

Document:-
A/CN.4/L.421

Draft articles on the law of the non-navigational uses of international watercourses. Titles and texts adopted by the Drafting Committee: titles of parts II and III of the draft; articles 8 to 21 - reproduced in A/CN.4/SR.2070 to SR.2073

Topic:
Law of the non-navigational uses of international watercourses

Extract from the Yearbook of the International Law Commission:-
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diplomatic courier. As for the possibility of entrusting the bag to a member of the crew other than the captain of the ship or aircraft, since the question had been extensively discussed both in the Commission and in the Drafting Committee, and since the Commission had indicated in its commentary to paragraph 1 of article 23 that there was nothing to preclude that practice, he proposed that it should be given explicit form. The amendments he was suggesting for that purpose appeared in his report (*ibid.*, para. 200).

36. With regard to part III of the draft (Status of the diplomatic bag), one Government considered that article 24 should include more specific rules, but no clear-cut proposal had accompanied that extremely general observation. In his own view, the revised text of article 8, together with article 25, could provide the legal basis for identification of the bag, and article 24 should therefore be retained in its present form.

37. Article 25 had elicited a number of general observations as well as several drafting proposals which deserved careful consideration, but did not appear to justify a revision of the existing text (*ibid.*, paras. 204-211).

38. With respect to article 26, a number of general observations had been made concerning the need for rapid transmission of the bag and for avoiding lengthy delays and cumbersome procedures. In that connection, it would be recalled that the UPU Congress held at Rio de Janeiro in 1979 had rejected a proposal to introduce a new category of postal items under the name of "diplomatic bags" in the international postal service by amending the Union's international regulations.¹² At present, favourable treatment for diplomatic bags could be secured only through bilateral, regional or multilateral agreements between national postal services; a number of bilateral agreements along those lines had already been concluded. On the basis of the observations and proposals submitted by Governments, he was offering for the Commission's consideration a revised text of article 26 (*ibid.*, para. 215).

39. On article 27, he would refer members of the Commission to his report (*ibid.*, paras. 216-220), and point out that the revised text he proposed placed the sending State under the obligation to make adequate arrangements for ensuring the rapid transmission or delivery of its diplomatic bags.

40. Article 28 was one of the most controversial; it had been discussed extensively and divergent points of view had been expressed on it throughout the Commission's work on the topic. It was indeed, as had been pointed out, a key provision which raised a wide range of political, legal and methodological problems, to which he referred in his report (*ibid.*, para. 222). The diversity and the differences of opinion of Governments on that article (*ibid.*, paras. 225-242) had led him to submit three alternatives, A, B and C, for the article, accompanied by comments on them (*ibid.*, paras. 244-253).

41. The comments by Governments revealed that most States were opposed to examination of the bag through electronic devices. Moreover, the International Conference on Drug Abuse and Illicit Trafficking, to which the Chairman had referred (para. 7 above) and which was also referred to in the report (A/CN.4/417, paras. 235, 239 and 240), had concluded that measures to combat illicit drug trafficking through misuse of the diplomatic bag should be taken in strict conformity with the provisions of the four codification conventions. But that would be tantamount to having two different régimes: one for consular bags, and another for the other three types of bag. The Nordic countries had suggested in their observations the use of specially trained dogs to detect the presence of illicit drugs in bags. In his opinion, that method would have the advantage of not violating the confidential nature of the bag's contents. Moreover, in view of the severity of the drug-trafficking problem, it was likely that no State would oppose such a measure.

42. The remaining articles had been the subject of proposals relating primarily to drafting, except in the case of article 33, which most Governments suggested should be deleted on the grounds that it might create a plurality of régimes. Two Governments had also considered that it might be desirable to incorporate provisions on the settlement of disputes: he would welcome the opinions and advice of the Commission on that matter.

43. Lastly, he said that the Commission could adopt a number of approaches in considering his report: it could do so article by article, or section by section, or it could focus the discussion on the most controversial matters. If it adopted the third approach, he would suggest that it concentrate on the following issues: (a) the scope of the draft articles, and specifically the possibility of extending it to the couriers and bags of special missions and of international organizations; (b) the inviolability of the courier and the scope and content of the facilities, privileges and immunities granted to him (particularly arts. 17 and 18); (c) the contents and inviolability of the bag (art. 28); (d) the relationship between the draft articles and other conventions (art. 32), the optional declaration (art. 33), and the settlement of disputes.

The meeting rose at 1 p.m.

