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FROM BEESLEY

---ILC; ENVIRONMENTAL ISSUES

ATTACHED IS TEXT OF INTERVENTION OF BEESLEY ON INTERNATIONAL LIABILITY TOPIC GIVEN ON MAY 13.

DRAFTER/REDACTEUR	DIVISION/DIRECTION	TELEPHONE	APPROVED/APPROUVE
SIG J.A. BEESLEY			SIG J.A. BEESLEY

518-1 (83/11)

Summary of Extemporaneous Intervention of Amb. Beesley

International Liability, 13 May 1988

Mr. Beesley stated that he could shorten his intervention by associating himself with the series of points made by Mr. McCaffrey and Mr. Calero-Rodriguez. He congratulated the Special Rapporteur on his scholarly and lucid Report, although he was not sure that it fully reflected a consensus of the Commission in all respects. He noted the Special Rapporteur's reference to lack of unanimity on certain issues, to which he would return later, since it was not his understanding that the Commission worked on the basis of unanimity (which is not the same thing as consensus). On those aspects of the topic which had been included in the earlier articles, he stated his preference for the earlier version. On the other hand, with respect to the new articles he shared the reservations just expressed on the shift in emphasis from liability for harm to assessment of risk. In his view the change was a far-reaching one, which required careful consideration.

On one or two particular drafting points, he agreed with the Special Rapporteur that "state of origin" was preferable to "source state". Also, the term "substances" in Art. 2(a) posed problems, and should perhaps be replaced or supplemented with the term "events".

Regarding the discussion of polluting activities on pages 4-5 of the Report, he concurred with Mr. McCaffrey in wondering whether the Special Rapporteur had asked himself the right question in addressing whether or not there is a duty not to cause appreciable harm from transboundary pollution. Must the Commission pursue indefinitely the question of whether or not there exists a positive obligation of this kind, when (as he said last year) it is engaged not only in the codification of international law but also its progressive development? As far as he was concerned, the duty was not in question, and he would cite Part XII of the Law of the Sea Convention (concerning not just direct pollution of the marine environment, but also its pollution through atmospheric and land-based sources) which even non-signatory governments had accepted as customary international law.

Mr. McCaffrey had given convincing reasons why the articles should not be based on evaluation of risk, since even activities involving minute risks could cause appreciable or even catastrophic harm. Although degree of risk was relevant to prevention, it should play a less important role in assessing liability once harm had occurred. In order to enable an objective evaluation to be made of the topic, it might help to consider hypothetical

cases clearly not now involving any State or any recent occurrence, for example, a "peaceful" underground nuclear test - an activity not prohibited by international law, since it is envisaged by the statute of the IAEA. Similarly, a military underground nuclear explosion on a coral atoll could contaminate the marine environment or atmosphere very seriously. Similarly, the manufacture of chemical weapons, again unfortunately not unlawful under the 1925 Geneva Protocol, or even a generally beneficial activity such as the construction of a dam, could cause appreciable damage, whatever the difference in risks. Here Mr. Beesley cited the Gut Dam case between the U.S. and Canada, in which Canada compensated U.S. property owners for damage caused by an alleged consequential rise in the level of the lake caused by a Canadian governmental entity.

The real issue, he said, was the imperative need to develop the law in this field. The rest of the world was waiting for the Commission to produce something concrete on the law of the environment. There was much interest in the 6th Committee of the U.N., and among governments, legislatures, the media and the public. The topic could do for the atmosphere, land, the stratosphere and outerspace what Part XII of the Law of the Sea Convention had done for the marine environment. For his part, Mr. Beesley would be happy to see the Commission develop the topic purely as an environmental law convention, but he did not insist upon it. It did appear to him, however, that situations and activities involving transfrontier pollution went to the heart of the topic. He associated himself particularly with Mr. Calero-Rodrigues on the need to establish positive legal obligations, and not let the topic rest entirely on the sufficiency of preventive measures taken, or on liability based on the assessment of risk. He did not deny that the extent of risk may be an important factor to take into account, particularly in determining whether due diligence was exercised,but remained convinced that the articles must not revolve solely around this concept. If the risk were foreseeable, a State would have to prove that it took the necessary measures to reduce it; if it were unforeseeable this should not necessarily stand in the way of attaching legal consequences to transboundary harm. A broader approach was needed, aimed at the protection and preservation of the environment, and was long overdue.

