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Summary record of the 2873rd meeting

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

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in sight. The report dealt with questions raised in the comments on the draft adopted on first reading in 2004 and for the most part gave convincing reasons for retaining the previously adopted solution, subject to a few drafting changes. One difficulty was that the Special Rapporteur sometimes covered new ground without saying whether he favoured additions or changes to the text; he took it that the Special Rapporteur did not want to prejudge certain issues and would like to have the views of the Commission before making any specific proposals thereon.

42. In paragraph 8 the Special Rapporteur considered whether prescribing a threshold might be in violation of the principle of non-discrimination and carry the risk that a State might discriminate against those who suffered transboundary damage that was not significant. It was clear, however, that discrimination would not be caused by limiting the general principles to be adopted to instances of significant damage. Other cases would not be covered, because they would be beyond the scope of the draft principles, for reasons that were given in paragraph 7. However, those reasons by no means excluded the application of the principle of non-discrimination in international law also to cases not covered in the draft principles; a provision to that effect should perhaps be added.

43. In paragraphs 17 and 18 the Special Rapporteur provided an analysis of certain issues relating to jurisdiction and applicable law. Some of the explanations he had given on the subject suggested that he had intended not to introduce new issues in the draft principles, but rather to take into account the fact that some States had criticized paragraph 3 of draft principle 6, which provided for access for victims of transboundary damage to "administrative and judicial mechanisms", for being insufficiently precise because it did not specify which courts would have jurisdiction or which law applied. Although trends existed in those areas, the Commission should be very careful and avoid suggesting, even in the commentary, that there were general rules by which States should abide with regard to jurisdiction and applicable law. Those questions were more complicated than they seemed at first glance, and the Commission did not have the necessary expertise to suggest appropriate solutions. The current discussions in the European Union relating to the law applicable to non-contractual obligations (the "Rome II Regulation") showed how controversial the question was: it was much more complicated than simply establishing a general rule that allowed the injured party to choose between the place where the damage occurred and the place where the damage was caused. Instead of proposing solutions that would inevitably give rise to criticism, it would be preferable not to go beyond the general statement contained in draft principle 6, paragraph 3.

44. The approach taken in paragraphs 27 to 30 was inconsistent with the adoption of specific rules on the applicable law, because in those paragraphs the Special Rapporteur was not suggesting that each State should adopt its own rules on conflict but was considering instead whether uniform rules on strict liability should be applied. It might be possible to go a step further than the phrase in draft principle 4 which read "liability should not require proof of fault" and to say that it was not absolute liability. It was even conceivable to exclude liability in case of an act of God or nature, as the Special Rapporteur had suggested in paragraph 30, although to go that far would be problematic: if there was a risk of earthquake, for example, the State would have an obligation of prevention and could not build a dam in an area at risk because of the predictable consequences. However, it would be difficult to assume that liability would be totally excluded just because the obligation of prevention was complied with. Thus, when a hazardous activity was carried out, it must be clear that there could be liability for the consequences even if they were not necessarily attributable to the conduct of a particular operator.

45. He had no firm views on the nature of the instrument that the Commission should suggest but believed, like Mr. Mansfield, that States could take the draft principles into consideration in various ways, such as when adopting treaties applicable to particular categories of hazardous activities—and it was clear that for many activities, specific provisions were needed. Some general principles devised by the Commission might help in defining the content of such instruments. General principles could also be taken into account and applied by an international arbitration tribunal when ruling on a dispute involving those matters, or a national court could draw on the draft principles and decide that they should be regarded as binding or could at least take them into consideration when applying the law. In any case, the nature of the instrument, whether a treaty or general principles, could not be regarded as decisive.

46. The fact that the Commission favoured the adoption of a treaty on prevention did not necessarily imply that it should opt for the same solution with regard to liability. It must be clear that infringement of an obligation under a treaty on prevention would give rise to international responsibility, and not to liability, which occurred when there was no breach of an obligation under international law. Thus two different areas were involved, and the Commission had been right to differentiate between the two in order to dispel any confusion. If the Commission tried to make a single instrument or to have the draft articles and the draft principles refer to each other, that might lead to further confusion. He was therefore in favour of keeping the two instruments separate and giving each its own form so as to make that distinction clear.

