

Document:-
A/CN.4/SR.2415

Summary record of the 2415th meeting

Topic:
International liability for injurious consequences arising out of acts not prohibited by international law

Extract from the Yearbook of the International Law Commission:-
1995, vol. I

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in certain areas, it had accepted an exception to the overall concept of general responsibility, thus reverting to the concept of fault. Should it be concluded that, because it had thus moved further away from the original concept of strict liability, the Commission should abandon it altogether after so many years of work? He had the feeling that the position of pure legal theory which underlay the nature of strict liability was being weakened. The question was one of principle. The Commission had to define the legal principle that was applicable in the matter and it had to do so in conformity with its obligation to codify the law in that area. He therefore appealed to Mr. Idris to reconsider his position so as to enable the Commission to take a decision on that fundamental problem.

52. Mr. HE said that he endorsed the view that the principle of strict liability should be stated in the form of a general provision. The question was whether the Commission should draft that general provision or, on the contrary, deal first with specific provisions. Pointing out that there was definitely some overlapping between article C and article 14, he took the view that it would be preferable to defer the adoption of article D until later. The Commission should have specific provisions at its disposal before taking action on article D.

53. The CHAIRMAN said that the working group set up to consider article C could also deal with articles A and D, which had been the subject of various comments and suggestions. He therefore invited all members of the Commission who had spoken on those articles, namely, Mr. Barboza, Mr. Bennouna, Mr. He, Mr. Idris, Mr. Mahiou, Mr. Pambou-Tchivounda, Mr. Rosenstock, Mr. Tomuschat, Mr. Villagrán Kramer, Mr. Yankov, and Mr. Eiriksson, who would act as Chairman, to take part in the working group.

The meeting rose at 1.10 p.m.

2415th MEETING

Wednesday, 12 July 1995, at 10.15 a.m.

Chairman: Mr. Pemmaraju Sreenivasa RAO

Present: Mr. Al-Baharna, Mr. Barboza, Mr. Bennouna, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Jacovides, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Razafindralambo, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

International liability for injurious consequences arising out of acts not prohibited by international law (*continued*) (A/CN.4/459,¹ A/CN.4/464/Add.2, sect. E, A/CN.4/468,² A/CN.4/471,³ A/CN.4/L.508, A/CN.4/L.510, A/CN.4/L.511 and Add.1, A/CN.4/L.519)

[Agenda item 5]

CONSIDERATION OF THE DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE AT THE FORTY-SEVENTH SESSION (*concluded*)

1. Mr. EIRIKSSON, speaking as Chairman of the working group set up at the previous meeting to deal with proposals made in plenary on the drafting of articles A, C and D (A/CN.4/L.508), recalled that the working group had been established in order to avoid turning the plenary into a drafting committee and to expedite agreement on the articles in question. The working group had been composed of Mr. Barboza, Special Rapporteur, Mr. Villagrán Kramer and Mr. Yankov, who chaired the Drafting Committee at the present session, Mr. Pambou-Tchivounda, the First Vice-Chairman of the Commission, Mr. Rosenstock, Mr. Tomuschat and himself. The working group had spent the whole of the previous afternoon on its task and had succeeded in reaching agreement on all the points which had been raised. Actually, some disagreement did remain, in principle, about whether article D was ready for adoption, but he would return to that matter later. Unfortunately, it had only been possible to circulate an informal document, in French and English only.

2. As already stated, the working group had confined itself to dealing with issues raised in the plenary. However, in considering forms of language to meet various concerns, it had felt obliged also to tackle related formulations. For example, it had changed the word *minimiser* as applied to risk in the French text of article B, to *réduire au minimum*, thereby bringing the language of the article into line with that used in the articles adopted at the previous session.

3. The revised version of draft article A [6] read:

“Freedom of action and the limits thereto

“The freedom of States to carry on or permit activities in their territory or otherwise under their jurisdiction or control is not unlimited. It is subject to the general obligation to prevent or minimize the risk of causing significant transboundary harm, as well as any specific obligations owed to other States in that regard.”