On the duty of co-operation in negotiating to produce agreements, Mr. Beesley was not sure that the duty would take the Commission very far. It would be much more concrete to talk about positive obligations to protect and preserve the environment, including, incidentally, the duty of non-discrimination as expressed in the OECD Principles cited by Mr. McCaffrey. On the subject of attribution, he was concerned at the possible implications of the approach. To take only one example, the present Art. 3 would perhaps

penalize States with centrally-planned or mixed economies, while allowing some States, including capitalist States, to claim that they had no means of knowing of the activity in question.

On the duty of due diligence, Mr. Beesley subscribed to the specific remarks of Mr. McCaffrey. Some of the difficulties in attribution of harmful activities to the State arose from the emphasis on evaluation of risk. Here he cited Principle 21 of the Stockholm Declaration, which provides

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction and control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

Art. 6 of the present draft seemed to water down the duty and overemphasize freedom of action. Besides being restricted to activities involving risk, it seemed to have abandoned any reference to "the commons", or the environment beyond the jurisdiction of any State.

He also cited Principle 22 on the need to develop the law, a call recently echoed in the Brundtland Commission Report, and wondered if the task entrusted to the Commission was indeed as narrow as the Special Rapporteur thought. The Special Rapporteur may have been concerned about apparent lack of unanimity on certain issues. But the Commission has never worked on the basis of unanimity. Rather, the Commission has sought consensus. He wondered also if the title of the topic itself had imposed such strict limits on the Commission as suggested by some, and wondered if the Drafting Committee could not take another look at the title. The title of the Code had been changed, so this was a precedent. The interventions of Mr. McCaffrey and Mr. Calero-Rodriguez were particularly interesting on the possible overlap with State Responsibility. Though some members were concerned that the Commission may be infringing on areas belonging more to State Responsibility, that topic had been on the agenda since 1955, and the Commission could not afford to wait another 30 years before dealing with the problems caused by damage to the environment.

He further questioned whether the Special Rapporteur's reliance on cases such as Barcelona Traction, which dealt with economic matters and not the environment, might not be misplaced, since it was open to the Commission to develop the law of the environment without being restricted by this case.

It was essential for the Commission to avoid the pitfalls of a narrow definition of its mandate under the topic, and to avoid the problems which some members apparently had had with whether the Commission was engaging in codification or progressive development of the law. Those who doubted the existence of principles of customary law could still co-operate in developing the law. Mr. Beesley saw no reason why the Commission should not try to formulate a general provision such as Art. 192 of the LOS Convention, which provides that

> States have the obligation to protect and preserve the marine environment.

Similarly, Art. 193, recalling Principle 21 of Stockholm:

> States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment.

For those who would characterise the Stockholm principles as "soft law", he reminded the Commission that they had been adopted as hard law in instruments such as the London Dumping Convention of 1972, and the Law of the Sea Convention of 1982, which were negotiated by consensus.

The particular relevance of Part XII of LOS Convention was that it, too, was intended as an umbrella convention, to be supplemented by specific agreements, and thus it provided a useful precedent. These conventions also demonstrated that environmental law was not as rudimentary as some had suggested. Mr. Beesley also cited Art. 207, which provides in part that:

> States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment from land-based sources, including rivers, estuaries, pipelines and outfall structures, taking into account internationally agreed rules, standards, and recommended practices and procedures.

He noted the wide scope of the article, and reiterated the duty not to cause harm to the environment of other states or of areas in which all States have an interest (Principle 21) which was inherent in this article. Arts. 210 and 212 provide for similar duties in respect of pollution by dumping and pollution through atmospheric sources - the latter applying to the atmosphere whether or not part of the polluting State's airspace. Arts. 213, 216, and 222 provide for enforcement of the duties in Arts. 207, 210 and 212 respectively. For example, Art. 213 provides:

> States shall enforce their laws and regulations adopted in accordance with Article 207 and shall adopt laws and regulations and take other measures necessary to implement applicable international rules and standards established through competent international organizations or diplomatic conference to prevent, reduce and control pollution of the marine environment from land-based sources.

