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Summary record of the 17th meeting
Held at Headquarters, New York, on Friday, 2 November 2001, at 3 p.m.

Chairman: Mr. Lelong . . . . . (Haiti)

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The meeting was called to order at 3.10 p.m.

Agenda item 162: Report of the International Law Commission on the work of its fifty-third session

1. **Mr. Yamada** (Japan) said that his delegation supported the draft articles on transboundary harm from hazardous activities. The draft struck a balance between the freedom of States to engage in activities not prohibited by international law and the limitation of such freedom owing to environmental considerations and international cooperative arrangements. It gave due consideration to the positions of both the State of origin and the State likely to be affected. Japan welcomed the introduction in draft article 19 of recourse to an impartial fact-finding commission within the framework of dispute settlement.

2. With regard to the form of the draft articles, the Government of Japan supported the recommendation made by the Commission to the General Assembly on the elaboration of a convention. His delegation proposed that each State should take a few years to study the draft articles and that the Sixth Committee, meeting as the Committee of the Whole, should then elaborate and adopt the draft articles as a convention on prevention of transboundary harm from hazardous activities.

3. Now that the Commission had completed its work on prevention of transboundary harm from hazardous activities, it should proceed with the larger, essential topic of international liability with regard to such activities. It was impossible to eliminate the risk of transboundary harm from those activities. Furthermore, the State likely to be affected could not prevent the State of origin from conducting activities which might cause transboundary harm. Also, there could be cases where States of origin failed to observe the provisions of the draft articles and caused damage to other countries.

4. International liability could relate to various fields of international law, and since each of the various categories might need specific consideration, it would be difficult to codify a general rule. However, rules must be developed to deal with the injurious consequences arising out of acts not prohibited by international law. The Commission should take a few years to study the question, decide whether codification was feasible and, if so, specify the scope of the work that would be required. Japan hoped that the General Assembly would adopt a resolution as recommended by the Commission.

5. **Mr. Dinstein** (Israel) said that the prevention of transboundary harm from hazardous activities was one of the most important aspects of international environmental law, since it dealt not with remedies but with risk assessment and prophylactic measures. The Commission had been justified in its decision to give precedence to prevention over compensation.

6. The issue at the root of the Commission's work was one of clashing sovereignties. On the one hand, the State of origin exercised full sovereignty in its territory and in general should be the arbiter of what activities ought to take place within its jurisdiction. On the other hand, international law did not allow sovereignty to be exercised arbitrarily in a manner disregarding the rights of other sovereign States. The State likely to be affected by hazardous activities originating abroad should be able to protect its sovereign domain from injury. Dispute management could only be accomplished by balancing the conflicting interests of the two States concerned in such a way as to prevent or at least minimize the risk of transboundary harm. That was manifestly the purpose of the draft articles, which had the full support of the Israeli delegation.

7. The core of the text was the duty of the States concerned to cooperate in good faith and, if necessary, to seek the assistance of a competent international organization (art. 4). Without diminishing the importance of protecting persons and property in the affected State, it was worthwhile emphasizing the risk to the environment which could be a matter of global significance. An adverse impact on the quality of the environment could not be measured in pecuniary terms, and prevention of harm must take precedence over any procedure for assessing damage after a disaster. In the present day and age, nobody would dare to deny that protection of the environment must override traditional concepts of sovereignty.

8. By the same token, his delegation would like to stress that the obligation of the States concerned to cooperate in good faith in the prevention of transboundary harm must transcend any tensions that might sour their relations at the political level. Where direct channels of inter-State communication were unavailable or ineffective, the good offices of third parties or international organizations should be available and utilized for the greater good of humankind. His delegation construed article 8 of the draft to mean that the timely notification which the State of origin was bound to give to a State likely to be affected had to be issued irrespective of political tensions. Should a direct

notification of that sort prove to be politically impractical, the State of origin would be obligated to provide the notification to a third party or a competent international organization, which, for its part, would convey it to the affected State.

9. **Ms. Quezada** (Chile) said it was vital to regulate international liability for acts not prohibited by international law, in order to fill the legal gap left by responsibility for wrongful acts. That was particularly true in the environmental field, where many potentially hazardous activities were not unlawful.

10. The draft articles dealt with one aspect of the question which was certainly fundamental, namely the prevention of transboundary harm, but they should also have dealt with the equally vital issues of liability and the obligation to compensate. The absence of a wrongful act did not mean that the act committed did not entail liability or the obligation to compensate. In the case of responsibility for wrongful acts, compensation was required even in circumstances precluding wrongfulness (art. 27 (b)).

11. Her delegation was also concerned because the draft articles covered only harm caused within certain legal entities, namely territories or other places under the jurisdiction or control of a State, and disregarded common spaces such as the high seas or the seabed. Since the environment was a global concept, it would be appropriate to consider setting up an international body which would be responsible for monitoring the environment in areas not under the jurisdiction of any State, and for conducting public activities at the international level.

12. With regard to the text proper, her first comment concerned the distinction between the activities covered by the draft articles and those which caused actual direct harm by the mere fact of being undertaken. Admittedly, if the purpose of the draft was prevention, it must allow preventive measures against activities likely to cause harm. However, that did not exclude the possibility of incorporating in the draft all aspects of liability, including compensation and restitution. Similarly, her delegation considered it appropriate to have a general definition of the activities covered by the draft, rather than a list of a priori definitions, which would soon be outdated because of the pace of scientific and technical progress.