4. It would be seen that the second sentence had been somewhat streamlined. First, it now indicated that the specific obligations owed to other States should relate not only to “transboundary harm”, as in the original draft, but also, like the general obligation, to the prevention and minimization of such harm. Secondly, the work-

¹ See *Yearbook* . . . 1994, vol. II (Part One).

² Reproduced in *Yearbook* . . . 1995, vol. II (Part One).

³ *Ibid.*

ing group had felt that referring to the “specific obligations” as “legal” might give the unintended impression that the “general obligation” was not “legal”. Hence, it was proposed that the adjective “legal” be deleted. Thirdly, the work in English and French had revealed certain difficulties in connection with the phrase “with respect to preventing and minimizing”, and the Group recommended the more direct form “obligation to prevent or minimize”, it being made clear in the commentary that what was meant was the obligation, as laid down in the articles, to take appropriate measures, described by some as an obligation of conduct rather than of result. Lastly, the view had been expressed that it would be more accurate to say that the freedom referred to in the first sentence of the draft article was “subject to” the obligations referred to in the second sentence than to say that it had to be “compatible with” those obligations.

5. The working group had not dealt with draft article B except to make the drafting change already mentioned in connection with the French text. Accordingly, the English text of draft article B [7] was the same as that proposed by the Drafting Committee in document A/CN.4/L.508 and read:

“Cooperation

“States concerned shall cooperate in good faith and as necessary seek the assistance of any international organization in preventing or minimizing the risk of significant transboundary harm and, if such harm has occurred, in minimizing its effects both in affected States and in States of origin.”

6. Proposed draft article C [8 and 9] read:

“Prevention

“States shall take all appropriate measures to prevent or minimize the risk of significant transboundary harm.”

7. In dealing with article C, the working group had proceeded on the premise, developed in plenary, that the words “or action” could be dispensed with and that the words “reasonable measures” should be replaced by “appropriate measures”, which corresponded to the wording of article 14 as provisionally adopted⁴ and which, moreover, followed the many precedents referred to in the commentary to that article and the way in which a similar issue was treated in the articles on the law of the non-navigational uses of international watercourses. The resulting language was much more straightforward than the original text by the Drafting Committee, as befitted an article setting out a general principle.

8. As for the question, raised by Mr. Tomuschat, of the relationship between article C and article 14, the Group recommended that the commentary should note that, at the appropriate time, article 14 should be brought into harmony with the new article C and should be confined to an article on implementation, taking as its model, for

example, the Convention on Environmental Impact Assessment in a Transboundary Context. A new article 14 might read:

“States shall take all legislative, administrative or other action to implement the provisions of these articles [on prevention, etc.]”

The wording would then be referring both to the general obligation set forth in article C and to the more specific obligations set forth elsewhere in chapter II of the draft articles (such as prior authorization, risk assessment, non-transference of risk, and so on).

9. Proposed draft article D [9 and 10] read:

“Liability and reparation

“In accordance with the present articles, liability arises from significant transboundary harm caused by an activity referred to in article 1 and shall give rise to reparation.”

10. Essentially two changes had been made. The first consisted in replacing the word “compensation” by “reparation”, the latter term being, in the working group’s view, generally accepted in the plenary as broader and therefore more appropriate. The second change, designed to avoid having to repeat the words “in accordance with” or “subject to” the articles, had been achieved by combining the two sentences of the article originally proposed by the Drafting Committee into one and qualifying both liability and reparation by the opening clause “In accordance with the present articles”. The title of article D had, of course, been changed accordingly.

