United Nations
GENERAL
ASSEMBLY
FORTY-THIRD SESSION
Official Records*

SIXTH COMMITTEE
31st meeting
held on
Monday, 7 November 1988
at 3 p.m.
New York

SUMMARY RECORD OF THE 31st MEETING

Chairman: Mr, DENG (Sudan)

CONTENTS

88-56947 0847S (E)

Distr. GENERAL
A/C.6/43/SR.31
18 November 1988
ENGLISH
ORIGINAL: FRENCH

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

AQENDA ITEM 1341 REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTIETH SESSION (continued) (A/43/10, A/43/539)

AGENDA ITEM 130: DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND (continued) (A/43/525 and Add.1, A/43/621-S/20195, A/43/666-S/20211, A/43/709, A/43/716-6/20231, A/43/744-8/20238)

1, Mr. HILLGENBERG (Federal Republic of! Germany) said that, because of its geographical situation, the Federal Republic of Germany was particularly interested in the law of the non-navigational uses of international watercouraer and in the work of the International Law Commission on the topic. Much work remained to be done, but thr Commission's deliberations were already helping to clarify existing principles of international law, The ever growing world population and the increasingly intensive use of international watercourses required a constant rethinking of international norms and regulations to enable mankind to deal wisely with thoee environmental resources. By specifying the content of those rules and principles, the Commission was taking an important step towards further developing international law . His government hoped that that work would result in a draft convention acceptable to all States, which would thus have a framework for concluding specific aqreementr regulating the equitable and sensible utilisation of international watercourses, That war an important goal, especially as disputes between neighbouring States had not been uncommon in the past.

2. His delegation supported the provisions proposed in draft articles 2 to 21 and was pleased that the Commission had decided to postpone a decision on the wording of article 1 (use of terms) and to continue the consideration of that important question,

3. Of the 14 draft articles provisionally adopted by the Commission, article 8 was of special importance since it contained a broad definition of the limits to any utilisation of international watercourses and would have a profound effect on many other provisions of the draft convention. In that respect, his Government feared that wording forbidding any utilisation which might cause "appreciable harm" to other watercourse States might also rule out uses which caused disturbances of a totally insignificant or inconsequential nature, which was certainly not the Commission's intention, It would therefore be advisable to adopt different wording, and specifically, to replace the expression "appreciable harm" by "substantial harm", The adjective "substantial" had already been used in a number of instruments dealing with the law of international watercourses, in particular by the International Lsw Association in the Helsinki and Montreal Rules. The expression "substantial harm" would better reflect the Commission's intention to exclude from the ambit of the articles alight *inconvenience8* which did not go beyond the limits of good-neighbourliness,

(Mr. Hillgenberg, Federal Republic of Germany)

4, With regard to draft articles 4 and 5, his delegation had already, at the previous session, raised doubts as to the phraee *"to* an appreciable extent", As in article 8, the adjective "substantial" should be used, for example, in the expression "substantially af fect" in order to make that provision more precise and more operable and to harmonise all the draft articles in that respect, particularly article 12 and article 18, paragraph 1, and paragraph 2 of the new article 16 submitted by the Special Rspporteur.

5. His Government supported the general concept of the new articles 15 to 18 submitted by the Special Rapporteur, However, it would be better if those draft articles, especially articles 16 and 17 dealing with the important problem of pollution, could be made more specific.

6. As to the questions of strict liability and due diligence in tho *context* of paragraph 2 of the *new* article 16, his Government shared the view of the Special Rapportour. As it stood, the proposed article did not address the question of responsibility or liability. As a result, the general rules *on* responsibility would apply at least as long as *no* specific rules on strict liability had been agreed upon for water pollution damage. It would therefore be *very* helpful if members of the Commirsion were able to agree on further clarifications of the question *of* responsibility in article 16, paragraph 2. Otherwise, those issues would have to be dealt with under the general topics "State responsibility" and "international liability *for* injurious consequences arising out of acts not prohibited by international law",

7, Mr. SUESS (German Democratic Republic) said that the German Democratic Republic's position was based on the understanding that the term "international watercourse" would be agreed on as a definition for the local scope of application of the future convention, His delegation had repeatedly stressed that it could not accept the concept of the "watercourse system" because it was incompatib'.e with the territorial sovereignty of watercourse States, It would be extremely difficult to elaborate a legal instrument that would be binding for the States adjoining all international watercourses. The Commission should be clearly *aware* that the purpose of its work was to prepare a document which could serve as a framework for States and leave them enough flexibility to define for themselves the respective tights and duties in the use of an international watercourse, according to their specific needs, There were no generally binding norms of international law and no uniform State practice on the subject. It was evident that, on that topic, the Commission's task was not codification, but the progressive development of international law, and its main concern should be to keep the proper balance between the rights and interests of the States involved so that the results of its work would be acceptable to *all* States,

8. His delegation was gratified that the Commission had included, in draft article 9, the principle of co-operation between watercourse States. However, it feared that the principle had not been sufficiently taken into account in other draft articlea, particularly articles 11 to 19 concerning planned measures and

(Mr. Suess, German Democratic Republic)

notification, Although the balance between the rights and duties of the notifying State and the potentially affected State had been improved, the major shortcoming was that the notifying State became dependent on thr consent of thr notified State. That was very clearly illustrated in the commentary on draft article 16. In the view of his delegation, such procrdurrr were not likely to develop co-operation and build confidence among watercourse States.

9. In general his delegation approved of the provisions of draft article 10 on the exchange of data and information. However, it felt that the draft convention should confine itself to establishing the general obligation to exchange data and information, leaving it up to the States concerned to dotermine the modalities for putting that obligation into effect.

10. His delegation had some reservations with regard to draft article 8, dealing with the obligation not to cause appreciable harm to other States, As currently worded, it did not address the issue of the legal consequences that would arise if a damaging event occurred, and the resulting obligation8 for the State which had caused the damage. His delegation felt that the article was bound to lead to a situation of legal insecurity and to confliatr between wateraourre States rather than promoting stable relationships among them, More consideration should be given to the general rule that every State had the lawful right to use its territory - including the national sections of watercourses - am it maw fit. Any limit on that use had to be agreed upon between the States sharing a watercourse. The draft convention could only lay down principles, and it war for the parties themselves to decide which uses were lawful and which unlawful and to establish the modalities according to which each State rhould perform its duties, That balance between the legitimate interests of States war baaed on draft articles 6 and 7, which had been provisionally adopted, It would be more realistic if draft article 6 covrrrd only "substantial" harm, so as not to limit unduly the right of every State to use its territory am it maw fit. Moreover, the dangerousness of non-navigational uses of watercourrer could not be determined in an abotrsct fashion, without considering the specific local conditions. That was why his delegation proposed the adoption of a uniform liability norm, which would be applicable to all forms of utilisation and could be concretised by the States involved according to their particular conditions and requirements.

11. His delegation had undertaken a preliminary examination of draft articles 16 to 18 preeented by the Special Rapporteur. Like other delegations, it would like to see the definition of pollution contained in draft article 16, paragraph 1, included in draft article 1. It had no reservations about paragraph 3 of article 16, but felt it would be more appropriate to recommend that States should discuss jointly procedurea for improving the quality of water than to authorize a given watercourse Stete to ret consultations in motion unilaterally.

