administrative measures to ensure that the precautions imposed by its law on operators were observed.

In the second part of the Report entitled "The Articles" the Special Rapporteur proposed the text of eleven draft articles on prevention. It may be stated that with the exception of draft article 20 *bis* dealing with "Non-transference of risk of harm" most of the provisions had originated in the eighth report, based as these draft articles were on the nine articles that had been proposed (in the eighth report) to be placed in an annex on non-compulsory rules.

In the scheme of the previous report the Chapter on "prevention" had immediately followed the ten draft articles which had been submitted to the Drafting Committee. The Special Rapporteur was of the view that the first ten articles remained unaffected by the decision adopted by the Commission on the recommendation of the Working Group and could thus apply without modification to activities involving risk. He accordingly proposed that, subject to the approval of the Commission, the articles on prevention would begin with article 11 and that the presentation referred in the present (ninth) report could, perhaps, serve as a starting point for drafting new provisions.

The Special Rapporteur accordingly proposed that the texts proposed for the annex to the Eighth Report which were drafted as legal propositions be purged of references to activities having harmful effects and used as a starting point for drafting new articles. Thus former article 1 of the annex, into which a text on pre-existing activities was incorporated has now been split into four draft articles and accordingly renumbered (articles 11 to 14). Article 2 of the annex has been replaced by two draft articles viz. 15 and 16. Article 3 of the Annex, on National Security and Industrial Sectors thus becomes draft article 17. Articles 4 and 5 of the annex are not dealt with in the present (ninth) report as they related to activities with harmful effects. Article 6, of the annex, on consultations with a view to finding a regime for activities involving risk, has become article 18. Article 7, of the annex, on 'Initiative by the Affected States' becomes articles 19 of the new text on 'Right of the State presumed to be affected.'

The Special Rapporteur deliberately omitted article 8 of the annex dealing with the settlement of disputes. He pointed out in this regard that the settlement of disputes could relate to two types of situations viz (i) disputes arising during negotiations in respect of diverging interpretation of facts and consequences of the activity in question, and (ii) disputes arising from the interpretation or application of the articles. In his opinion while the first category of disputes could be rapidly resolved by fact-finding experts or commissions, governments were likely to be reluctant to accept third party settlement in respect of the latter category of disputes i.e. those related to interpretation or application of the

articles. The Special Rapporteur, therefore proposed the postponement of the consideration of the first type of disputes until he had submitted his formulations on a general provision for the settlement of disputes.

Article 9 of the annex on factors involved in a balance of interests pending the decision on where it should be inserted, has been reproduced unaltered as article 20. The new formulation article 20, *bis* on the principle of 'non-transference of risk or harm', the Special Rapporteur said, could either be placed in the chapter on principles or left in the one on prevention to which it primarily related.

In the third and final part of his Ninth Report the Special Rapporteur focussed on the "polluter pays" principles which has thus far not been considered in the treatment of the topic. He believed that the Commission could examine the principle later in the context of the Chapter on principles. He held the view that unlike the "principle of the non-transference of risk or harm" which dealt mainly with the measures of prevention, the "polluter pays" principle had expanded beyond the framework of prevention (i.e. liability on costs of prevention) to focus also on costs incurred in connection with compensation.

The Secretariat of the Asian-African Legal Consultative Committee last year prepared a brief on the Eighth Report of the Special Rapporteur. That brief dealt with the text of draft articles which now form the basis of draft formulations on 'Preventive Measures' set out in the Special Rapporteur's Ninth Report. The present brief is therefore restricted to those proposals which are either new or have been subjected to substantive amendments since they were first proposed last year.

Draft article 11 entitled *'Prior authorization'* sets out the first supervisory function and responsibility of a State in respect of activities with a risk of trans-boundary harm and requires the prior authorization of the State within whose territory or jurisdiction or control they are conducted. Such prior authorization is also required to be obtained in the event that a major modification or change in the activity is proposed.

This formulation is in effect a modified version of the opening sentence of draft article 1 on preventive measures that the Special Rapporteur had proposed in the last report to be included in an annex on preventive measures.

This formulation would best be commented upon after the Commission has taken a decision on and adopted a definition of the concept of risk. Only in the light of that definition could it be determined whether States would reasonably be expected to accept prior authorization as a general obligation. It must, however, be stated that the stipulation relating to prior authorization, as formulated, does not provide or envisage the periodic renewal of the authorization or the possibility or even the obligation to withdraw it in certain cases. Consideration should be

given to the issue of expanding the scope of the provision to cover periodic review and renewal of authorization of activities involving risk.