11. As already stated, the proposed changes had been agreed upon by the working group. Some members, however, remained of the view they had stated in plenary that article D should not go forward at the present stage, while others remained of the view that it should. The working group had failed to agree on that point and had decided to leave the decision to the plenary. If the plenary decided that article D was to go forward, the members taking the opposite view would place their reservations on record. In any event, the article should be accompanied by a commentary indicating the various qualifications contained in the article—in effect, that it would be for the future work on the topic to determine the actual content of the obligation. Some members had considered that the commentary should, in addition, briefly refer to the various views on the nature of liability, on which material had been provided in two reports by the Special Rapporteur. If the article was not sent forward, the question of a commentary would not, of course, arise.

12. In conclusion, he wished to refer to a point which had arisen repeatedly within the working group and which the working group’s members had asked him to emphasize, namely, the need to reaffirm the view often expressed by the Commission that the articles it adopted should be accompanied by the most complete and informative of commentaries in order to allow readers to form

⁴ See 2414th meeting, footnote 4.

an opinion on both the content and the origins of the Commission's product.

13. At the suggestion of Mr. BARBOZA (Special Rapporteur), the CHAIRMAN invited the Commission to consider the proposals of the working group article by article.

Article A

14. Mr. ROSENSTOCK said that article A, like the others in the series, had to be understood within the context of the specific provisions adopted at the previous session.

15. Mr. de SARAM, noting that article A was not yet accompanied by a commentary, said that he wholeheartedly concurred with the wording proposed at the present stage.

16. The CHAIRMAN, speaking as a member of the Commission, said that he was not entirely happy with the wording of the first sentence. It was surely not the Commission's intention to imply that States had only limited freedom in exercising activities in their territory that were not prohibited by international law. However, he was prepared to go along with the working group's proposal.

Article A, as proposed by the working group, was adopted.

Article B

17. Mr. PAMBOU-TCHIVOUNDA said that, as already explained by Mr. Eiriksson, the working group had not dealt with article B except by introducing a drafting change, in the French version, one which he welcomed. Had the Group considered the article, he would have suggested that the words "in minimizing its effects" should be replaced by "in remedying it". It would be recalled that the Commission had discussed that point at the previous session.

18. Mr. KABATSI said that he, too, would prefer the article to speak of remedying harm rather than of minimizing its effects. Eliminating the effects of significant transboundary harm was, at it were, the first option, the second option—that of reducing the effects of harm to the barest minimum—being resorted to only if the first was not feasible.

19. Mr. THIAM said he, too, took the view that the word "minimizing" was inappropriate. The effects of harm, once it had occurred, could be remedied but not reduced.

20. Mr. BARBOZA (Special Rapporteur) said the point raised was very interesting, but he feared that use of the word "remedy" might be taken to allude to reparation. Minimizing the effects of harm could include reducing those effects to zero. He would prefer the working group's text to remain as it stood.

21. Mr. EIRIKSSON, after pointing out that the working group had not been mandated to consider article B,

remarked that, since the subject-matter of the article was cooperation, it might be sufficient to replace the word "minimizing" by "dealing with".

22. Mr. FOMBA said that, unlike Mr. Thiam, he thought the effects of harm could indeed be reduced. In the case of marine pollution, for example, minimizing the effects of harm could include measures ranging from a complete clean-up to relatively slight improvements. The difference between the working group's text and that suggested by Mr. Pambou-Tchivounda was not very great, and for that reason he had no objection to keeping the text as it stood.

23. Mr. MAHIOU said that he preferred "minimizing" to "remedying", not because he could see no difference between them, but precisely because the latter term was much wider in scope and could, as the Special Rapporteur had already pointed out, be interpreted as including reparation or compensation. Article B dealt with the physical effects of harm, and the word "minimizing" was entirely appropriate in that context.

24. Mr. GÜNEY said that, for reasons already given by previous speakers, he too was in favour of adopting the working group's text without change.

25. The CHAIRMAN said that another possibility would be to add the words "eradicating or" or "removing or" before the word "minimizing".