The meeting rose at 11.30 a.m.

2873rd MEETING

Wednesday, 10 May 2006, at 10 a.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

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

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

[Agenda item 3]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the Commission to continue its consideration of the third report on the legal regime for the allocation of loss in case of transboundary harm arising out of hazardous activities.

2. Mr. MATHESON said that the Special Rapporteur was to be congratulated for the outstanding work he had done in a remarkably short time in bringing about the adoption on first reading of a set of draft principles on international liability for transboundary harm.[62] Those principles had received widespread support and praise from States, both in the Sixth Committee[63] and in formal comments from Governments.

3. In many important respects the draft principles constituted a significant step towards the goal of ensuring prompt and adequate compensation for all victims of transboundary harm caused by hazardous activities. Among the most important advances were: a recognition that compensation should be provided for the victims of hazardous activities, even where those activities were not prohibited by international law; a broad definition of compensable damage, including the impairment of the environment itself, and the costs of reasonable measures of reinstatement and response; a recognition of the desirability of imposing strict liability on the operator—i.e., the party in control of the activity at the time the incident occurred—and that any conditions or exceptions to that liability should be consistent with the overriding principle of prompt and adequate compensation; a recognition of the importance of providing arrangements to supplement the operator's liability, including insurance, financial guarantees, industry-wide funds and possibly State contributions; and an emphasis on the importance of providing appropriate procedures, both domestic and international, to guarantee that compensation was provided, and that it should be expeditious, non-discriminatory, and not place undue burdens on the victim.

4. The fact that States had indicated their acceptance of those advances was an important and encouraging development. It was now the Commission's task to conclude its work on the topic in a manner that preserved that important degree of consensus on the principles.

5. The third report disposed of several basic questions in a manner with which he was in total agreement. First, the Special Rapporteur concluded that the Commission needed to retain the threshold of "significant" damage, which was necessary to exclude frivolous or vexatious claims but was also a flexible standard that could take account of variations in circumstances in particular situations. Second, he cautioned against the expansion of the scope of the principles to include global commons, which raised particular problems of standing to sue, proper forum and remedies, applicable law and quantification of damage that would require entirely separate treatment and would not fit sensibly within the current principles. Third, the Special Rapporteur concluded that the Commission should retain the current format of recommendatory principles rather than attempt to transform them into a different and more obligatory format such as a convention or draft articles. He personally entirely agreed with that conclusion. By his count, a substantial majority of those States that had commented on the matter, in the Sixth Committee in 2004[64] and 2005[65] and in formal comments in 2006 (A/CN.4/562 and Add.1), had supported the Commission's decision to produce recommendatory principles—to say nothing of the many other States that presumably had not commented on the point because they agreed with what the Commission had done. That had the advantage of not requiring a potentially unachievable harmonization of national laws and legal systems and was more likely to lead to widespread acceptance of the substantive provisions.

6. The Special Rapporteur had encouraged the Commission to consider ways of enhancing the formulation of certain propositions in draft principles 4, 5 and 6. That was something to which the Commission should give serious thought. Perhaps it could find ways of making clear to States the importance of following those core principles as part of their general effort to bring their conduct into conformity with international law, best practices and responsible norms of behaviour.

7. In doing so, however, it was essential not to convert recommendatory principles into statements of legal obligation—for example, by using terms of obligation like "shall" or "duty". The draft principles went well beyond what could fairly be seen as current customary law, and that was indeed one of their basic strengths. States had indicated that they supported them as guidelines and calls for action, but such support would decline dramatically if they were changed into statements of legal obligation. There was hardly a consensus at the current time that States had a duty to ensure compensation for activities that were themselves internationally lawful—which was the scope of the principles. If the Commission asserted such an obligation, then the consequence, under the normal rules of State responsibility, would be that States would themselves be liable if such compensation were not provided, and, needless to say, States were not currently prepared to accept such generic State liability for private activities. Agreement had been reached on a very forward-looking and innovative set of norms precisely because they were not represented as obligations, and if the

[62] See footnote 55 above.

[63] See Topical summary of the discussion held in the Sixth Committee (A/CN.4/549/Add.1) (footnote 60 above), paras. 57–107.