Art. 225 provides that enforcement activities themselves shall not endanger the environment.

Finally, Mr. Beesley cited Art. 235, of special relevance to the topic, which provides in part:

> States are responsible for the fulfillment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law...
>
> With the objective of assuring prompt and adequate compensation in respect of all damage caused by pollution of the marine environment, States shall co-operate in the implementation of existing international law and the further development of international law relating to responsibility and liability for the assessment and compensation of damage...

All of these provisions were valuable precedents for the Commission, in his view, because no State had rejected Part XII of the Convention, in which these provisions were found, and many States, including non-signatories, had declared that it reflected customary law.

Mr. Beesley made a number of more specific points. On paragraphs 10 and 11 of the Report, he stated that he had strong reservations, for the reasons given by Mr. McCaffrey. Likewise, he associated himself with Mr. McCaffrey's views on the procedural and substantive aspects of prevention. Concerning the link between risk and fulfilment of the duty of due diligence, and liability, he said that it would seem not to provide a sound legal foundation in cases where harm occurs despite the fact that the risk was considered inappreciable. Put another way, harm was the decisive factor, and risk was determinative only in considering the adequacy of preventive measures, and thus it may be a relevant factor in assessing amount of compensation. Thus, Mr. Beesley agreed with the analysis of Mr. Calero-Rodrigues on the question of whether the topic should include liability for damage caused by activities without apparent risk.

On attribution, he was hesitant, for reasons already given, to accept the Special Rapporteur's justification for the requirement that States "know or have means of knowing" of the activity before the obligations imposed by the articles would apply. Although it was desirable to provide some exemptions for States lacking adequate means to know fully what transpires within their territory, particularly developing countries, the inclusion of this requirement weakened the draft articles generally. On arts. 6, 9 and 10 he concurred with Mr. Calero-Rodrigues that there should not be such an emphasis on risk as the sole basis for determining liability. He also agreed that art. 8 could be eliminated, for the reasons given by Mr. Calero-Rodrigues.

Turning to drafting points, which he intended to raise also with the Drafting Committee, he noted that the references to the marine environment and outer space in the previous report had been deleted from Art. 1. Thus, the article referred only implicitly to the environment. Furthermore, "situations" and "physical consequence" had been deleted, and would perhaps require other terms to replace them which would cover the same ground.

In para. 2(a), he was not sure whether the word "environment" referred to the State of Origin, the Affected State, or neither, and the definition of "appreciable risk" did not seem to include a slight risk of catastrophic harm as discussed above. In para. 2(b), he thought that the reference back to Art. 1 might create a tautology. Para. 2(c) did not seem to him to correspond to the views of the majority of the Commission, and perhaps the previous wording of "transboundary loss or injury" would be preferable to "appreciably detrimental". In para. 2(d), as mentioned, "State of Origin" would be better than "Source State".

Mr. Beesley said he had always had difficulty with Art. 4, which had been inherited from the previous Special Rapporteur. While he understood the intent, he questioned whether the actual text of the provision that where States are party to another applicable agreement "the present articles shall apply, subject to that other agreement" conflicted with general principles of treaty law. Here he was referring to the principle that the most recent treaty between the same parties took precedence in case of conflict. Similarly, he thought that the wording of Art. 5 was unclear, though the principle may be fundamental. As he had always had difficulty understanding the precise purpose of the article, he would welcome clarification from the Special Rapporteur.

On Art. 6, Mr. Beesley reiterated that he did not see why the carefully negotiated balanced text of Principle 21 of the Stockholm Declaration had been abandoned, and indicated that he much preferred the Stockholm formulation.

He had no major objections to the text of Art. 7, except to stress that in his view the present topic was not based solely on co-operation, but agreed with Mr. Calero-Rodrigues that the 2nd sentence, as well as all of Art. 8, could be omitted. Art. 9 could be modified to pose a positive obligation to preserve and protect the environment, if the Commission wished to do so. Regarding Art. 10, he felt that it should be drafted in such a manner as to emphasize that this was to be a victim-oriented convention...