12. With regard to draft article 17, his delegation considered that the envisaged scope of the protective measurer was too broad and inconrirtent with the subject-matter to be codified. Furthermore, draft article 17 concerned only the "protection" of the environment, whereas other comparable instruments were more realistic and ret forth the obligation "to prevent, reduce and control pollution",

(Mr. Suess, German Democratic Republic)

thus showing that pollution could only be reduced gradually, through the common rfforto of tho riparian States.

13, Lastly, it was imperative that the Commission should concentrate on producing a balanced instrument, taking into account the rights and duties of States *and* the specific character of international watercourrer and the variety of possible uses which might be made of them,

14. Mr. TARUI (Japan) said that the report of the Special Rapporteur on the law of the non-navigational uses of international watercourses contained helpful insights into various questions and laid out a practical and ureful basis for the Commission's work, The Special Rapporteur had also presented a work schedule, according to which the first reading of thr *draft* articles would be completed by 1991, the laet year of the term of office of the current members of the Commission. His delegation therefore hoped that the Commission would make efforts to advance its work steadily in accordance with that schedule.

15. His delegation rupported the realistic approach taken by the Specie1 Rapporteur especially with regard to draft article 16 on the pollution of *international* watercourses. Only thore types of pollution which caused appreciable harm rhould be prohibited, and the rules against pollution *contained* in paragraph 2 of that article rhould not be thoae of strict liability but those of due diligence. Further conaiderntion rhould be given to the meaning of the term "appreciable harm" and to the way in which the due diligence rule rhould be formulated.

16, The Commission's work on that topic was aimed at preparing a basic framework convention that would regulate in a co-ordinated manner the multifarious non-navigational uses of international watercourses. It was therefore important that the Commission should take a realistic approach to each of the issues involved, taking into account the diverse opinions held by its members.

17. Mr. KOZUBEK (Czechoslovakia) said that the work of the International Law Commission on the difficult topic "International liability for injurious consequence8 arising out of acts not prohibited by international law" marked a very important step *in* the progressive development of international law and its codification, However, a number of major issues remained unresolved, on which views of the members of the Commission and of delegations to the Sixth Committee differed significantly, especially with regard to the concept of the topic itself, its scope and the approach to be taken in dealing with it.

16.. Even the concept of a general obligation regarding liability for transboundary injuries had not yet been agreed upon. International practice proved that States preferred to deal with specific risk situations in specific treaties. It was therefore questionable whether a comprehensive *convention* covering activities not prohibited by international law would be acceptable to a majority of States. His dolegation felt that the Commission should concentrate rather on working out a general framework convention containing basic principle8 as guidelines for the preparation of much specific treaties.

/...

(Mr. Kosubek, Czechoslovakia)

IQ, The scope of application of the draft articles was delimited by the Special Rapporteur in draft article 1. His delegation did not have any serious difficulty in accepting the conoopt of "appreciable risk" as a main criterion for liability, but felt that the sole concept of risk could not serve as a sufficient basis for elaborating general rules of international law on the topic. It therefore recommended that liability for appreciable risk should be combined with liability for appreciable tranaboundary harm in order to determine liability. Such an approach would make it possible to include within the scope of the topic risks which were not obvious, or low-risk activities which nevertheless could have serious injurious consequences. Like the Special Rapporteur and marry delegations, his *delegation* felt it would be difficult to draw up a comprehensive list of dangerous activities *in* thr draft *convention,* owing to the rapid development of technology, but that more detailed information *on* the various activities which might fall within the framework of the draft articles could be given in the commentary,

20. His delegation welcomed the replacement of the word "territory" *in* article 1 by the term "jurisdiction and effective control", It doubted, however, whether it was really necessary to specify that the control should be "effective". Moreover, that adjective did not appear in draft articles 2 and 3. Another problem arose with regard to article 1. That article applied *not only* to activities of State organs and State companies but also to those of private companies and persona, including foreigners and foreign companies. It was clear from the wording that a State was liable for activities of all its subjects but it was not clear under what circumstances civil and not State liability was to be applied, and what the role of civil liability would be in the application *of* that article.

21. The main idea *of* draft article 3 was that the State should have the obligations under the future convention only if it knew, or had the means of knowing, that an activity involving risk was *carried* out in areas under its jurisdiction or control, While that idea had some advantages, his delegation hoped that the Commission would consider it *again very* carefully, *since* such a restriction could narrow considerably the concept of liability.

22. The text of draft article 7 on co-operation between States in preventing and eliminating the injurious conaequonces *of* acts involving appreciable risk could be improved and restructured. It rhould include obligations relating to notification, conaultatione and prevention which were closely connected with the duty to co-operate, As the duty of participation was simply a specific form of the duty to co-operate, articles 7 and 8 could be combined in a single article.

23, Draft article 9, dealing with prevention, was very important since the more effective the preventive meaaures taken, the more limited the injurious consequences of activities involving risk would be. While States would certainly take concrete preventive meaaurea according to their financial and technical ability, close co-operation among the States concerned would nevertheleaa be useful *and* desirable.

/...

(Mr. Kosubek, Czechoslovakia)

24, Article 10 contained the basic principle on reparation, It would be promature to comment on it betore knowing how the relevant criteria in other draft articles would be formulated, However, the *main* question was whether *roparation* must be tied only to risk.

25, With regard to tho topic of the law of the non-navigational uses of international watercourses, he supported the drafting of a *framework* convention containing widely acceptable general or model rules which would enable States to conclude apecifio bilateral or regional agreemento regulating the uses of particular watercourrer under specific conditions.

26, Two questiona had been raised by the Commission. The first concerned the extenc to which draft articles ahould deal with problems of pollution *and* environmental *protection,* In hie delegation's view, that quaotion deserved special attention and could be dealt with in a separate part of the draft, However, the draft convention should not deal with that problem in a very detailed manner, but ahould simply rot out the principles, rules and basic obligations which could be developed more fully in legal instruments adopted by watercourse States in each particular c ..se.

27, The second question raised by the Commission concerned the concept of "appreciable harm". That concept had been used in a number of international agreementa and his delegation could provisionally ● ccept it in the draft. In paragraph 138 of the Commission's report, *the* Special Rspporteur explained that "appreciable harm" meant harm that was significant, not trivial or inconsequential, but less than substantial. It was legitimate to wonder whether thst explanation was clear enough, In his view, the concept of appreciable harm represented only a general principle and it was for watercourse States to determine the specific point at which hai · became appreciable.