[64] Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-eighth session, prepared by the Secretariat (A/CN.4/537), paras. 144 and 148 (mimeographed; available on the Commission's website, documents of the fifty-sixth session).

[65] See Topical summary of the discussion held in the Sixth Committee (A/CN.4/549/Add.1) (footnote 60 above), paras. 98–107.

language on that point were altered, the question would arise whether those innovations could be maintained or needed to be watered down. The Commission should not sacrifice the great substantive progress it had made to a reflexive desire to have obligatory language. If it were to turn those principles into statements of obligation, then as a minimum it would have to reformulate them as convention articles, which would take considerable time and effort and might not be feasible during the remainder of what promised to be a busy session. Certainly it should not make such a fundamental change on second reading, when States would no longer have the opportunity to give their views.

8. On the other hand, the Commission could make it clear that States should implement the principles by negotiating and entering into specific obligatory arrangements: that was the most important function that the principles could serve. That might include bilateral or regional arrangements, or agreements governing particular types of activities, where States could agree on the precise terms and conditions for liability and compensation. In short, the Commission should not take any action that would lower the current level of State acceptance of the principles themselves, which would be the consequence of adding language of obligation to them. He therefore urged the Commission to retain the recommendatory format that had gained such broad State acceptance.

9. Turning to other matters raised in the Special Rapporteur's report, he noted, first, that a suggestion had been made that the Commission should include a presumption of causal connection between a hazardous activity and transboundary damage. He shared Mr. Gaja's concerns about the Commission's ability to prescribe rules of proof and procedure in that complex area. The Commission could caution against imposing unfair burdens of proof on injured parties, but logically there needed to be a demonstration that a particular activity had causal connection to a particular incident of transboundary damage, otherwise all operators could be presumed liable for all damage.

10. Secondly, the question had been raised whether the principles covered or should cover so-called "pure environmental damage"—namely, damage to the environment that went beyond impairment of its commercial use. He had assumed that the principles already covered such damage and that the definition of "damage" in principle 2 was already sufficient on that point. Indeed, that was one of the positive features of the draft. Perhaps that could be confirmed in the commentary.

11. Thirdly, a suggestion had been made that a "most favourable law principle" should be adopted, apparently meaning that, in deciding which State's law should be applied in a particular case, a forum should always choose the law of the State that most favoured the victim. He was unclear as to how such a principle would work in practice. For example, if there were a serious pollution incident in Mexico that caused much damage locally but also some lesser damage in the United States of America, would a Mexican court always be obliged to give a United States plaintiff the benefit of the more expansive provisions of United States law on such matters as the amount of recovery for pain and suffering, punitive damages and attorneys and fees while restricting Mexican victims to less expansive standards? He had doubts about such a requirement.

12. Fourthly, he noted that there was much disagreement on how the precautionary approach should be described and what its content might be. His only comment on the matter in the current context was that it was not necessary to go into those issues in connection with the principles, since they did not have a direct bearing on liability and compensation.

13. Fifthly, a suggestion had been made that it might be opportune to designate a minimum of exceptions to the liability of operators, such as hostilities, insurrection and acts of nature. His initial reaction was that it would be better to give States the flexibility to decide what exceptions to allow in a particular context, subject to the overriding requirement that they must not compromise the principle of providing prompt and adequate compensation to all victims.

14. On the whole, the draft principles adopted on first reading were an excellent product that could have far-reaching and progressive effects on the conduct of States. If the Commission was to consider changes to the text, it should proceed cautiously so as not to diminish the level of support and acceptance that they had already received.

15. Ms. XUE said that the draft principles adopted on first reading in 2004 represented a great achievement for the Commission. Although the draft itself had as yet attracted few comments from States, those that had responded were generally appreciative of the fact that the drafting had been completed so expeditiously.

16. Generally speaking, she agreed with the Special Rapporteur's analysis of the seven significant trends listed in paragraph 3 of his third report, and shared his view that the draft should be general and residual. The operators of hazardous activities should in principle incur strict liability for causing transboundary damage. States should see to it that mechanisms for remedies were established in order to settle claims.