26. Mr. BARBOZA (Special Rapporteur) said that in his view the word "minimizing" conveyed the proper meaning. It was, moreover, a hallowed term which appeared in similar conventions.

27. Mr. KABATSI said he did not think that it would create any problems if the expression "eradicating or minimizing" was used.

28. Mr. EIRIKSSON suggested that the expression "eliminating or mitigating", which occurred elsewhere, could perhaps be used.

29. Mr. TOMUSCHAT said that "wiping out" was the term used in the judgment in the *Chorzów Factory* case,⁵ though it was, of course, a term of State responsibility.

30. Mr. GÜNEY said that, for reasons already cited by himself and other members, he had a marked preference for the word "minimizing", which should be retained.

31. Mr. BENNOUNA said that he would have no objection to replacing the word "minimizing" by the words "eliminating or mitigating" in the second part of the article, which dealt with prevention after the event. In the first part of the article, however, which dealt with prevention proper—or prevention before the event—there was no need for the words "or minimizing" and it would suffice to state "in preventing the risk".

32. Mr. ROSENSTOCK said that he favoured the text as it stood. The activities contemplated by the article would inevitably include many where the most that could be hoped for was that their effects could be mini-

⁵ See 2379th meeting, footnote 19.

mized. "Minimizing" was both the traditional and the correct word in the context.

33. Mr. RAZAFINDRALAMBO said he supported that view.

34. Mr. BARBOZA (Special Rapporteur), agreeing with Mr. Rosenstock, said that it was not possible to provide for reparation through cooperation, inasmuch as the obligation to cooperate was founded on an entirely different basis from the obligation to make reparation. So far as cooperation was concerned, the article went far enough.

Article B, as proposed by the working group, was adopted.

35. Further to a point raised by Mr. PAMBOU-TCHIVOUNDA, Mr. BARBOZA (Special Rapporteur), supported by Mr. EIRIKSSON, suggested that article B should be placed after articles C and D.

It was so agreed.

Article C

Article C, as proposed by the working group, was adopted.

Article D

36. Mr. GÜNEY said that the working group had touched on substance and gone beyond its mandate. Moreover, article D was not compatible with the work the Commission had done at its preceding session, in 1994, on the law of the non-navigational uses of international watercourses. In the draft on that topic, the obligation not to cause significant harm, though a general obligation, had been linked to the obligation to exercise due diligence: thus, where the States concerned complied with the latter obligation, they would not incur responsibility. In that respect, article D lacked balance. Therefore, it should not be submitted to the General Assembly at the present stage.

37. Mr. TOMUSCHAT said that, while he did not think the working group—of which he had been a member—had exceeded its mandate, he did feel that it would be premature to accept the article before the Commission had studied fully all of the implications of an issue that was central to the whole draft. In particular, it should examine the threshold at which liability arose and the form of reparation, which should not be automatic. As it stood, the article would give rise to many difficulties and it would be unwise to adopt it. Furthermore, it should not be assumed that the article commanded the support of the majority in the Commission.

38. Mr. EIRIKSSON said that there had been no intention whatsoever in the working group of changing the substance of the article. The working group had merely considered two points: first, the replacement of the word "compensation" by the broader term "reparation" and, secondly, the elimination of the double reference to "the present articles". He was very much in favour of sending the article to the General Assembly, together with

commentaries that would reflect the discussion on those two points.

39. Mr. ROSENSTOCK said that he was unable to approve the adoption of article D, which was premature for a variety of reasons. The words "In accordance with the present articles" indicated that there was no intention to lay down a principle or rule that was independent of the specific provisions of the draft, which was both right and proper. But there were, as yet, no such provisions and the Commission had taken no decisions about their content. It would therefore be wrong to prejudice that exercise by attempting to adopt a principle forthwith. At most, the Commission should take note of article D and recognize that it was a matter to be kept in mind when it undertook the detailed drafting of provisions that might or might not reveal that it was prepared to state generally that there was some such principle. Furthermore, such practice as existed was limited to specific conventions, usually concluded between a small number of States in relative proximity to one another and dealing with specified dangerous or ultra-hazardous substances or activities. In some of those conventions, liability was limited in a variety of ways, often being confined to the operator or to fixed amounts. In the absence of any State practice to support the principle in article D, in the absence of a detailed study of the issue by the Commission, and in the absence of an attempt to elaborate detailed provisions that could provide some substance to the content of the article, it would be unwise to take any formal action at the present stage.

