Article 2, paragraph 1), requires that if a State considers that its rights have been violated, or if its interests have been harmed as a result of action taken by another State, the latter must heed its complaints and seek in good faith a way of restoring equality, if equality has genuinely been impaired. Moreover, the principle laid down in Article 2, paragraph 3, of the Charter establishes the obligation to settle international disputes in such a manner that not only international peace and security but also justice are not endangered.

134. This obligation to negotiate, which thus seems applicable to any clash of interests, is particularly applicable to injurious consequences arising out of acts not prohibited by international law, if account is taken of the views expressed by the International Court of Justice in the Fisheries Jurisdiction case. The Court states the following:

> "Neither right is an absolute one: the preferential rights of a coastal State are limited ... by its obligation to take account of the rights of other States and the needs of conservation; the established rights of other fishing States are in turn limited by reason of the coastal State's special dependence on the fisheries and its own obligation to take account of the rights of other States, including the coastal State, and of the needs of conservation." 33/

And a little further on:

> "The obligation to negotiate thus flows from the very nature of the respective rights of the Parties; to direct them to negotiate is therefore a proper exercise of the judicial function in this case. This also corresponds to the principles and provisions of the Charter of the United Nations concerning peaceful settlement of disputes." 34/

32/ I.C.J. Reports, 1969, pp. 47-48.

33/ I.C.J. Reports, 1974, p. 31.

34/ Ibid., p. 32.

Further on, the Court quotes the paragraph of the Judgment in the North Sea Continental Shelf cases reproduced above (see para. 132).

135. This description given by the Court in the fisheries case seems applicable, almost word for word, to the situations arising under our topic. The obligation to negotiate emanates from the very nature of the parties' respective rights: on the one hand, the right of the State of origin - derived from its territorial sovereignty - freely to use its territory; on the other hand, the affected State's right, also based on its territorial sovereignty, to use and enjoy its territory without impairment.

136. Since, in the past, technological applications were such that they resulted in transboundary injury only in very exceptional circumstances, there was no need for any regulation - a situation that also pertained in the case of fisheries until fishing activities were intensified. However, once scientific progress placed at our disposal techniques that did have the potential to cause transboundary injury, a situation of interdependence developed which calls for certain restrictions to be placed on the rights of all States. Thus, as the Court indicates, there is now an "obligation to take account of the rights of other States and the needs of conservation". The phrase concerning conservation is admirably suited to all obligations concerning the environment. However, let us remember that not all obligations under our topic concern the environment, even though a great number of them do.

137. Let us make the qualification, in order not to run the risk of being misinterpreted, that we by no means believe that rights of territorial sovereignty are "preferential rights". They are not, but neither are they absolute rights, as is demonstrated by the very existence of international law, whose application would be impossible - as any form of civilized coexistence would be - if States were to attempt to put the concept of absolute sovereignty into practice. In the case of the topic under consideration, let us say it once again, the rights of territorial sovereignty of the State of origin clash with the rights emanating from the territorial sovereignty of the affected State, which have equal status.

138. It would perhaps be helpful, in order to gain a better understanding of the nature of the obligation to negotiate, to digress briefly in order to describe what appear to be two of its obvious limits. It is clear that the obligation to negotiate does indeed have limits, and they seem to be good faith and reasonableness. They are the two major guides in the area in question, and - as is usually the case where they are concerned - we all know what they are but it is very difficult to describe or quantify them as they occur in practice.

139. Does State A have an obligation to negotiate if State B suddenly, after many years, interprets a border agreement between them in a capricious manner, with the result that a region that has always been recognized as belonging to State B is suddenly claimed as belonging to State A? We think not, because that situation would be based neither on reasonableness nor, probably, on good faith. This is so because the obligation to negotiate is not only an obligation to heed the other party; it is not only an obligation "to enter into negotiations, but also to pursue them as far as possible, with a view to concluding agreements", as indicated in the

Advisory Opinion of the Permanent Court of International Justice in the Railway Traffic between Lithuania and Poland case. 35/ Nobody can be obliged to pursue negotiations if the other party's position is not reasonable and is not based on good faith.