17. In the light of the comments made by Governments in the Sixth Committee or submitted later in writing, three points should be taken into consideration during the second reading. First, compensation mechanisms for victims of transboundary damage must be established and the amount of compensation calculated taking account of the particular context and circumstances of the sector concerned. The draft principles had been developed on the basis of existing international mechanisms for compensation and in the light of the latest developments in international law. That did not mean, however, that they were automatically applicable to compensation mechanisms for all types of hazardous activities, because existing mechanisms differed widely. The future mechanisms would still have to take into account the characteristics and operating methods of the industrial activities concerned with regard to such issues as channelling of and limits to liability, financial guarantees and harmonization of national laws.

18. The main objective of establishing strict liability was to ensure reasonable compensation even without any proof of the operator's fault. The principle of prompt and adequate compensation did not entail that the standard of remedies and compensation for harm caused by hazardous activities was even higher than in the case of liability involving fault.

19. States had the obligation to prevent, through legislation, transboundary damage caused by hazardous activities carried out in their territory, to mitigate such damage and to provide appropriate remedies in case of an incident. That was an established principle of international law. However, the assertion, in paragraph 3 (*e*), that "it is regarded as no longer acceptable under international law for a State to authorize a hazardous activity within its territory with a risk of causing transboundary harm and not have legislation in place which guarantees suitable remedies and compensation in case of an incident causing transboundary damage", was questionable. Such legislation was not well developed in most States. Moreover, many of the existing international conventions on compensation for hazardous activities had very few States parties and thus lacked universality. Accordingly, the Commission's report should indicate that there was still much room for development in both national and international law.

20. Paragraphs 27 to 30 of the report offered useful analyses and suggestions on a number of important questions concerning the "polluter pays" principle. The issues of damage to environment and damage to "non-use" values (paras. 11–14) and multiplicity of claims (paras. 15–18) were all highly technical in nature and went beyond the scope of general principles. The participants in the discussion in the Hague Conference on Private International Law on the draft international convention on jurisdiction and foreign judgments in civil and commercial matters had taken more than 10 years to reach agreement.[66] When, in June 2005, the Conference had finally adopted the Convention on Choice of Court Agreements, the text had differed drastically from the 2001 draft.[67] That example showed that it was not necessary for the Commission to address such technical details as jurisdiction or applicable law.

21. The Special Rapporteur had provided a balanced analysis of the legal status of the draft principles. As could be seen from the comments of Governments, even such a strong advocate of strict liability for transboundary damage as the Netherlands Government had been surprised by the text of the draft principles adopted on first reading in 2004. Far from being too conservative, the Commission had been in the vanguard in elaborating the principles, which were clearly aspirational. However, she agreed with the Special Rapporteur that the legal value of the draft principles lay in the fact that they were conducive to strengthening the responsibility of States for environmental protection.

22. The precautionary approach discussed in paragraphs 24 to 26 of the report was of great importance for the prevention of harm, although views still differed among States as to whether it could be taken as a principle or could merely serve as a standard. Careful study was required on whether such a standard should apply in allocation of loss, because the regime currently being designed was premised upon several understandings. First, although highly hazardous activities were at issue, they were not activities prohibited by international law. Secondly, risk assessments had been conducted in the prevention phase to determine whether those activities should be permitted. If an incident occurred, the activity should not be terminated or suspended, because it was usual for the affected State to make such a request. As defined, the precautionary approach was not based on conclusive scientific evidence, and therefore disputes might arise as to the exact role that it could play in presenting evidence. The *Trail Smelter* arbitration showed that a request for termination or suspension of an industrial activity of another State could be based only on hard evidence, not on precaution. Thirdly, the purpose of allocating loss was to avoid a situation in which innocent victims were unable to receive any compensation or remedy. When transboundary harm occurred, such issues as what rescue measures could reduce loss and what measures could avoid medium- or long-term impact on the environment would probably give rise to disputes as to how precautionary those measures should be. Emphasis should be placed on cooperation between the State of origin and the affected State. The report of the Commission should give some expression to that policy consideration so as to draw Governments' attention to it.