28, Mr. CALERO RODRIGUES (Brasil) expressed satisfaction at the steady progress achieved by the International Law Commission in its work on thr topic of the law of non-navigational uses of international watercourses, *However* , ho expressed concern that the Commission was letting itself be carried away by excessive enthusiasm, as if the intricacies of the topic did not exist or had been entirely resolved. The Commission should reflect more carefully on some of the issuer involved before actually crystallizing its conclurionr in draft articles and should keep in mind at all times the nature of the instrument being prepared, which was a framework convention,

29. In paragraph 191 of its report (A/43/10), the Commission requested the views of Governments on two points relating to environmental protection and pollution. The first was the extent to which the draft articles ehould deal with that question. The debate in the Commirrion, as summarised in paragraphs 133-137 of the report, showed that some members did *not* see the desirability of devoting a reparats part or chapter of the draft articles to environmental protection *and* pollution, although moet members took the opposite view and considered it essential to *devote* a separate part of the drsft articles to those questions, so that they

(Mr. Calero Rodrigues, Brasil)

aould be ΩΩ□○♋♍ℳΩ in their entirety. His own delegation au yet had no firm position on thr matter. The general principle8 enunciated in the draft article8 would certainly apply to thr qurrtion of environmental proteotion and pollution,

30. Those questions were to be dealt with in terms of rightr and obligations of watercourse Water, an were all thr othrr questions included in the draft. It would havr to be seen therefore whether each specific rule applied to question8 of environmental protection and pollution, Some rules, having a general character, would certainly be applicable to such questions, while others which were narrower and more specific in scope wo'.d not be applicable. Finally, specific rule8 were likely to be needed to deal with those questions. However, thr need for such rules could be determined only after consideration had been given to the rights and obligationa which States rhould have in that regard and to whether such rights and obligations were not already included in other provisions of thr draft, The qurrtion of having or not having a separate section on protection and pollution was not ● 88ontial and rhould be decided in the light of thr degree of development that the provisions might require. However, settin' out those provisions in a separate part of the draft would not ● nhanco their import&nor - which would reside in their content, and their placement in the draft rhould be decided according to the logic of the text as a whole.

31, The second qurrtion on which the Commiarion raked for Governments' comments in paragraph 191 of its report was the concrpt of "appreciable harm", in the context of article 16, paragraph 2. A general obligation not to cause appreciable harm was already contained in article 6, adopted earlier by the Commission, and the paragraph in question simply reiterated the same general principle. He could not see why harm caused by pollution rhould be treated differently from harm having any other origin. If the concept of "appreciable harm" waa conridered defective, it rhould be analysed, not in the context of the now paragraph 2, but in the context of article 8. A8 pollution war a frequent cause of harm, the atudy of the problems involved could contribute to a further clarification of article 8, and it was in that article that the final result of such a study ahould be reflected.

32. With article8 8, 9 and 10, referring to the obligation not to cause appreciable harm, the obligation to co-operate and the regular exchange of data and information, the Commission had completed the formulation of the general principles applicable to the topic. His delegation supported the three principles in question. It had alwaya held that the obligation not to cause harm was the cornerstone of the law governing the use of international watercourses and that that principle war 80 basic as to cast doubt on the need to include the principle of equitable and reasonable utilisation and participation in the draft. He therefore welcomed tho fact that the obligation not to cause appreciable harm had been given it8 rightful place in the draft, Ho agreed that the term "harm" rhould ,e qualified and accepted, at least provisionally, the expression "appreciable harm". The Commission explained in paragraph 5 of its commentary to draft article 8 that the article did not proscribe all harm, no matter how minor, that harm murt be capable of bring established by objective evidence and that "appreciable" harm war harm which was not insignificant or barely detectable, but

(Mr. Calero Rodrigues, Brasil)

was not necessarily "serious". The following paragraph8 of the commentary madr it clear, however, that the question of qualifying harm was not an easy onr and that the Commission might wish to revert to it later,

33' His delegation was alro in agreement with the formulation of the principle or co-operation (art. 9) and of the principle of exchange of data and information (art. 10). If the ● xirtoncr or non-existence of a general duty of co-operation in genrral international law oould be discussed, thrrr was no doubt that such a duty should be recognised in the domain of the law of. international watercourses. The regular exchange of data and information, on the othrr hand, was an important example of co-operation and, in it8 turn, established a basis for other forms of co-operation. ILC had born successful in the careful drafting of article 10.

34, While satisfied with thr ● nunaiation of the general principles, his delegation was not fully satisfied with the provirionr of Pert III (Planned Measures, arts. 11 to 20). Those provirionr wore morr detailed end constraining then what would be necessary in a framework agreement. They established procedural rules that would be best left to thr discretion of States when thry negotiated watercourse agreements. Even if the ruler wore residual, thr very fact that they were included in the draft might have a negative influence on the freedom of States. It was not necessary to inalude in the articles a relatively complicated system rotting forth all the steps that States should take in order to ● valuato the possible harmful conerquencer that the uses *of* an international watercourse in one State might have on mother State. Because of the strictness of the régime, an important exception was provided, which might, in fact, become a significant loophole: implementat ion of planned measures might proceed without *any* restrictions if the planning State considered that such implementation was of the "utmort urgency in order to protect public health, public safety or equally important interests". The ● rticlou might seem attractive, logical, coherent and comprehensive, but it was unlikely that they would be adequate to the ends in view or satisfy the States concerned.

35. Excessive procedural provirionr restrained the flexibility that States might find useful in their contacts. Delays in the implementation of planned measures might be necessary in some cases, but superfluous in others. The delays were temporary, for the State might 90 ahead with the project if consultations and negotiations conducted "with a view to arriving at an equitable solution of the situation" were not successful. The mandatory establishment of delays, therefore, should serve only a very limited purpose *and* might contribute to creating a negative climate in the relations between the States concerned. They were not what was *needed to* foster co-operation,

36' It was on the basis of co-operation that Brasil had worked with its neighbours on two of the moet important watercourse systems in the world, thr Amason and the River Plate, Through a large network *of* agreements and understandings, the States concerned had succeeded in establishing salutary régimes which seemed to adjust in a very satisfactory mannrr to the interests of all parties involved, both those of Brasil and those of its neighbours, That had been done wlth flexibility end pragmatism, without restraints or pre-conditions, with good will, mutual respect

/...

(Mr. Calero Rodrigues, Brazil)

and confidence. Brazil therefore expected that the articles in preparation would help to promote and facilitate, in State relationships concerning all watercourses, the same harmonious relations that Brazil had established with its neighbours.

37. Mr. VOICU (Romania) said that the main problem with regard to international liability for injurious consequences arising out of acts not prohibited by international law was the scope of the draft convention. Having noted that the Special Rapporteur had introduced the concept of "appreciable risk" as a criterion limiting the types of activity covered in the draft, he considered that that new concept was not sufficient for defining the limits of the scope of the future convention as clearly as desired and, moreover, had the fault of drawing attention to gaps that were open to criticism. The very term "appreciable risk" was too vague to serve as a criterion: a risk could be deemed "appreciable" by some people but not by others. Hence it was not possible to determine objectively whether a given risk was really appreciable. Further, the Special Rapporteur himself recognized that the concept did not appear to cover adequately activities involving small risk but possibly sufficient to cause serious damage. As such activities could not be left out of the draft convention and as the term "appreciable risk" did not solve the problem, it would seem advisable to abandon the concept.

38. The Commission should focus on solving more general situations, such as the attribution of liability in all cases where transboundary harm occurred and where the State affected was not required to prove that a norm of international law had been violated. In other words, the occurrence of harm in the territory of another State should involve the liability of the State of origin in all cases, after the fashion of "objective liability" in the domestic law of many States. There was no justification for making certain transboundary harm subject to application of the convention, because, even if the purpose of the work in this connection was not to regulate the problem of harm caused to the environment in its entirety, the ecological dimension of the issue must not be completely ignored.