140. A perfect example of the above is provided by the I.C.J. Judgment in the North Sea Continental Shelf cases. 36/ There were two sets of negotiations held between the same parties - the first between 1965 and 1966 and the second following the instruction to hold negotiations given in the Judgment.

141. In the Court's view, the first negotiations were not genuine negotiations, since Denmark and the Netherlands acted in the conviction that "the equidistance principle alone was applicable, in consequence of a rule binding upon the Federal Republic". 37/ The countries in question certainly saw no reason to depart from the rule of equidistance. It is therefore possible to believe that they entered into the talks with the Federal Republic without deeply committing themselves to genuine negotiations, owing to their belief that the content of the complaint was unreasonable as it was not in accordance with the law.

142. On the other hand, the second set of negotiations was genuine. Once the Court had clarified the relevant point of law and determined that under international law equidistance was not the only method of determining borders such as the ones in question, the parties engaged in genuine negotiations until they reached a settlement.

143. The Special Rapporteur does not believe that it is of any importance for the purposes of our analysis that the Court provided some elements as a guide for negotiation, such as the reference to the principles of equity and the unity of deposit. That is part of the particular nature of the case in question; the genuinely general aspects of the case are the basis for and the limits to the obligation to negotiate.

D. Article 16

144. We are therefore of the view that there is in our field an obligation to negotiate, because we have here a clash of various interests that must be reconciled if they are essentially reasonable, and that the final paragraph of article 16 takes account of the two important parameters to which we are referring, namely, reasonableness and good faith.

35/ P.I.C.J., Series A/B, No. 42 (1931), p. 116.

36/ Which, in passing, in this respect follows the advisory opinion just quoted, since it indicates that the parties "are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it" (I.C.J. Reports, 1969, p. 47).

37/ Ibid., p. 48.

145. There may be disagreement on two different aspects: on the nature of the activity or its effects, and on the measures that are to make up the legal régime for the activity.

146. In the first instance, we have a disagreement on facts, which would best be resolved by establishing a fact-finding body of experts. The text offers the following alternative: that the facts should be established by means of negotiation between the parties, without experts being involved, since experience has revealed a clear reluctance on the part of States to accept the involvement of third parties in their disputes. Perhaps it would be easier to accept fact-finding machinery - the appointment of whose members and other details would be dealt with in a possible annex - if the opinion of such a body were not binding on the parties. That is the solution suggested by Professor Quentin-Baxter in his schematic outline (sect. 2 (6)). According to the outline, the obligation to negotiate would arise only if (a) it does not prove possible within a reasonable time to agree upon the establishment and terms of reference of fact-finding machinery; (b) any State concerned is not satisfied with the findings, or believes that other matters should be taken into consideration; and (c) the report of the fact-finding machinery so recommends.

147. The solution put forward in the schematic outline is actually a rational one, since it is first of all necessary to hold the same view on the nature and effects of the activity in order to be able to agree on the necessary preventive measures and the legal régime that would be most applicable. Moreover, although it is easier to begin by holding a round of consultations than to set about appointing a body of experts and wait until the experts reach agreement, account should be taken of the fact that, on the one hand, the presumed State of origin can begin the activity without awaiting the outcome of the deliberations in question and, on the other hand, the temporary liability régime laid down in the articles gives the presumed affected State a certain amount of assurance that compensation will be given for any injury. In principle, there would be no vexing haste.

E. Article 17

148. Under the article, the notified State's silence may militate against it, since that State has a duty to express its views in accordance with the obligation to negotiate, which means that if the presumed affected State has not given any reply within six months of having been warned, the conclusion will be that it accepts the nature attributed to the activity in question by the other State, and the activity will thus be subject to the régime laid down in the draft articles, as if it were an activity referred to in article 1.