40. Mr. BARBOZA (Special Rapporteur) said he wished to reassure Mr. Güney that article D simply laid down a very general principle providing for the possible liability of the operator.

41. It was none the less an important principle and one that characterized the whole topic. The sense of article D, as drafted, was that where, under certain conditions to be established by the articles, significant transboundary harm gave rise to liability, there must be reparation. That principle, though not proclaimed as a universal principle, formed the basis for the draft's chapter on liability. It was also the corollary to and a necessary complement of the principle laid down in article A, concerning the freedom of States and the limits to that freedom. Liability was one way of enabling a dangerous activity, which a State was free to authorize or to carry on under its jurisdiction or its control, to be a legal activity. The other way was prevention, in that the activity had to be accompanied by all the necessary precautions to minimize the risk involved. One trend of opinion in the working group, which had been expounded by Mr. Tomuschat and Mr. Rosenstock, was that the Commission should wait until the chapter on liability had been examined at the next session before a principle was proposed on liability and reparation. The other trend of opinion held that the principle as now drafted should be submitted to the General Assembly forthwith, together with the other principles that had been approved. That course, it had been argued, would have the advantage of securing the guidance of Governments for the Commission's future work on the topic, or at least their reactions.

42. A chapter on liability had in fact already been included both in his fourth report⁶ and in his sixth report,⁷ and the principle at issue had long since received the Commission's general approval.

43. He had originally proposed three principles, which the Commission had endorsed and included in its report to the General Assembly on the work of its fortieth session. Those principles read:

(a) the articles must ensure to each State as much freedom of choice within its territory as is compatible with the rights and interests of other States;

(b) the protection of such rights and interests requires the adoption of measures of prevention and, if injury nevertheless occurs, measures of reparation;

(c) in so far as may be consistent with those two principles, an innocent victim should not be left to bear his loss or injury.⁸

44. The adoption by the Commission of the principle in article D would give him guidance for the next stage. There were in fact two reports on liability—his sixth and tenth⁹ reports—and he would have to present them as alternatives and harmonize them. But he would require some orientation; there would be no point in undertaking that arduous task if the Commission itself had strong misgivings about such an elementary principle.

45. In the past, the only way in international practice to meet transboundary harm caused by an activity dangerous to persons, property or the environment had been through some form of liability, either the absolute liability of the State (as in the case of the Convention on International Liability for Damage Caused by Space Objects), the strict liability of operators, for example the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment, or the strict liability of the operator with a subsidiary liability of the State or of some fund (as in the Vienna Convention on Civil Liability for Nuclear Damage, the Convention on Third Party Liability in the Field of Nuclear Energy or in the conventions on oil pollution). There could be some other variants, but in international practice, significant transboundary harm had always given rise to liability.

46. The present text was flexible enough to contemplate all possibilities. As it limited itself to stating that transboundary harm gave rise to liability and to reparation in accordance with the provisions of the articles of the draft, it certainly did not go beyond what had already been agreed by the Commission at the fortieth session, in 1988. On the other hand, he reminded the Commission that at its forty-fourth session, in 1992, it had been decided, consistent with the recommendation of the working group specially appointed by the Commission, that upon completion of the articles on prevention, the Commission would propose articles on remedial measures when activities had caused transboundary harm.¹⁰ Thus,

he was of the opinion that the principle in article D should be referred to the General Assembly.