39. He drew the Committee's attention to the very contemporary topic being considered by the Second Committee on the basis of a Romanian proposal under agenda item 143, entitled "Responsibility of States for the protection of the environment and prevention of environmental pollution as a result of the accumulation of toxic and radioactive wastes, and strengthening of international co-operation for the purpose of resolving the problem", and quoted from the statement of the representative of Romania at the 22nd meeting of the Second Committee who explained the reasons why Romania had requested the inclusion of that question in the agenda of the General Assembly: the reasons *were* set forth in an explanatory memorandum (A/43/193). It was for those reasons that the Commission could not set aside completely the harm caused to the environment, even though there was, of course, no question of it taking up directly all aspects of the problem, because, for that purpose, there was another forum to which reference was made in draft resolution A/C.2/43/L.23, submitted to the Second Committee by the Group of 77 following the said Romanian proposal.

(Mr. Voicu, Romania)

40. His delegation considered that the terms "jurisidiction" and "control" were adequate; they were used in the 1982 United Nations Convention on the Law of the Sea and the 1972 Convention on the Prevention of Marine Pollution. It had also noted with interest. the comments made in paragraph 55 of the Commission's report concerning the term "physical consequences". Reintroducing that concept in draft article 1 would not solve the difficulties referred to in paragraph 54. Moreover, his delegation shared the opinion, reported in paragraph 58, of those who proposed the deletion of the words "vested in it by international law" in draft article 1. To a large extent it concurred in the explanations given by the Special Rapporteur in paragraph 61 concerning the use of the terms "jurisdiction" and "control", explanations which, moreover, ought to be included in the official commentary.

41. The wording of article 2 should be reviewed once the other articles had been drafted. The definitions which it had to include depended, to a very large extent, on the comprehensive solutions that would be found for the draft convention as a whole.

42. With regard to article 3, the Special Rapporteur should be congratulated on the care he had taken to bear in mind the interests of developing countries whenever those countries were States of origin and whenever transnational corporations were carrying out dangerous activities in their territory. Those corporations sometimes behaved as a State within the State and it would be unreasonable for a State which was *not* aware of, or had no chance of *intervening* in, the activities of a transnational corporation, should be liable as a State of origin.

43. The Romanian delegation, like other delegations, favoured the wording of article 5 suggested in paragraph 80 of the report. After analysing article 10, it wondered whether the first part of that article genuinely met the concerns of the international community, since it was difficult to see why the basic premise should be that the innocent victim should not be left to bear alone the harm suffered as a result of an activity involving risk. A draft convention should sanction the idea that it was not normal that a State which had been responsible for causing harm in the territory of another State by carrying out a dangerous activity should not be required to make reparation for that harm, The topic dealt with *in* article 10 therefore called for further clarification.

44. With regard to chapter III of the report, *concerning* the law of the non-navigational uses of international watercourses, his delegation would confine itself to very brief comments, having already stated its position at the forty-second session of the General Assembly (A/C.6/42/SR.41, paras. 38 to 45), with reference to paragraph 134 of the International Law Commission's report, Romania felt that the articles relating to environmental protection and pollution control should be the subject of a separate draft convention. and that the draft under consideration should deal solely with international watercourses.

45. Paragraph 1 of article 16 [17], which defined pollution, should be included in article 1 (Use of terms). That paragraph should not be expanded, especially to

(Mr. Voicu, Romania)

include energy, because if the composition of the water was not altered, there was no reason to consider that the introduction of energy might constitute pollution, The end *of* paragraph 1, beginning with the words "for any beneficial purpose . .." should be deleted. With regard to the use of the term "appreciable harm" in paragraph 2, Romania rharrd the opinion of the Special Rapportour to the effect that that expression war rrlativrly clear and war to be found in several international agreements.

46, The text of article 8, alreudy adopted by the Commirion was satisfactory; it was therefore unnecessary to settle the question of whether a rule rhould be introduced concerning liability with or without fault, In article 9, the reference to the principles of sovereign equality, territorial integrity and mutual benefit war appropriate, since it made for *a* better underrtandinq of the general obligation *of* States to co-operate with each other. His delegation would rubmit comments on the other chaptrrr *of* the Commission's report at a later stage.

47. Mr. KHVOSTOV (Byelorussian Soviet Socialist Republic) raid that his Government's comments on the quertion of the jurisdictional immunities of States and their property had born published in document A/CN.4/410/Add.1. International law today was not a hard-and-fart ret of rtandardr and principle8 but a constantly evolving system of law subject to the influence of States and to work carried out in international organisational hence the importance of the work which had been accompliehrd by the Commission.

46. With regard to international liability for injurious consequences arising out of acts not prohibited by international law, there was no doubt that, with the progress *of* science and technology, an international programme aimed at preventing or attenuating the risks involved in economic activities wao abrolutrly necessary. A8 the Special Rapportrur had stated, in ordrr to lessen or ● liminatr the risk of ● xtraterritorial harm, it wax first necessary to ensure rmooth co-operation among the Staten of origin and the *affected* States (see A/43/10, pars. 24). Secondly, the Special Rapporteur had ● xglainod that the principle of reparation would prevail in case there wax no agreed régime between the State of origin and the affected State (see ibid., pars, 96). Laetly, the question *of* compensation must also be resolved, taking into account the social significance and novel character of activities with harmful consequences as well a6 any expenses which might have been incurred by the State of origin. By adopting a flexible approach the Commission would succeed in drafting *an* international instrument acceptable to the majority of States. His delegation wae not in favour of the idea of international liability. It considered that the safety measures adopted by the State in which the catastrophe had occurred must be taken into account. Liability could only be dealt with under special agreements. It rhould be possible to approach that matter on the basis of the limited liability of legal entities. In regard to future work on that topic, tne Commirrion rhould focus its attention *on* developing general principlea which States could draw upon to conclude agreements concerning their scientific and technical activities.

(Mr. Khvostov, Byelorussian SSR)

49. With regard to the law *of* the non-navigational uses of international watercourses, the Commission ahould draft a framework agreement of a recommendatory charactrr which riparban States could draw upon to conclude special agreements on apecif ic questions relating to watrrcouraea .

50. His delegation noted with aatiafaction that the Commiaaion had takrn account of many of the comments submitted by his Government in roaponaa to the Secretary-General's questionnaire on the atatua of the diplomatic! courier and *the* diplomatia bag not accompanied by diplomatic courier, The draft article8 drawn up by the Commiaaion constituted a round baaia for the adoption of a legal inatrumont on the question, which should aanation thr principle of the inviolability of the diplomatic bag and thr confidential nature *of* its contents and etatabliah a uniform régime concerning all categories of couriers and bags.