Draft article 12 on *Transboundary Impact Assessment* would provide that a State requires that an assessment of the possible transboundary impact of an activity be undertaken before an activity is authorized. The Special Rapporteur explained that assessment did not require that there must be *certainty* that a particular activity would cause significant transboundary harm, but only *certainty* that a significant risk of such a harm existed. Opinion was divided concerning this provision with some members believing that it was the State itself which should make the assessment, and others arguing that it was the duty of the operator to undertake such assessment.

The subject matter of this article on assessment and, the requirements of exchange of information and consultation covered by articles 15, 16 and 18 are closely linked and must be read together. All are geared to an objective which is very important for the purposes of an effective prevention regime, namely encouraging the participation of the State presumed to be affected so that it can help to ensure that the activity is carried out more safely in the State of origin and at the same time be in a position to take more precaution in its own territory to prevent or minimize the transboundary impact. Cooperation, in the view of the Special Rapporteur, is an essential part of these obligations.

The requirement of environmental impact assessment plays an important role. Article 12 should therefore be spelt out, in some detail, so that the essential components of a good environmental impact assessment are clearly defined. Precedents for such definitions exist, both in conventions and in decisions of the UNEP Council. Unless the essential requirements are identified, there is a risk that a State might appear to have fulfilled its obligations by carrying out a study of some kind, whereas, in reality, it had totally failed to have the potential risk properly assessed.

The relationship between articles 12 and 15 is unclear, because article 15 gave the impression that, even if the assessment required under article 12 showed a possibility of substantial transboundary harm, the State could nevertheless give its authorization within the meaning of article 11. It is not clear why, in that case, it should be required to notify the other States of the results of the assessment.

Draft Article 13 on *pre-existing activities* provides that it should happen that an activity with a risk of transboundary harm is being conducted without prior authorization the State within whose territory or jurisdiction the activity is being conducted must require that an authorization under article 11 is obtained.

It was pointed out during the discussions in the Commission that article 13, extended the scope of international liability to pre-existing activities, which may have continued for several years without ever causing harm. This presupposed that they had not involved any significant risk at the outset. To subject pre-existing activities to the requirements envisaged might create differences in the relationship between the State and the operators, since the new demands of the State with respect to prevention could be regarded as a departure from the initial undertakings or as a modification, implied or otherwise, of the investment contract. A suggestion was made that the last sentence be amended by the addition of the words "without prejudice to the liability of the State." The view was also expressed that the article be deleted.

Draft article 14 on *Performance of Activities* referred to, by the Special Rapporteur, as the core of the articles on prevention, would require, in the first instance, that a State ensures, through legislative and other measures, that an operator involved in undertaking the types of activities covered by this topic, has used the best available technology, to minimize the risk of significant transboundary harm; and in the event of an accident, harm is contained and minimized. States, under this article, are also required to encourage operators to take compulsory insurance or provide other financial guarantees enabling them to pay for compensation. This provision deals with two different issues namely the use of the best available technology to minimize the risk and the use of compulsory insurance. It not clear however, whether the reference to the best available technology means the best technology available in the State of origin or available throughout the world. For many developing countries, it was something that would make a great difference. The articles on prevention should therefore include general provisions on ways of facilitating the transfer of tehcnology, including new technology, in particular from the developed to the developing countries. Cosideration should also be given to the question whether it may not be desirable to treat the issues of the use of the best available technology and compulsory insurance in separate articles.

The formulation on *Notification and Information* in article 16 provides that should an assessment of an activity reveal the possibility of significant transbounday harm, the State of origin would be required to inform the State or States likely to be affected should an accident occur, and provide them with the results of the assessment. Where there is more than one potentially affected State, assistance of competent international organizations may be sought.[4] States are also required whenever possible and appropriate, to provide those sections of the public, likely to be affected, with such information as would enable them to participate in decision-making process relating to the activity. The report refers to three recent

4. See Article 16 see A/CN.4/450

legal instruments on the environment which contain similar provisions viz. the Convention on Environmental Impact Assessment in a Transboundary Context; the Convention on the Transboundary Effects of Industrial Accidents; and principle 19 of the Rio Declaration on Environment and Development.

Most members who commented on the articles supported the principle of notification and information, but expressed concerns about the scope of the article and the practical application of the obligation contained in it. The relationship between articles 12 and 15 remains unclear, because article 15 gave the impression that, even if the assessment required under article 12 indicated a possibility of substantial transboundary harm, the State could nevertheless give its authorization within the meaning of article 11. It is not clear why, in that case, it should be required to notify the other States of the results of the assessment.