47. Mr. de SARAM said it was clear that article D, although seemingly simple, touched upon a fundamental question on which there had been differences of opinion for many years. As he saw it, the text of the article was fully acceptable in its present form. The question was whether the Commission should express a view by consensus on what in fact was the basis of an international obligation under public international law to compensate in the event of physical transboundary harm. It must be placed on record that that was a fundamental question on which there was considerable disagreement.

48. Mr. LUKASHUK said he congratulated the working group and its Chairman for the excellent work done. It would be useful to call upon such small groups in the future to help speed up the work in plenary.

49. It was clear that article D must remain in the draft, because it established an important principle. However, one of the vital norms in the draft thus referred to articles that did not yet exist. He therefore endorsed the proposal already made in the Drafting Committee to adopt the idea in principle but to defer finalization of the wording until the articles to which reference was being made became available.

50. Mr. VILLAGRÁN KRAMER said that the article was long overdue. For the past 15 years, the Commission had informed the General Assembly of the nature of its work, its approaches to the subject and the difficulties encountered. In the course of its report to the General Assembly on the topic, the Commission had drawn attention to the *Trail Smelter* case,¹¹ the *Lake Lanoux* case¹² and the *Corfu Channel* case,¹³ as well as to a number of European and international treaties. The enunciation of the principle merely confirmed what already existed in international law: there was a general principle of international law that any harm caused to another State required good reparation or compensation.

51. If the Commission distinguished between lawful and wrongful acts, it would need to view the subject in a totally different perspective. In the case of a wrongful act, it was the violation of a norm, a commitment or an obligation, and not harm, that constituted the basis of liability, whereas in the case of a lawful act, of an act not prohibited by international law, it was important to decide whether or not it gave rise to liability. If the Commission said that it did not, then in his opinion there was something wrong in international law. The fact could not be ignored that a principle of law did exist and that harm, in the case of the theory of fault, gave rise to liability, as did the violation of a norm. Thus, the existence of a general principle of law was simply a fact that

⁶ See 2413th meeting, footnote 12.

⁷ *Yearbook* . . . 1990, vol. II (Part One), p. 83, document A/CN.4/428 and Add.1.

⁸ *Yearbook* . . . 1988, vol. II (Part Two), p. 18, para. 82.

⁹ See footnote 1 above.

¹⁰ *Yearbook* . . . 1992, vol. II (Part Two), p. 51, document A/47/10, para. 345.

¹¹ United Nations, *Reports of International Arbitral Awards*, vol. III (Sales No. 1949.V.2), pp. 1905 *et seq.*

¹² Original French text in United Nations, *Reports of International Arbitral Awards*, vol. XII (Sales No. 63.V.3), p. 281; partial translations in *International Law Reports*, 1957 (London), vol. 24 (1961), p. 101; and *Yearbook* . . . 1974, vol. II (Part Two), pp. 194 *et seq.*, document A/5409, paras. 1055-1068.

¹³ See 2381st meeting, footnote 8.

the Commission would be taking into account by approving the draft.

52. The principle was very important in that it would open the way to determining the liability of private and public operators. It was difficult to see how liability for private or public operators could be established if there was no agreement on the substance, namely the existence of the principle. Nor was it apparent how liability and the amount of reparation due could be limited if the Commission did not agree that there was a basis for liability.

53. He totally disagreed with the proposal to defer consideration of article D. He was convinced that the article represented a step forward for the Commission, which would do well to inform the General Assembly of its approval. The working group had not overstepped its mandate whatsoever. It had simply settled a question of terminology by replacing "compensation" by "reparation" and by deleting one of the two references to "the present articles".