23. On the "polluter pays" principle, paragraph 29 of the report applied a very rigorous criterion for the application of strict liability by stating that "it is sufficient if the use posed a risk of harm to the others". Pending a clear identification of which activities fell within the category of highly hazardous activities, that criterion could be taken to extremes. What was more important was how to bring the criterion into line with the regime of State responsibility.

24. With regard to notable obligations of State (paras. 31–32), she fully agreed with the Special Rapporteur's analysis and comments. On the principle of non-discrimination (paras. 33–35), the practical criterion in matters of procedure and substance should be that of national treatment.

25. Ensuring prompt and adequate compensation (paras. 36–37) was considered to be the most significant contribution of the draft principles. However, the Special Rapporteur rightly pointed out that that the criterion of adequacy did not denote the highest possible amount of compensation, but rather a reasonable and appropriate amount.

26. As to the final form of the draft principles, it was clear that they still needed to be tested in international practice to see to what degree they could be accepted

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[66] Hague Conference on Private International Law, *Preliminary Draft Convention on Jurisdiction and Foreign Judgments In Civil and Commercial Matters, adopted by the Special Commission, and Report by Peter Nygh and Fausto Pocar*, Preliminary Document No 11 of August 2000 for the attention of the Nineteenth Session of June 2001.

[67] For more information on the historical origins of the Convention, see F. Pocar and C. Honorati (eds.), *The Hague Preliminary Draft Convention on Jurisdiction and Judgments*, CEDAM, Milan, 2005.

by States. The Special Rapporteur had wisely adopted a cautious approach, pointing out in paragraph 39 the legal uncertainties surrounding some of the draft principles. In her view, the most pragmatic course of action, and the best so far proposed, would be for the final product to be cast in the form of draft principles. On the relationship between the draft principles and the draft articles on prevention of transboundary harm from hazardous activities adopted by the Commission in 2001[68] (paras. 45–46), the Sixth Committee might wish to consider establishing a working group to review the matter further.

27. Mr. KOSKENNIEMI said he wished to make three points: first, he would refer to a paradoxical aspect of the topic which revealed something about the situation in which the Commission found itself; second, he would express sympathy with Ms. Escarameia's frustration about the current situation and explain why, regretfully, he could not support her suggestions; and last, he would make one substantive proposal on the draft.

28. As to the paradoxical aspect of liability, he said he had been struck, when reading the account of the debate on the topic in the Sixth Committee,[69] by the extent to which Governments had internalized the language of allocation of loss which the Commission had decided to use when dealing with the topic. When he had started his career in the Ministry of Foreign Affairs many years earlier, his first assignments had been with the Organisation for Economic Co-operation and Development, the United Nations Environment Programme and other international organizations that had been addressing questions of environmental law and struggling to deal with problems which arose from non-prohibited, useful activities that nevertheless caused pollution and were harmful to society in various ways. At the time, concepts such as the "polluter pays" principle—which was actually an economic allocation principle and not at all a principle of private or public liability—and the precautionary principle had been new, and lawyers had been uncertain as to what they might mean in relation to standards of proof in law. Nowadays, lawyers in the Sixth Committee and elsewhere readily spoke the languages of law and of economics and thought of liability in terms of allocation of losses. That seemed to be progress, but it had come at a price. A consensus had emerged around the vocabulary and approach, and it had become customary for international organizations and the Commission itself to address environmental problems in the language of technical sophistication and economic feasibility. That, however, had made everything excessively general, fluid, tentative and exhortatory. Meanwhile, as Ms. Escarameia had asked, what had become of the rights of the victim of pollution? Everything in the draft principles ultimately reduced to the question of the optimal economic solution, which was sometimes for the loss to be borne where it fell. While in some sense that was reasonable, as a lawyer he felt frustrated and angry at such a result. Surely it was the business of legal instruments and of law to establish subjective rights which were non-negotiable in that, regardless of the economically optimal solution, certain rights must be protected and could not be a function of macroeconomic rationales about industrial activities.