Article 16, addresses itself to facilitating preventive measures, and provides for periodic *Exchange of Information* between the States concerned on an activity with a risk of transboundary harm.

The Special Rapporteur explained the need for an article on *'National security and industrial sectors'* to ensure the legitimate concerns of a State in protecting its national security as well as industrial secrets which may be of considerable economic value. This interest of the State of origin, in the view of the Special Rapporteur, would have to be brought into balance with the interests of the potentially affected State through the principle of "good faith". *The Draft Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources shared by Two or More States*[5] —attempted to maintain a reasonable balance between the interests of the State involved by requiring the State of origin that refuses to provide information on the basis of national security and industrial sectors, to cooperate with the potentially affected State in good-faith and on the basis of the principle of good-neighbourliness to find a satisfactory solution. The Special Rapporteur attempted to introduce the same balance in article 17 by requiring good-faith cooperation from the State of the origin with the potentially affected State. In the view of the Secretariat of the Asian-African Legal Consultative Committee the protection of national security and industrial secrets, is a very necessary element in regulating the supply of information to other States. However, this formulation reflects a certain inequality in that terms the national security and industrial secrets" are used without according to them a specific definition. The Secretariat of the AALCC is of the view that it may perhaps be useful to define these two terms and great care needs to be exercised in drafting the provision in order to achieve a satisfactory balance of interests.

5. See A/CN.4/406. Also See General Assembly Resolution 34/186 of 18 December, 1979.

It was observed that the exception contained in this article was useful but, apart from the fact that it heightened inequality between States, it might defeat the purpose of the obligation to cooperate in good-faith. In particular, it might suppress any inclination to exercise the right of initiative that draft article 19 recognized for the State likely to be affected by giving the State of origin a discretionary power not only for the information to be transmitted, but even for the decision whether or not to transmit it.

Article 18 provides for *Prior consultations* between the States concerned, on preventive measures. In the view of the Special Rapporteur consultations were necessary to complete the process of participation by the affected State and to take into account its views and concerns about an activity with a potential for significant harm to it. During the debate this article was criticised particularly because the term "mutually acceptable solutions" might give the impression that the envisaged activity might have harmful consequences. The Secretariat of the AALCC concurs with the view. While it is desirable that States should be obliged to consult it is far fetched to require them to reach an agreement.

Article 19 on *Right of the State* presumed to be affected is designed to deal with situations where for some reason the potentially affected State was not notified of the conduct of an activity with a risk of potential transboundary harm, as provided for in the above articles. This may have happened because the State of origin did not perceive the hazardous nature of the activity although the other State was aware of it or because some effects made themselves felt beyond the frontier, or because the affected State had a greater technological capability than the State of origin, allowing it to infer consequences of the activity of which the latter was not aware. In such cases, the potentially affected State may request the State of origin to enter into consultations with it. That request should be accompanied by technical explanation setting forth the reasons for consultations. If the activity is found to be one of those covered by these articles, the State of origin is obligated to pay compensation for the cost of the study.

The Special Rapporteur stated that one of the goals of these articles is to provide for a system or a regime in which the parties could balance their interest. In addition to procedures which allow States to negotiate and arrive at such a balance of interest, there are principles of content to such an exercise. Article 20 intended to deal with the factors involved in a balance of interest lists factors that must be taken into account in any balancing of interests. The Rapporteur was of the view that, an article listing factor relevant to balancing of interests was useful because it more easily operationalized a very general concept.

This article refers both to equitable principles and to scientific data and most of the members found it useful particularly as the articles were to become a frame-

work convention whose provisions were meant not to be binding but to act as guidelines for States. It is however, not clear whether it would be applied in practice, but as long as it was intended to help in applying the provisions of a framework convention, it could be endorsed.

The Special Rapporteur explained that his ninth report dealt with preventive measures that a State should take in respect of activities with a risk of transboundary harm. These measures, which were basically of a procedural nature, should be accompanied by an article setting forth the principle of non-transference of risk or harm. He mentioned that similar provisions were found in some other legal instruments dealing with comparable problems such as the Code of Conduct on Accidental Pollution of Transboundary Inland Waters, the United Nations Convention on the Law of the Sea and the Rio Declaration on Environment and Development. Such an article could be placed in the section on principles and could be drafted more broadly so as to apply to both issues of risk and harm covering the articles on prevention and those on liability which will come later.