54. He strongly endorsed article D. If necessary, it should be put to the vote.

55. Mr. AL-BAHARNA said that, with all due respect to the working group for its efforts to reformulate the draft articles, he had much preferred the original version. He objected, in the case of article D, to the expression "reparation". The regime of liability was much more closely bound up with compensation than with reparation, which fell under the regime of State responsibility. Numerous examples in domestic jurisdiction, State practice, multilateral treaties, judicial decisions and arbitration all spoke of liability and compensation. For example, neither the draft international convention on liability and compensation for damage in connection with the carriage of hazardous and noxious substances by sea¹⁴ nor the Convention on Damage caused by Foreign Aircraft to Third Parties on the Surface made mention of reparation. Consequently, he urged the Commission to reconsider using the term "reparation". The Special Rapporteur had completed 11 reports, in which he had invariably spoken of compensation. It was not clear why it was necessary to shift to the regime of reparation, which would be far more complicated.

56. As to the wording of article D, he proposed replacing the phrase "In accordance with the present articles" by "Subject to the present articles", which was stronger, and then ending the sentence after the words "referred to in article 1" and adding a new sentence to read: "Such liability gives rise to compensation".

57. Mr. KABATSI said that the principle of liability was qualified in article D by the phrase "In accordance with the present articles"—referring to articles which had not even been formulated. He would, nevertheless, accept article D as it stood, or in a slightly modified form, since it dealt with such an important matter. The articles bearing on the topic of international liability would not be complete without a specific article defining the circumstances under which liability arose. In its

present form, article D simply asserted the principle of liability and made no attempt to impose it.

58. Mr. JACOVIDES said that, while it would be helpful to have an overall view of the full set of articles, he could accept article D as it currently stood. The article would, of course, be subject to review in the light of further developments.

59. Mr. BARBOZA (Special Rapporteur) said that if, as suggested, the word "compensation" were to replace "reparation" in article D, the article would then fail to cover the important case of environmental harm. Where such harm occurred, compensation was not sufficient, because conditions had to be restored to their former state. Environmental harm was a fairly recent concern and it was perhaps for that reason that such cases were not dealt with in the instruments mentioned by Mr. Al-Baharna.

60. The issue of "compensation" versus "reparation" had already been taken up quite some time ago by the Commission. It was his impression that members had preferred the latter term, especially since "compensation" was precisely defined as monetary compensation in article 8 of part two of the draft on State responsibility.¹⁵

61. Mr. AL-BAHARNA asked whether the mere use of the word "reparation"—without further specifying the elements of such a regime—would in fact adequately cover the case of environmental damage.

62. Mr. HE said that it might be better to postpone the adoption of article D until the next session, for the Commission had not yet discussed the specific articles relating to liability. Many issues still had to be clarified.

63. Mr. BARBOZA (Special Rapporteur) said that the commentary could include mention of the points made by Mr. Al-Baharna.

64. The CHAIRMAN said he wished to suggest, as a compromise, that the Commission should adopt article D marked with an asterisk, which would read:

"* As it is clear from the phrase 'In accordance with the present articles', the substantive content of article D is left to the later elaboration of the articles on liability. At this stage, article D is a working hypothesis of the Commission to enable it to continue its work on the topic."

In addition, the commentary could include the various views expressed with regard to article D.

65. Mr. JACOVIDES said that the Chairman's suggestion seemed a good compromise, as long as it was acceptable to the Special Rapporteur.

66. Mr. BENNOUNA proposed that, as they were redundant, the words "to enable it to continue its work on the topic" should be eliminated from the proposed text.

67. Mr. GÜNEY said that he could accept the proposed text if article D itself was amended. Thus, after the

¹⁴ IMO, document LEG 72/4, annex.

¹⁵ See 2414th meeting, footnote 7.

words "referred to in article 1", he would add "if all due diligence is not exercised". Furthermore, in his view, it would be best to postpone adoption of article D until the Commission had examined the Special Rapporteur's commentary to that article, at which point it could adopt both the article and the commentary.

68. Mr. VILLAGRÁN KRAMER said that, while not wishing to be obstructionist, he himself preferred to work with norms and principles. A working hypothesis could never in his opinion be considered the equivalent of a general principle of law. If the Commission could not arrive at a consensus at the next session, in 1996, the adoption of article D would have to be put to the vote.