29. The draft principles were hortatory, not binding; indeed, Mr. Matheson had said that it was a precondition of his acceptance of them that they should not be obligations. He therefore had great sympathy with Ms. Escarameia's sense of frustration, which he shared: the concept of threshold damage had been included in the draft principles in order to enable lawyers to calculate the outcome that best suited the interests of a given State. When the law began to involve calculations of economic losses, the upshot would be that the most powerful interests would hold the upper hand in negotiations. Such a situation was difficult to accept. Of course, it was possible that environmental, indigenous or other groups affected by large-scale industrial or commercial activities could so organize themselves as to become accepted as effective stakeholders. That situation was rare, however. The more powerful interests could usually dictate terms, and the law let them do so.

30. Ms. Escarameia had suggested that the draft principles should be made more substantive and that they should be upgraded so as to form a convention. If that approach were feasible, he would support it. However, for the draft principles to be recast in the form of a convention but remain non-binding would be the worst possible outcome. As Prosper Weil had written, such outcomes did away with the distinction between rights and privileges and between obligations and hortatory statements, making everything negotiable and giving the most powerful interests a free hand.[70] Political realism suggested that States—and the Commission—were not ready for the draft principles to be turned into binding provisions, and to adopt a so-called "binding" convention with non-binding obligations would be hypocritical.

31. Most of the principles and the language used by the Special Rapporteur favoured a case-by-case approach to assessing what would be a reasonable solution in a given situation. Although that approach too was problematic, it seemed the only feasible one, in most cases, at least. The section of the report comprising its paragraphs 33 to 35, however, did not fit that rationale. Whereas such concepts as threshold damage, the precautionary principle or the liability of the operator were all aspects of a contextual assessment of what was reasonable, non-discrimination and minimum standards were non-negotiable absolutes: the State had a non-negotiable obligation to provide equal access to remedies for foreign victims and its own nationals, for example. It was a matter not of a human rights obligation, but of a procedure which by its nature was non-negotiable. As the articles on prevention stood a better chance of being adopted as a convention than did the present draft principles, he therefore wished to propose that the provisions relating to non-discrimination and minimum standards should be incorporated in the draft articles on prevention of transboundary harm from hazardous activities adopted by the Commission in 2001.

[68] See footnote 56 above.

[69] See Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-ninth session (footnote 60 above).

[70] See P. Weil, "Towards relative normativity in international law?", *AJIL*, vol. 77 (1983), pp. 413–442.

That said, generally speaking he found the draft principles acceptable, though he regretted the Commission's lack of ambition in falling back on *ad hoc* negotiations instead of setting out binding rules. It was a melancholy fact that, in the modern world, the latter would not be acceptable to States.

32. The CHAIRPERSON said that, melancholy though Mr. Koskenniemi's conclusion might be, it raised a fundamental issue, namely, whether a convention should contain only binding provisions.

33. Mr. GAJA concurred with Mr. Koskenniemi's view that the principle of non-discrimination was binding. The non-discrimination principle would apply to damage caused to an alien located in the territory of the State where damage originated. However, remedies were generally not available in the State of origin in case of damage caused outside its territory. States should therefore be encouraged to provide persons beyond their borders with remedies.

34. Ms. XUE said that Mr. Koskenniemi took too cynical a view of the situation. If the Commission concluded that there could not be a binding international agreement on the topic, it would not be because industry had the upper hand in negotiations. In cases of transboundary harm, a balance often had to be maintained not only between the interests of industry and those of the individual victims but also between those of States. Scholars often cited the arbitral award in the *Trail Smelter* case, which had concerned damage to agricultural interests in Washington State caused by a smelter in the Canadian town of Trail. After extensive research, however, she had found that surprisingly little had been written on the actual facts of the arbitration. It had emerged that, initially, the Canadian side had feared that the case would come before the Canadian courts, thus bringing into play Canadian air pollution laws. The Trail smelter and other industries along the United States–Canadian border were of the utmost importance to Canada and, for that reason, the Canadian side had sought to apply United States water laws, which would leave open the possibility that the smelting industry could continue, whereas application of Canadian law would inevitably have led to closure of the smelter. In the end the two sides, having jointly investigated the level of pollution, had agreed that the victims would be compensated and the emission of fumes gradually reduced. It was often held that, because United States water law had been applied, the case did not form part of the body of international law, but it was nonetheless a case of great relevance to the Commission and the draft principles, in that at its core lay the conflicting interests of States rather than of individual industries.