Few members commented on article 20 *bis* on the 'Non-transference of risk or harm. Some found it logical and normal to include in the draft articles the principles of non-transference of risk or harm. However, others felt the article only complicated the situation.

By the Special Rapporteur's own admission the approach adopted in the ninth report is a step backwards because although the Commission had decided to consider, for the present only activities involving risk there remained the issue of activities having harmful effects. The Secretariat of the AALCC concurs with the view that this raises three questions viz. (i) when do activities involving a risk become harmful or wrongul; (ii) where would harmful effects fit into the draft provisions if the proposed articles are sufficient for the drafting of a general convention and (iii) whether the Special Rapporteur proposed to provide for a separate regime on the settlement of disputes for activities having harmful effects. Consideration needs to be given to these questions before taking a decision.

The obligation imposed on the States to require an environmental impact assessment to be undertaken before authorizing any activity, likely to cause transboundary harm, be carried out in its territory is indeed the core provision of the draft articles aimed as they are at preventive measures. Careful consideration may be given in this regard to the need and utility of explicitly spelling and defining the essential components of a good enviroment impact assessment. This definition of environmental impact assessment may be necessary because unless the essential requirements were identified there is a risk that a State may appear to have fulfilled its obligations by carrying out a study while in reality it

(the assessment study) may have totally failed to fully envisage and assess the potential risk. Various decisions of the UNEP Council and the United Nations Convention of Enviromental Impact Assessment in a Trasboundary Context, *inter alia*, offer precedents for such a definition on environment impact assessment.

The Special Rapprteur's proposals do not make adequate provision for the special needs of the developing States. The suggestion in the present (ninth) report that some general form of wording should be included in the chapter on principles to take account of the position of the developing countries, does not go far enough. The Secretariat of the AALCC endorses the view that the need of the developing countries, including the need for preferential treatment, should be duly and properly reflected in the proposed articles on prevention. The principles adopted in the Rio Declaration on Environment and Development should be taken into account in this respect. Furthermore with regard to preventive measures it may be pointed out that the standards which applied to the developed countries may be unsuitable or impractical for the developing States in as much as the costs involved, in socio-economic terms, may be so great as to impede their development. This aspect of the need of the developing countries needs to be given due recognition and reflected in the proposed articles.

At the conclusion of the discussion, the Commission decided to refer article 10 on non-discrimination which the Commission had examined at its forty-second session, and articles 11 to 20 *bis* proposed by the Special Rapporteur in his ninth Report to the Drafting committee to enable it to continue its work on the issue of prevention. The Commission indicated that the Drafting Committee could, with the help of the Special Rapporteur, take on a broader task and determine whether the new articles which had been submitted came within a logical framework and were complete or, if they were not, whether they should be supplemented by further provisions. On that basis, the Drafting Committee could then start drafting articles. Once it had arrived at a satisfactory set of articles on the prevention of risk, it might see how the new articles were linked to the general provisions contained in articles 1 to 5 and the principles embodied in articles 6 to 9 and in article 10. The Drafting Committee devoted nine meetings to the articles. Its report which was introduced by the Chairman of the Committee contained the text of the articles adopted by the committee on first reading namely article 1 (scope of the present articles),2 (used terms), (prior authorization), 12 (risk assessment) and 14 (measures to minimize the risk). However, in line with its policy of not adopting articles not accompanied by commentaries, the Commission agreed to defer action on the proposed draft articles to its next session. At that time, it will have before it the material required to enable it to take a decision on the proposed draft articles.

VIII. United Nations Conference on Environment and Development Follow-up

(i) Introduction

For long, the AALCC has been addressing the environmental issues from the points of legal perspective. As early as its Tokyo Session held in 1974, the item "Environmental Protection" was included in the agenda of the Session, and since then, the topic has been under active consideration by the Committee.

After the adoption by UN General Assembly of Resolution 44/228, the Committee at its twentyninth Session in Beijing (1990) recommended *inter alia* that the AALCC should be actively involved in the preparation for the UNCED and render useful assistance to its member States in this regard.

The Committee's work programme on this subject, included: (1) Promotion of ratification of the 1982 United Nations Convention on the Law of the Sea and its subsequent implementation; (2) Transboundary movement of hazardous wastes and their disposal; (3) Consideration of the issues before the UNCED Prepcom, particularly Working Group III dealing with legal and institutional matters; (4) Assistance in the preparation of the Framework Conventions on Climate Change and Biodiversity; and (5) Development of legal principles on environmentally sound and sustainable development. The Secretariat prepared and updated a series of analytical studies and relevant recommendations on those issues to assist its Member States and make modest contribution to the success of the Rio Conference.