51. Finally, his delegation hoped that at its forty-first ● eaaion, the Commiaaion could focus its attention on the draft Code of Crimea aqrinat the Peace and Security of Mankind and on the draft articles on the atatua of the diplomatic courier und the diplomatic bag not aoaompaniod by diplomatic courier,

52. Mr. ROUCOUNAS (Greece) raid ho was gratified that the work of the Commiaaion on international liability for injurious consequences ariainq out □↗ ● ctr not prohibited by international law waa entering a new phase,

53. The Commiaaion ahould maintain the notion of appreciable riak without it parvadinq the whole draft, The purpose of the draft waa to establish flexible mechaniama for the prrvention of tranrboundary harm, to organise international co-operation to that effect and, in particular, to specify terms of reparation ahould such harm occur. Dotecting appreciable riak war therefore important mainly in the preventive phase.

54. With regard to reparation, furthrr scrutiny ahould be given to activities whose harmfulness was not detectable at thr time when they were undrrtakan, and to that of activitira involving factors which, taken separately, wore not potentially harmful but which cumulatively wore ultimately injurious. It waa still too aoon to abandon a composite definition of appreciable risk, in other words a definition comprising a general statement as well as a non-•xhauative list of activities involving risk, particularly since such liata were to be found in a number of exiatinq inatrumrnta,

55. Once the notion of riak had been introduced into the draft, there would be a rtronq temptation to attribute to it the aame legal conarquencea as those which it entailed in certain liability systems in domestic law, Transplanting concopta of domestic law into international law did not always give good results. It would be better to continue to work imaginatively, drawing in particular o:i the international conventions and agreements which were gradually building up a body of international environmental law, with a view to elaborating an international framework for prevention and reparation, The obligation of prevention ahould be conridered from the standpoint of its results. If harm occurred and that

/...

(Mr. Roucounas, Greece)

obligation had *not* been respected, reparation must ensue. If it had been respected, or if the risk was not foreseeable, reparation should also take place, but the ceiling would be different,

56. With respect to the law of the non-navigational uses of international watercouraea, his delegation supported the inclusion of specific provisions for the protection of watercourse ayetema against pollution, especially since more than 80 per cent of marine pollution was transported by watercourses. The United Nations Convention on the Law *of* the Sea contained proviciona on the protection of the sea against pollution, and the draft currently being elaborated could not fall short of the ruler provided for in that Convention. Lastly, for the sake of uniformity, the definition *of* water pollution should correspond to the definitiona contained in other inatrumenta in force.

57. As a corollary *of* the general obligation to co-operate contained in article 9 (A/43/10, p. 78), article 10 (ibid., p. 78) introduced the specific obligation for watercourse States to exchange on a regular basis reasonably available data and information on the condition of the watercourse, in particular information of a hydrological, mrteoroloqical and ecological nature. To the extent that those exchanges also included information regarding pollutants, article 10 war largely aatiafactory, If the information exchanged did not cover pollutants, an appropriate provision should be included in article 17 (ibid., footnote 61). *In* order to obtain the "reasonably availablo information", it would be necessary to envisage international co-operation through qualiiied institutions.

58. The criterion for determining whether wetercourae States had fulfilled their obliqationa under article 17 waa the non-pollution of the waters. It was not a matter of introducing the notion of due diligence and it was even lees a question of exonerating States on the basis of presumptions. The Special Rapporteur had rightly decided that it was beat that the questiona of responsibility for appreciable harm and of due diligence should be dealt with "within the framework of other topics under consideration [State reaponaibility and international liability for injurious consequences arising out of acts not prohibited by international law] where they mainly belonged" (ibid., pars, 168).

59. With respect to the term "appreciable harm", his delegation continued to have reservations about the appropriateness of using the adjective "appreciable", Nevertheless, his delegation took note of the fact that according to the Special Rapporteur, the idea was to use "a term that was entirely factual, one that provided as factual and objective a standard as was possible in the circumstances" (ibid., pars, 156).

60. With respect to article 18 (ibid., footnote 64), emergency situations must include both natural and man-made causes. It would be useful to provide for and make explicit the co-operation mechanisms to prevent, counteract or attenuate the risk of harm resulting from emergency situations.

(Mr. Roucounas, Greece)

61. The draft articles adopted thus far on first reading ret up an effective conrultstion and negotiation mechanism which should facilitate attainment of the goal of a rraronable and equitable use of international watercourses.

62, Mr. ELTCHENKO (Ukrainian Soviet Socialist Republic) noted that the Intrrnational Law Commission had made definite progress at its fortieth session in the elaboration of draft articles on the law of the non-navigational uses of international watercourses; the Commireion had provisionally adopted draft articles 8 to 21, concerning in particular thr general obligation to co-operate, the exchange of information and environmental protection,

63. As reflected in the fourth report preeented by the Special Rapporteur, the questions of watercourse pollution control and environmental proteation had been given serious consideration, which was easily understandable since those questions concerned the vital intereetr of many States. Co-operation between States, in particular riparian States, could play a significant role in the prevention of watercourse pollution, an extremely complex and delicate issue. Differences of opinion had emerged among thr members of the Commirrion during the consideration, at its fortieth session, of the need for maximum protection of fresh-water reserves and of the need to control the pollution of the marine *environment* by *international* watercourses. That issue gave rise to difficulties because of the existence of a large number of different régimes relating to the non-navigational uses of international watercourses, resulting from thr diversity of hydrological, physical and geographical condition8 rnd from the special characterietice of various international watercourses.

64. His delegation was convinced that the Commission could advance in ite consideration of that issue if it elaborated articles intended as recommendations or framework instruments. Such articles must be formulated in a concise manner and should be easily adaptable to the conditions of the various international watercourrer , thur enabling the riparian States to apply them more widely upon the conclusion of agreements concerning the use of thore watercourses.

65. In that context and given that article6 16, 17 and 18, relating to pollution control, environmental protection and liability of States causing tranrboundary harm, inevitably widened the scope of the topic, his delegation believed that, in the text of the draft articles on the law of the non-navigational uses of international watercourses, it would be preferable to provide only a limited number of article@ *of* a general nature; the riparian States would be then responsible for adopting more specific and detailed measures on environmental protection and pollution *control* in international watercourses.

66. With respect to the concepts of "appreciable harm", "obligation of due diligence" and "strict liability", him delegation had serious doubts about their correctness and about the possibility of using them in the document being elaborated, because therr were no objective criteria permitting a precise definition of those concepts - they wore vague from the point of view of international law and their interpretation could *not* be impartial. The

(Mr. Eltchenko, Ukrainian SSR)

introduction of those concepte into the draft articles was not widely supported by States end could only complicate the Commission's task.

67, Mr. BIRIDO (Sudan) said that hi8 delegation welcomed the fourth report of the Special Rapporteur on international liability for injurious consequencse arising out of act8 not prohibited by international lsw (A/CN.4/413 and Corr.2). The difficulty of the topic stemmed from the concept of the sovereignty of States and from the fact that States were not willing to give up that sovereignty. The topic therefore must not be viewed as an attempt to preserve the sovereignty of all States. At issue was thr question of how to reconcile the right of States to act within their own territories and their right not to be subject within their territories to harm resulting from activities of which they were unaware. The principles of good-neighbourliness, ao-operation and good faith provided the beet basis, at least for agreed procedurea providing for the obligation to give notification of potentially hasardour activities and their possible conrequencee and to negotiate in good faith when such consequences occurred,

68. With respect to the law of the non-navigational uses of international watercourses, his delegation welcomed the progress made owing to the work of the Special Rapporteur and hoped that the International Law Commission would accord the highest priority to that topic in its future deliberations.