13. Concerning the rule laid down in article 8, it should be made clear that if the State which had received the notification did not react, authorization was deemed to have been given under the terms laid down by the State of origin. That did not, however, release the latter State from the obligation to avoid causing any harm. With regard to article 9, it was important not to prevent an activity from being carried out because of lack of agreement between the States concerned. Nevertheless, the State of origin was bound to take account of the observations made by the other State during consultations. The rule established in article 9 would make it possible to achieve a balance between States when agreement between them was lacking.

14. Article 10 dealt with the extremely important subject of an equitable balance between the interests of the States concerned. Account should be taken of the level of development of States when considering the cost involved, and the technical and financial resources required, in dealing with the risks arising from the hazardous activity. Subparagraph (d) did not seem adequate in that respect, since it referred to the costs which States were "prepared to contribute", not those which they were "able to contribute". That was a matter referred to in the Stockholm and Rio Declarations and in the Montreal Protocol on Substances that Deplete the Ozone Layer. The same principle should apply to due diligence. States would not be released from their obligations under the draft articles, but the obligations would be limited. At all events, the basic principle to be applied should be the "polluter pays" principle. Subparagraph (f) was important because an affected State would not be able to impose on the State of origin rules of prevention more stringent than those applied to comparable activities under its own internal law.

15. With regard to article 13, it was undoubtedly necessary to inform the public about the activities and the risks involved, but that should be done in accordance with national rules. The same applied to the consultations envisaged, which should not take the form of an international consultation. At all events, the persons affected should have access to remedies for any damage sustained.

16. Article 18, a saving clause, was relevant but not sufficiently explicit, since it did not specify the obligation concerned. Her delegation took it to refer to obligations of a similar or identical kind. Article 19 warranted a formal comment: there was no need to spell out the means of dispute settlement, since they were all covered by "peaceful means of settlement". The six-month waiting period specified in paragraph 2 was too long for negotiating a settlement, and should be reduced. The fact-

finding commission mentioned in that paragraph seemed to be out of place, since it was not an appropriate mechanism except where there was a divergence of views on the facts, which was not always the case. When the disputes had to do with questions of law, such a mechanism would not be appropriate unless it was given the functions of a conciliation commission.

17. Lastly, her delegation considered that preventive measures were not sufficient. Rules were needed to provide compensation where harm had been sustained. The Commission should therefore tackle those issues with a view to completing its work.

18. **Mr. Roth** (Sweden), speaking also on behalf of Denmark, Finland, Iceland, Norway and referring to the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law, said that in the first place, the term "significant" could be questioned as a criterion for applicability. Second, the obligation of prevention should apply also to risks to areas outside of national jurisdiction. Third, the reference to environmental impact assessments in article 7 should be stronger. Fourth, with regard to article 10, there was a risk that parties might have different views of what constituted an "equitable balance of interests"; a strong dispute settlement clause would be needed. Furthermore, the factors involved in an equitable balance of interests could in no way prejudice the right to compensation if harm occurred. In such a situation, the "polluter pays" principle should apply. The precautionary principle, implied in subparagraph (c), was not set out with sufficient clarity. Fifth, article 13 should be strengthened to ensure that the public too was able to present views. Sixth, there should be an element of proportionality in article 14. In certain circumstances, even information that could legitimately be considered secret might have to be made public. Seventh, it might be appropriate to consider whether a duty to take response action should be included, either in the draft articles on prevention or in a second set of draft articles dealing with liability. Eighth, the dispute settlement clause in article 19 was too weak; arbitration and judicial settlement should be given a bigger role.

19. As to the final form of the document, the Nordic countries were quite flexible. However, they felt that merely adopting the draft articles as they stood was not appropriate. They should be discussed and be open to amendments. The text could subsequently be adopted in whatever form the Commission decided, although for reasons of legal certainty, a convention would be preferable, even though the negotiations might be difficult and time-consuming.

20. A document that would cover both prevention and the various aspects of liability, such as compensation, would be preferable. Indeed, compensation, which might be necessary in and of itself, could also have a preventive function. It was difficult to foresee how the complete regime would work without knowing what the compensation scheme would look like.

21. The views of the Nordic countries on the question of liability were the following: there should be a duty to take response action, as well as a duty of reinstatement, where possible; there should be a duty to pay compensation to cover all damage to persons and property; the "polluter pays" principle should be applied as a general rule; injured persons should have access to justice in appropriate courts, but there should also be liability for the State itself, residually in cases where there was no operator liability.

22. Turning to the question of reservations to treaties, he said that the tendency towards decreasing numbers of reservations was important. To promote that trend, it was important for States to express objections to reservations which in their view undermined the integrity of a treaty. It was regrettable that the issue of reservations incompatible with the object and purpose of the treaty still had not been considered by the Special Rapporteur in his reports to the Commission; he should give the highest priority to that issue in his future work.

23. The competence to formulate reservations at the international level should not be extended. The integrity of article 7 of the Vienna Convention on the Law of Treaties must be respected; the circle of persons who were considered as representing their State was well established and should not be altered. In that context, a distinction should be made between the reservations under internal law and reservations at the international level. The matter of competence to formulate reservations and interpretative declarations at the internal level was clearly a matter for internal law and should not concern the Commission.

24. Lastly, the Nordic countries were concerned about the effect of draft guidelines 2.3.1 and 2.3.2, which would make the whole regime of treaty reservations applicable also to so-called late reservations. That would be in contradiction with the basic definition of a reservation and entailed a serious risk of abuse.

The meeting rose at 4 p.m.