35. Mr. MATHESON said that, in his view, the message of the draft principles was not at all that the interests of the victims in compensation should be compromised and subordinated to the interests of corporations. Quite the contrary: the overriding objective of the draft principles was to ensure prompt and adequate compensation for all victims, as was evidenced by, for example, draft principles 4 and 6, even if it was open to States to choose the mechanisms and procedures to secure such compensation. Mr. Koskenniemi should take a rosier view.

36. Ms. ESCARAMEIA, after expressing her gratitude to Mr. Koskenniemi for his understanding, even in the absence of his full support, said that, as ever, she had been impressed by the brilliance of Mr. Koskenniemi's analysis but frustrated by the conclusions he drew. Whereas his inclination was to see reality as static and unchangeable, she herself was confident that the draft principles could, if not immediately then in 20 years' time, take the form of a convention. Unlike Mr. Matheson, who seemed convinced that States were happy with non-binding principles, she had come to believe, drawing on her experience as a delegate to the Sixth Committee and on the basis of the written comments from Governments, that the majority of States—indeed, all but the most powerful—were in favour of a convention with binding principles. She would continue to argue that case in every forum, and she was confident that public opinion would eventually prevail over vested economic interests.

37. Mr. MOMTAZ, after commending the third report as a work both of synthesis and of balanced research, said he would comment on two aspects of the topic: the final form that the draft principles should take, and the scope of their application *ratione materiae*. With regard to the former, much depended on the relationship between the draft principles and the draft articles on prevention of transboundary harm from hazardous activities adopted by the Commission in 2001. The question was one not of form but of substance, and would affect the ultimate fate of the Commission's work on the topic. Its importance was recognized by States in their comments and observations. The Czech Republic, for example, had described the draft principles as "a promising tool for the progressive development of international law", while Mexico considered that the Commission's work would result in "the strengthening of existing rules" and stressed that the purpose of the draft text was "not only to develop international law but to codify rules applicable". It had also expressed the view that, if the provisions continued to take the form of principles, some should be reformulated, especially draft principles 4 to 8, so that they became "prescriptive rather than hortatory in nature". That approach coincided with Ms. Escarameia's views on the matter, which he shared. If the Commission was to respond to Mexico's request, it would clearly need to move beyond the principles already set out in the Declaration of the United Nations Conference on the Human Environment (the "Stockholm Declaration")[71] and the Rio Declaration on Environment and Development (the "Rio Declaration"),[72] which contained assertions regarding the precautionary approach and the "polluter pays" principle that the United States rightly described as "controversial". Although the principles set out in those Declarations had been very useful in their time, international law had since developed in important ways that must not be overlooked. The Commission should therefore not content itself with general assertions from which any prescriptive element was lacking.

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[71] *Report of the United Nations Conference on the Human Environment, Stockholm, 5–16 June 1972* (United Nations publication, Sales No. E.73.II.A.14 and corrigendum), part one, chap. I.

[72] *Report of the United Nations Conference on Environment and Development, Rio De Janeiro, 3–14 June 1992* (United Nations publication, Sales No. E.93.I.8 and corrigendum), vol. I: *Resolutions adopted by the Conference*, resolution I, annex I.

38. The best way forward was to adopt the text in the form of a treaty or framework agreement. In that way, the principles set out in the Stockholm and Rio Declarations could be developed on the basis of existing practice. That would then serve as a basis for cooperation between the States parties to such an instrument, allowing them to decide through separate agreements on detailed arrangements for conducting such cooperation.

39. Such a framework arrangement would be comparable to a *pactum de contrahendo* and would, over a period of time, lead to the creation of standards. The draft framework convention he proposed should first clarify the meaning and scope of the principles on which the legal regime for the allocation of loss should be predicated. The most important principle was the "polluter pays" principle, and its corollary, the strict liability of the polluter, would constitute the cornerstone of any draft articles on compensation. That exercise was crucial inasmuch as the Rio Declaration had affirmed the "polluter pays" principle in an extremely timid manner. Since then, it had been embodied in numerous international agreements, one of the most recent being the Framework Convention for the Protection of the Marine Environment of the Caspian Sea, signed in Tehran on 4 November 2003. The writings of legal scholars testified to the fact that the "polluter pays" principle, which had originally been rooted in economic considerations, was in the process of becoming a binding principle of international environmental law. Since it was generally agreed that that principle was at the interface between prevention and compensation, it had a bearing on the law on liability in the absence of proof of fault, or strict liability.