69. His delegation would prefer to retain the term "international watercourse system". Nevertheless, it was very important to arrive et a consensus on that point and the beet course would be to request the assistance of experts in order to work out a clear and concrete scientific definition.

70. It was also important to strike a balance between the different rights and interests of riparian States on the one hand and the issuer of sovereignty of States and their right to benefit from natural resources within their territories on the other.

71. While agreeing that the notion of acquired rights must be taken into consideration, his delegation did not think that those rights and the interests of riparian States were necessarily contradictory. Such interests were usually defined and regulated by bilateral agreements, and a framework agreement should not interfere with them.

72. It waa appropriate to adopt an approach which established a balance between the various interests at stake and waa in conformity with the legal principle underlying the concepts of equitable uae and shared natural resources, and took into consideration all the relevant factors, not just the demographic factor.

73, Since the use of watercourse systems posed different problems in different parts of the world, the most sensible approach was to prepare a framework agreement with general residual rules, in which the States could find the necessary guidance.

(Mr. Birido, Sudan)

74. Given the fundamental importance □↗ ● nvironmontel protection *end* pollution control, those issues must be dealt with in a separate part,

75. The *exchange* of hydrologica' meteorological *and* other data and information between watercourse States was also of paremount importance, especially in the event of drought, floods and other nature1 disasters.

76. In the draft Cods of Crimes against the Peace and Security of Mankind, crimes must be defined expressly and precioely. The definition must includo the serious nature of the act rnd the intent, In ouch cases as genocide and apartheid, intent itself did not have to be proved, Mercenarism should be included among the crimes against the peace and security of mankind.

77. His delegation welcomed *the* Commission's intention to devote its attention over the following throe years to the statue of the diplomatic courier *and* the jurisdictional immunities of States end their property.

78. Lastly, he wished to emphasise the importance of the International Law Seminars, particularly for the developing countries, His delegation joined the Commission in appealing to all States to contribute generously, so that ouch seminars could take place in future,

79. Mr. ALZATE (Colombia) said, with regard to the law of the non-navigational uses of international watercourses, that Colombia, en Andean country traversed by numerous international watercourses, war meeting the needs *of* the riparian populations end was therefore concerned sbout regulating the management of those watercourses. It was precisely in that field that the international community was undertaking to define the scope of the rights and obligations of States. Colombia was making great administrative and technical efforts in that regard. It had established a national commission on hydrographic basins, which was responsible, inter alia, for regulating and protecting its resources, in co-ordination with the competent national agencies and the regional agencies.

80. His delegation believed that the scope of the draft should be limited to the non-navigational use8 of international watercourse8 end other watercourses, because the concept of a "watercourse system" would oncompass broad areas that did not come under the scope of the draft *convention* and would make its implementation costly, particularly for the developing countrior. Allowing a watercourse State to determine whether its use of a watercourse could be appreciably affected by the implementation of a proposed agreement that applied only to a part of the watercourse or to a particular project, programme or use end entitling it to participato in consultations on, and in the negotiation of such an agreement, and, whe re appropriate, to become a party thereto. as provided in article 5, paragraph 2, would amount to granting that State powers that wore too broad and which could, in some cases, restrict the development possibilities of one of the signatories. In that case, it would be very difficult to determine at *what* point a State suffered "appreciable harm", to establish parameter8 of an economic, biological, ecological, physical or social nature and to determine the threshold of

(Mr. Alsate, Colombia)

tolerance for ouch *of* them, Colombia believed that the question could only be resolved by referring to the characteristics of each region, Therefore, article 5 should make it possible for the watercourse State that originated the project, programme or the use at issue to review with the other States, *according to* regional characteristics, the need for their participation, which would only be justified to the extent that the State that originated the project, programme or use in its territory would be unable to prevent the consequences appreciably affecting the use of the watercourse, Even if only a shade of meaning was involved, the balance between the parties would be ● rtablirhed in practice, *in* the sense that their use *of* the watercourse would be affected and 'the State that originated the project would be unable to prevent or to minimise the causes of that situation.

81. As to article 9, "General obligation to co-operate", it war essential to define from the outset what was meant by "optimum utilisation" and "adequato protection"; those terms referred to one of the mort important aspects of the question, because States had to define *in* the same instrument the parameto.s by achieving optimum utilization and adequate protection, In that case, regional characteristics and the particular conditions *of* a given watercourse gained in importance, Otherwise, an unrestricted obligation would be imposed *on* the parties.

62. Colombia welcomed the fact that the principle of "good faith" had been retained in the draft, That principle wan self-rufficient *and wan* the basis for international relations. Therefore, it was superfluous to repeat that principle in article 4, paragraph 3, in article 17, paragraph 2, and in article 20. The principle might thus be weakened because, as a result of a legal exegesis of sorts, the question might be raised as to whether the States could act as they pleased with regard to the articles in which that principle wao not reaffirmed,

03. Article 20 could be redrafted, using internationally accepted terminology, for example, that *of* the United Nations Convention *on* the Law of the Sea, with a view to specifying that nothing contained in the draft could be construed as obliging a State party to provide informatio whose disclosure would be contrary to its vital security interests. That would make article 20 clearer,

84. As to the questions raised by the *Commieaion,* Colombia believed that environmental protection and pollution should be considered separately and in the light of the experience of such specialized agencies as the United Nations Environment Programme, which dealt with the question of land-based pollution, particularly pollution by watercourses, in its regional programmes. The complete elimination *of* pollution was a lofty objective, but a difficult one to attain, particularly in view of the process of world development. That was why the balance established by the principles contained in the Stockholm Declaration was important, Those principles recognised the need to *reconcile* the essential requirements of development. with the obligation to protect the environment, Moreover, Colombia was convinced that the draft had to be not only legally viable, but also politically acceptable, In conclusion, he hoped that a comprehensive document would be prepared, making it possible to consider the question in a general context,

/...

85. Mr. BENNOUNA (Morocco) raid, with regard to pollution and environmental protection, that his aountry was concorned about the dangers of pollution and was convinced that the activities of States had to be co-ordinrted, because environmental degradation knew no boundaries. Co-operrtfon and prevention measures were therefore necessary *to* ensure that the water needs of populations wore mot and to preserve the marine environment and biological resources.

86. As to the specific quortion concerning the emphasis to be given in thr draft articles to the problems of pollution and ● nvironmontal protection, ho wondered whetner, from a methodological point of view, it was appropriate to devote a separate chapter to that question, because it could ue found in all aspects of the non-navigational uses of watercourses. Conservation and preservation constituted a concern reflected throughout the text of the ♎❒♋♐♦ ● rticlor, Articles 2, 4, 6, 8, 9 and 10, which had already boon adopted by the Commission, referred to it, as did Part III, *aoncerninq* planned measures.