69. Mr. YANKOV said that with the change suggested by Mr. Bennouna, the proposed text protected the views of all concerned. For the time being, article D was simply a working hypothesis. The Commission was not a legislative body and whatever articles it formulated were still proposals which had to be accepted by States.

70. Mr. AL-BAHARNA said that the words "provisionally adopted" might be substituted for "working hypothesis".

71. Mr. MIKULKA said that he endorsed both the proposed formulation and Mr. Bennouna's amendment to it.

72. He had been surprised by the assertion that article D could not be characterized as a "working hypothesis" because it dealt with *lex lata*. However, that was only one position. Other members had other views. It was precisely for that reason that the Chairman had suggested a compromise. Labelling article D as a "working hypothesis" was simply a way of indicating to the Special Rapporteur that he should continue with his work, based on the assumptions set forth in article D.

73. With regard to Mr. Güney's proposal to include a reference to due diligence, it might be more appropriate to mention that matter in the commentary, noting that the Commission would consider the problem of due diligence when it examined the specific articles on liability. Article D simply stated the conditions under which liability arose. Mentioning the subject of due diligence in article D could only complicate matters, because the question would then arise of exactly who or what had to show due diligence.

74. Mr. EIRIKSSON said that incorporating an obligation of due diligence in article D would in fact simplify matters, because the Commission would not have to adopt further articles on that subject. However, it was not at all clear that the members were ready to take that course of action. All possibilities should be left open for the time being. He agreed that the discussion relating to the link between liability and reparation should be included in the commentary.

75. Mr. ROSENSTOCK said that, as he understood it, if the Commission adopted article D as it stood, along with the proposed comment, it would eventually have to choose between a strict causal liability or, alternatively, a regime based on due diligence, based primarily on the articles on prevention already agreed upon.

76. Mr. MAHIOU said that, although he was not entirely satisfied with the proposed formulation, he could accept it, especially since it did represent a compromise between the opposing points of view. Moreover, it provided a guideline for the Special Rapporteur's future work.

77. In his opinion, the obligation of due diligence should not be incorporated in article D, because it would imply the inclusion in that same article of a set of issues which were reserved for future articles. He would point out that the Commission had just adopted the article on prevention, a matter which was treated in an entire set of articles. In the same way, the Commission would subsequently be reviewing a set of articles on the subject of liability and, at that time, it could decide whether article D should remain in its present form.

78. Mr. de SARAM said that the proposed formulation should be taken at its face value, in other words, article D was a working hypothesis that would enable the Commission to move ahead in its work. The formulation also had the merit of accommodating, in a procedural manner, the sharp divisions that had arisen on the subject.

79. Mr. GÜNEY said he could agree that the issue of due diligence should be dealt with in the commentary rather than in article D itself. The commentary should stress that the obligation of due diligence would be re-examined in the context of future articles.

80. The Commission should postpone any decision on article D until after it had reviewed the Special Rapporteur's commentary to the article. Furthermore, given the wide range of views among members, the Commission could only take note of article D, not adopt it.

81. Mr. BENNOUNA said that he wished to make a fraternal appeal to Mr. Güney to join the consensus to adopt the compromise formulation.

82. Mr. GÜNEY said that he could not ignore the appeal of his colleague and he certainly did not wish to hinder the Commission's progress. Nevertheless, he would prefer the article to be adopted provisionally. Once the Commission had examined the commentary, it could confirm its decision.

83. The CHAIRMAN said that the notion of provisionality was already implied by the words "working hypothesis".

84. If he heard no objections, he would take it that the Commission agreed to adopt article D, with the accompanying text he had suggested, as amended by Mr. Bennouna.

Article D, as proposed by the working group, was adopted.

The meeting rose at 1.05 p.m.