The Committee's endeavours in respect of the preparation for the UNCED were reinvigorated during its Thirtyfirst Session held in Islamabad in January 1992. At that Session, a two-day Special Meeting on Environment and Development was convened: Following a series of formal and informal exchange of views, a

draft text of the statement entitled "Statement of General Principles of International Environmental Law" was adopted.

It was consequently circulated as an official document in all working languages of the UN under agenda item, *Principles on General Rights and Obligations*, of Working Group III.

The AALCC was represented at the Rio Conference by the then President Mr. Aziz A. Munshi and the Secretary-General Mr. Frank X. Njenga, who had the honour to address the Conference.

In view of the long-term nature of environmental protection and sustainable development, the Committee decided to continue its efforts and further pursue its environmental programme after the conclusion of UNCED. The measures and actions to be taken in this regard included:

(a) Prepare a general assessment of the outcome of the Rio Conferecne concentrating particularly on the issues with legal implications;

(b) Continue to monitor the on-going process of UNCED at its next stage and following-up aspects of its new programmes with legal implications;

(c) Prepare a detailed analysis and Comments on the two Conventions on Climate Change and biodiversity and monitor the developments after the signature of the Conventions and make recommendations to the Member States of the Committee in respect of ratification of the Conventions respectively as deemed appropriate;

(d) Make studies on the further development of international environment law;

(e) Render assistance to the Member States at their requests in the field of national legislation concerning the protection of the environment; and

(f) Strengthen the cooperation with the UNEP.

A study was prepared by the Committee's Secretariat in accordance with the mandate given by the Committee at its 31st Session held in Islamabad in January 1992 and in the context of reference to the concerns and involvement of the Committee in the preparation for the UNCED.

This study concentrated on the major issues with legal implications such as the principles on general rights and obigations of States in the field of sustainable development, international legal instruments and mechanisms and international institutional arrangements as well as financial resources and transfer of environmentally sound technologies.

The Secretariat, while monitoring the progress of work in the PREPCOM of UNCED, also took into account the then ongoing parallel negotiations on the Climate Change and Biodiversity Conventions. The outcome of the Rio Summit and the successful conclusion of these two Conventions were the focus of deliberations at the AALCC's Thirty-second Session held in Kampala in 1993. The AALCC's study has been reproduced in the printed report of the Kampala session 1993. At that session, the Committee directed the Secretariat to continue to monitor the developments in respect of these two Conventions and also involve itself in the negotiations concerning elaboration of an International Convention on Combating Desertification. Accordingly, for the Thirty-third Session, two studies were prepared namely, (i) United Nations Conference on Environment and Development: Follow-up and (ii) United Nations Convention on Climate Change and Biodiversity: Follow-up.

Thirty-third Session: Discussions

The Assistant Secretary-General Prof. Huang Huikang while introducing the item *"The United Nations Conference on Environment and Development follow-up."* recalled that the AALCC at its Beijing Session held in March 1990 took note of the United Nations General Assembly's decision to convene the United Nations Conference on Environment and Development in June 1992 at Rio at the Summit level. The Committee directed the AALCC Secretariat to involve itself in the preparatory process and prepare studies to assist the Member Governments in effective participation at the Rio Summit.

Following that directive, the Secretariat prepared studies reviewing the progress made at the UNCED PREPCOM and the parallel negotiations going on in respect of the Conventions on Biodiversity and Climate Change. These studies were placed for consideration at the Cairo and Islamabad Sessions held in early 1991 and 1992 repectively. The then President of the Committee Mr. Aziz Munshi, Attorney-General and Minister of Justice, Government of Pakistan and the AALCC Secretary-General represented the AALCC at the Rio Summit held in June 1992.

The Assistant Secretary-General stated that the Kampala Session (1993) provided the first opportunity to review the outcome of the Rio Summit, and the follow-up of the Rio Summit was of crucial importance to enable the Secretariat to continue to monitor the subsequent developments and submit a report to the AALCC's Thirty-third Session scheduled in Tokyo. The Committee also took note of the resolution 47/188 of the General Assembly of the United Nations at its forty-seventh session by which it established an Intergovernmental Negotiating Committee (INC-D) for the Elaboration of an International Convention to