87. Moreover, ● rticlor 16, 17 and 18 were, in the final analysis, very general; that was particularly true in thr cam of the definition given in article 16, the obligation not to cause appreciable harm and the obligation to hold mutual coneultatfonr ret forth in chapter III, which could lead to tho establishment of a list of harmful substances. Article 17, còncerning the protection of thr environment, *laid* down the obligation to co-operate in that field. That obligation had already been succinctly *rot* forth in article 9, which referred to thr optimum utilisation and adequate protection of the watercourse. However, the repetition of *the* general principles applicable to pollution control and environmental protection could be a source of confusion, as the same principle had a different moaning *and* scope according to where it ● □□□♋❒❒♎ in the draft convention,

88. As to the second question raised by the Commission, concrrning the concept of "appreciable harm" *in* the context of article 16, paragraph 2, it would be tempting to answer that it sufficed to refer to the definition given in draft article 8 or to the relevant commentary. However, on reading that commentary it appeared that the essential question of the nature of liability (with or without fault) had not been covered. Therefore, it was not surprising that the question of l!ability, which had not been resolved in article 8, had ● morgod when article 16 w s being considered. If *an* answer to that question had to be given, it could be applicable to both article 8 end article 16.

89. He wondered whether that rhould in a way be viewed within the framework of the general régime of liability for fault by invoking the concept of reasonable diligence or that of liability arising from activities not prohibited by international law, It should be recognised *in* that connection that the two possibilities remained *open and* that everything depended *on* the degree of progress in the nrgotiationr between the watercourse States and the adoption through mutual agreement of preventive measures to combat pollution and protect the environment, If such measures existed (a list of prohibited substances, en obligation imposed on users, etc.), then any harm resulting from failure to implement them should *entail* liability on thr part of the State *of* origin through reference to the rule of due diligence, Without such preventive measures, there was automatically a case of

(Mr. Bennouna, Morocco)

liability arising from non-prohibited activities and reference ahould be made, for reparation, to the text which the Commiraion war drafting in that field, Consequently, a specific régime of liability could not be deduced ipso facto from the principle of the prohibition of causing appreciable harm, Eaoh particular rituation rhould be analysed and reference made to the relevant ruler of liability in the field.

90, In conclusion, his delegation did not see the need to devote a separate section to pollution aontrol and protection of the environment, It would auffico to develop, if need be, the ● xirting article8 whiah already referred to the question. That would prevent confusion, such as attribution of a different meaning to the same concept depending on whether it concerned uses in general or control of pollution, which was but the result of those uses.

91, If despite everything ILC maintained its decision, it rhould, for the purposes of presentation, begin work on cross-references and ensure that the different proviaiona of the text were aarefully co-ordinatrd, which had not yat been done. The general régime of liability aould not be resolved within a single draft framework agreement, In each case, reference rhould be made to the liability ruler adapted to the aituation in queation according to the state of relationr between the States concerned.

92, Mr. TUERK (Austria), referring to the law of the non-navigational uses of international watercourses, raid that Austria, which waa an upstream State as well as a downstream State of one of the great European rivers, conridared it abrolutely neceaaary to strike a balance between the interdependence of riparian States on the one hand and their aoverrign independence and right to benefit from the natural resources within their territories on the other, between upper and lower riparian States, and between the varioua uses ot thr waters. His delegation therefore felt that it was necessary to give aprcial attention to the codification and progressive devrlopment of that area of international law,

93. In that regard, Auatria had conaiatently advocated the framework agreement approach as the only method which could eventually lead to rules having univeraal effect. Such a framework agreement, containing fundamental legal principle8 which ware accepted by the entire international community, would have to provide the basis for the conclusion of specific watercourse agreements at the bilateral, regional or subregional level, It roomed that the uniqueness of each watercourse, in view of the various geographic and hydrographic factors, the different uses and the different legal and political circumstances, war generally recognized. Nevertheless, ILC ahould not succumb to the temptation of trying to include too many details in some of the draft articles. Caution should be exercised on that point,

94. Furthermore, although ILC had decided to set aside for the time being the question of the uao of terms, his delegation neverthelraa wished to indicate its strong preference for the term "international watercourse" as opposed to "international watercourse system", bacauae, in view of the geographic location of

(Mr. Tuerk, Austria)

Austria, the concept of a "watercourse system" would hrvr the effect of subjecting praoticrlly all Austrian waters to *thr* rules laid down in a future framework agreement. His delegation therefore hoped that the Commission would retain the expression "international watercourse", since any other solution would adversely affect quite a number of States.

95. His delegation was particularly pleased to note that ILC at its fortieth session had achieved eubrtantial progress on that topic. However, *on* the whole, the part of the report dealing with that question had become somewhat too long and too complex, whiah made it impossible for some Governments to examine thoroughly all its aspects and make obrrrvationr which represented their co-ordinated positions. Nevertheless, in thr way of preliminary observations, ho said that thr currant text of the draft articles undoubtedly constituted an improvement in certain respects as compared to thr previous text. For example, draft article 12, on notification concerning planned measures with possible adverse effects, now contained the concept of "an appreciable adverse effect" inrtrad of "appreciable harm". That provision had furthermore boon complemented by a now draft article 11 on information concerning planned measures, which was an appropriate expression of the principle of good-neighbourlinoar in that contort, Obviourly, thr degree of co-operation between States regarding the use and development of international watercourses was a teat of the state of their mutual relations.

96. Draft article 10, concorning tho regular exchange of data end information, which was baaed on article lb as proposed by the Special Rapporteur, referred to "reasonably available dats and information", While his delegation shared the Commission's view that ouch an exchange should not be excessively burdensome for tho States concerned, it felt that the use of that term in tho draft article *in* question rhould be reconsidered because it was rather imprecise, In that connection, consideration rhould be given to several factors, including the nature of the relevant data, the question of ownership, national legislation *on* data protection, and differing notional rtandardr of data protection which might lead to an imbalance with regard to data exchange, Furthermore, it should still be determined whether the obligation to process, where appropriate, *dsta* and information in a manner which facilitated their utilisation by other watercourse States meant that such data and information should bo computer-compatible and should be translated.

97. While aware of the practical need For a provision dealing with an exchange of data and information *in* cases whore there were serious obstacles to direct contacts between watercourse States, such as armrd conflict or the absence of diplomatic relations, the Austrian delegation believed that the current wording of draft article 21 relating to tho question was inadequate because it only stated the obvious, namely that the States concerned should make use of eny indirect procoduro accepted by them, That article rhould unequivocably stipulate thet relevant information should, for instance, be exchanged through the United Nations, unless the Staten concerned agrood on a different channel of communication.

(Mr. Tuerk, Austria)

98. With regard to the new draft articles submitted by the Special Rapporteur, he said that the growing need for enhanced environmental protection with respect to international watercourses justified dealing with that matter in a separate part of the draft articles. It was true that various provisions of the draft convention already referred to the rights and obligations of States with regard to the non-navigational uses of international watercourses: any new articles relating to the question would therefore have to be appropriately linked to those provisions. Such articles should not, however, be too detailed and should only lay down general rules in a framework agreement.

99. Referring specifically to the definition of pollution of international watercourses dealt with in draft article 16 as proposed by the Special Rapporteur, his delegation agreed with the position of the Nordic countries that the definition appeared too narrow in comparison with other generally accepted international instruments and that it might be transferred to draft article 1, dealing with definitions.