40. Given that the national legislation concerning abnormally dangerous activities listed in the survey conducted by the Secretariat had generally opted for strict liability,[73] it was puzzling that the Special Rapporteur had not come out more strongly in favour of deeming strict liability to be an international legal rule. The emphasis placed on the operator's primary liability did not, of course, exempt from liability the State on whose territory the injurious act had occurred, possibly as a result of its failure to comply with a primary rule of international environmental law, namely its obligation to prevent such acts. Accordingly, the Commission could not but endorse paragraph 5 of draft principle 4, whose merits had been confirmed by State practice in the wake of the environmental disasters triggered by the oil spills that had polluted the coasts of Western Europe.

41. As for the scope *ratione materiae* of the draft principles, they were unquestionably intended to cover any act not prohibited by international law which might give rise to transboundary damage reaching or exceeding a specified threshold. It was unnecessary to draw up a list of activities. A case-by-case approach would suffice. Since terrorist acts were indubitably prohibited by and incompatible with international law, damage arising from such acts should certainly not fall within the scope of the draft principles. The same was true of damage inflicted by a belligerent State on a neutral State because, under international humanitarian law, it was incumbent upon belligerent States to refrain from causing injury to third States, hence damage to a neutral State could not be held to have been the result of a lawful act.

42. He failed to comprehend the reasoning behind the footnote on the implications of international humanitarian law concerning armed conflict with regard to liability principles, in paragraph 10 of the third report. In international humanitarian law, it was immaterial whether recourse to war had been wrongful; all parties must abide by the provisions of that law. That was the very foundation of the distinction between *jus ad bellum* and *jus in bellum*. Even a State which had been the victim of an act of aggression and which was exercising its right of self-defence must respect international humanitarian law. In the case of the conflict between Iraq and Kuwait, Iraq's liability stemmed not from the fact that it had resorted to force in a manner contrary to international law, but from its deliberate pollution of the environment and its confiscation of the property of neutral States' nationals. Similarly, as attacks on dams, which international humanitarian law termed "installations containing dangerous forces", were subject to a whole series of rules when such attacks occurred in the context of an armed conflict, there was no need for the Commission to deal with that question.

43. He shared the views expressed by the Special Rapporteur in paragraphs 7 and 8 of his third report and fully agreed that the threshold of significant damage should be retained, as should the principle of guaranteeing equal treatment between nationals and foreigners.

44. The CHAIRPERSON, speaking as a member of the Commission, welcomed Mr. Momtaz's support for the idea of a framework convention that he himself had floated the previous year. The subject being considered by the Commission lay at the crossroads of environmental law, international economic law and the law on responsibility. It was a subject replete with major principles which ought to be guided by legal, rather than political, considerations. In view of the fact that a framework convention would in effect lay down rules for States' conduct it might be wise to reformulate some of the principles. He therefore urged Mr. Momtaz and Ms. Escarameia to join the Drafting Committee, to ensure that their approach was better reflected in the final text.

45. Mr. ECONOMIDES said that the points made by Mr. Momtaz and Ms. Escarameia had been of great significance. The suggestions contained in the report of the Special Rapporteur were a step backwards in two respects. The proposed adoption of principles worded as non-binding recommendations would constitute neither the codification nor the progressive development of the law on the subject. If the principles contained customary rules, turning the principles into recommendations would weaken the standard-setting nature of those rules, and, in so doing, the Commission would be betraying its codification function. If, on the other hand, the principles dealt with matters that had not yet acquired the status of customary rules, by casting them in the form of recommendations rather than rules, the Commission would be shirking its duty to engage in progressive development.

[73] *Yearbook ... 2004*, vol. II (Part One), document A/CN.4/543, pp. 97–134, paras. 29–260.

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

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

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

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

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

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

The meeting rose at 11.35 a.m.

2874th MEETING

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

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

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

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

[Agenda item 3]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

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

[74] See footnote 8 above.

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

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