100. With regard to the concept of "appreciable harm" in the context of article 16, paragraph 2, meaning harm that was significant in the sense of "considerable in size or amount", his delegation shared the view of the Special Rapporteur and the members of the Commission that that seemed to be the appropriate criterion for determining the threshold of unacceptable pollution of an international watercourse. It could certainly not be denied that that criterion was subjective and difficult to define. He could not see, however, any advantage in replacing that term with "substantial harm" because the difficulties of definition would be more or less the same and there was no doubt that such a criterion would permit considerably more pollution before legal injury could be said to have occurred.

101. Furthermore, if agreement could be reached - at least *in* a preliminary manner - on enshrining a fundamental rule in draft article 8 that watercourse States should utilise an international watercourse in such a way as not to cause "appreciable harm" to other watercourse States, it seemed logical to apply that rule also in relation to a watercourse State which caused or permitted pollution of an international watercourse. Whatever the criterion finally used in the draft articles, it would be necessary to establish an appropriate mechanism for the settlement of disputes which might arise between the States concerned when applying such a criterion.

102. With regard to the question of strict liability of a State of origin that had caused "appreciable harm" to another watercourse State, it would be unrealistic to try to lay down such a principle as a general rule, since that type of liability was suitable only for hazardous activities. In the case of normal industrial activities with harmful effects, a certain "level of harm" would have to be tolerated for the foreseeable future. States should certainly do everything possible to continually decrease that level. His delegation was therefore inclined to share the opinion of members of the Commission who believed that the concept of due diligence might be a proper standard for determining liability for appreciable harm caused by pollution, the burden of proof to be placed on the source State. It

(Mr. Tuerk, Austria)

was obvious that such a standard would have to be considered also in the light of the means at the disposal of the source State. States would have to be under an obligation, however, to endeavour to acquire the appropriate means.

103. His delegation was pleased that general support had been expressed in the Commission for the inclusion in draft article 17 of a general obligation to protect the environment of international watercourses and the marine environment from pollution. It hoped that the Commission would take action on the the Special Rapporteur's suggestion regarding the inclusion of a definition of the term "environment of an international watercourse" in an introductory article. Furthermore, it believed that it might be appropriate to replace the term "territory" by the expression "jurisdiction or control" for the same reasons as in the case of liability for injurious consequences not prohibited by international law.

104. Mr. WATTS (United Kingdom) said that the United Kingdom continued to support the "framework" approach of the draft articles on the law of non-navigational uses of international watercourses but was not yet convinced, given the wide diversity of watercourse systems, that the results of the Commission's work should necessarily take the form of binding rules in a Convention. It might be better ultimately for the work to be embodied in a set of recommendations or guidelines.

105. Turning to the points on which the Commission had invited the comments of Governments, his delegation would be content to see the problems of pollution and environmental protection dealt with broadly on the basis of articles 16, 17 and 18, which, it believed, were quite sufficient. However, it would be prepared to consider the possibility of adding articles of a general nature on the exchange of data and on the development of protection regimes and protected areas, as envisaged by the Special Rapporteur. With regard to environmental impact assessments, a matter on which the Special Rapporteur was considering preparing draft articles, the United Kingdom would prefer not to see any additional article introduced since assessments, especially in the form of a document specifically so titled, were not a sufficiently widely or uniformly adopted practice to enable States generally to accept a treaty obligation to make such assessments.

106. As to the use of the term "appreciable harm" in article 16. paragraph 2, an alternative word to "appreciable" should be found. In that respect, the meaning given to the term in paragraph 138 of the Commission's report seemed to be broadly correct, and should be reflected in the texts of the draft articles more adequately than by the use of the term "appreciable". Furthermore, the Commission might wish to consider the possible confusion which could result from the fact that the term "appreciable" was used *not* only in article 16, paragraph 2, but also in other places in the draft convention, specifically draft articles 4, 5, 8 and 12. In addition, the report gave two separate and somewhat different explanations of "appreciable harm": the first in paragraph 138, and the second in paragraph 5 of the commentary on draft article 8, To that it should be added that the term "appreciable" was not used consistently in the draft convention and in the draft articles On international liability for injurious consequences arising out of acts

(Mr. Watts, United Kingdom)

not prohibited by international law; the ambiguity resulted from the fact that the term "appreciable" could mean either "detectable" or "significant". The Commission might find it helpful to reconsider the different uses of the term in the draft articles. In doing 80 it might prove helpful to bear in mind thnt a term which played such an important role in the draft article8 rhould have a meaning which was char on the face of the text without reference to explanation8 in the accompanying report, and that most environmental instruments tended to use the word "significant" in preference to "appreciable". It should be noted that the Commission itself, in relation to draft article 16, paragraph 2, regarded "appreciable harm" as meaning "harm that was significant".

107. His delegation welcomed the adoption in draft article 12 of a lower threshold to trigger the obligation of notification but had reservations about thr choice of word8 "appreciable adverse effects". The earlier version (former draft article 11), in referring to "appreciable harm", put the notifying State in the undesirable position of having to admit at the outset that the measures it was planning might violate certain of the draft articles.

108. The new draft article 9 (formerly article 10) concerned with the duty to co-operate was now more specific, which wa8 an improvement, However, the United Kingdom was still concerned about the practical operation of an article impoeinq obligation8 on States; the Commission might wish to consider whether the concept8 Of "optimum utilisation" and "adequate protection" wore measurable in a practical sense and whether, in the current draft articles, the consequences Of failure to attain the required standards were clear:,

109. Mr. PARK (Observer for the Republic of Korea) said that the draft articles prepared by the Special Rapporteur on the law of the non-navigational uses of international watercoureso were well balanced and generally acceptable. His delegation supported the *principle* that a waterrouroe State's right to utilise a watercourse in an equitable and reasonable manner was limited by the duty of that State not to cause appreciable harm to other watercourse States.

110, The term "appreciable harm" in article 16, paragraph 2 (A/43/10, note 49) indicated a more factual and acceptable standard than other expressions such as "substantial harm", "significant harm" or "sensible harm", Al though the precise definition of the term remained undetermined, it had the advantage of being widely employed in various international documents on watercourses.

111. The matter of pollution of international watercourses and pollution control had to be encompassed in the framework agreement. Article 17 (ibid, note 61) should be divided into eeveral paragraphs establishing the general obligation to protect the environmsnt of international watercourses and more specific obligations. In order to strengthen compliance with the articles on environmental protection, pollution and related matters, it would be advisable to stipulate the measures that watercourse States had to take at the national level and make it clear that any breach on their part of an obligation with rsrpect to the pollution of international watercourse8 gave rise to international liability, The

/...

(Mr. Park, Observer, Republic of Korea)

watercourse State must cease the wrongful act and compensate the directly injured watercourse State for any harm that had been caused to it. Finally, the principles and ruler to prevent and mitigate the pollution of internatonrl watercourses should take into account the economic capacity of developing countries and their need for economic development, as well a8 the coat8 and benefits □↗ ● *nvironmontrl* protection,

The meeting rose at 6.15 p.m.