2070th MEETING

Wednesday, 29 June 1988, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Present: Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucouas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

¹² See in this connection the Special Rapporteur's fourth report, *Yearbook* . . . 1983, vol. II (Part One), p. 121, document A/CN.4/374 and Add.1-4, paras. 316-317.

1. The CHAIRMAN announced that, in the week of 20 to 24 June 1988, the Commission had used 100 per cent of the conference servicing time allotted to it.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (*continued*)
(A/CN.4/409 and Add.1-5,¹ A/CN.4/417,² A/CN.4/L.420, sect. F.3)

[Agenda item 4]

EIGHTH REPORT OF THE SPECIAL RAPPORTEUR
(*continued*)

CONSIDERATION OF THE DRAFT ARTICLES³
ON SECOND READING (*continued*)

2. The CHAIRMAN reminded the Commission that, in his introductory statement, the Special Rapporteur had suggested that members should first comment on individual articles, then on the various parts of the draft, and lastly on substantive issues.

3. Mr. REUTER expressed his admiration of the scrupulous preparation of the eighth report (A/CN.4/417).

4. Referring to the protection of the diplomatic bag, he noted that the Commission had received a request for assistance in the fight against drugs from the International Conference on Drug Abuse and Illicit Trafficking.⁴ It went without saying that he sympathized with the Conference's objectives, but it was not clear what specific steps the Commission could take; so far, it had always declined to limit the fundamental rights of States, even for so worthy a cause as combating drug abuse. Many proposals to accord special rights for combating drug trafficking on the high seas had been submitted at the Third United Nations Conference on the Law of the Sea, but none had been adopted. The nature of the action the Commission could take would ultimately depend on the overall régime it selected for the diplomatic bag.

5. He wished to raise two points which showed how the Special Rapporteur's thinking on the draft articles had evolved. With respect to article 1, he did not oppose the granting to international organizations of certain immunities normally accorded only to States, but feared that a number of technical difficulties might arise. No two international organizations were alike, and opening the instrument to all of them through a general rule like the one proposed by the Special Rapporteur in his report (*ibid.*, para. 60), might be like overloading a boat so much that it sank.

6. He drew attention to article 1, paragraph 1 (2), of the 1975 Vienna Convention on the Representation of States, which provided that:

(2) "international organization of a universal character" means the United Nations, its specialized agencies, the International Atomic Energy Agency and any similar organization whose membership and responsibilities are on a world-wide scale;

¹ Reproduced in *Yearbook* . . . 1988, vol. II (Part One).

² *Ibid.*

³ For the texts, see 2069th meeting, para. 6.

⁴ See 2069th meeting, footnote 8.

The Commission might consider following that precedent and stipulating that the instrument in preparation covered only international organizations of a universal character, many of which already benefited from certain privileges and immunities under conventions or headquarters agreements. It might also draw on article 90 of the 1975 Convention, which established a special mechanism whereby universal organizations not parties to the Convention could "adopt a decision to implement" its "relevant provisions". There was also a precedent for enabling international organizations to become parties to an international instrument, but that approach had political implications, and the reaction of States had never been entirely enthusiastic. He was therefore inclined to believe that if accession to the instrument was made possible only for organizations of a universal character, the chances of winning State support would be increased.

7. Mr. Calero Rodrigues had rightly pointed out that article 4 might need to be revised to conform with the greater need of international organizations to communicate with their own departments and offices in other countries than with other international organizations and States parties to the instrument.

8. The second innovation in the thinking of the Special Rapporteur appeared in article 33. The text provisionally adopted at the thirty-eighth session enabled States that had slight reservations regarding the future Convention to make an optional declaration limiting its application to certain categories of diplomatic courier and diplomatic bag. A great deal of care and thought had gone into the drafting of article 33, but the Special Rapporteur was now proposing that it be deleted, on the grounds that many Governments had not supported it or had objected to it outright (*ibid.*, para. 277). Yet the patterns forming over the past few years showed that Governments were stressing the need for greater flexibility in their multilateral treaties, and that their ratification of major conventions was accompanied by a growing number of reservations. The Commission had traditionally considered that reservations were a matter for the State alone to decide, but jurists must nevertheless take account of the growing need for flexibility in the terms of treaties.

9. He would therefore regret the deletion of article 33, although he would not oppose it. If the Commission accepted the Special Rapporteur's recommendation, it should include in its commentary a full explanation for the deletion of an article which had provided the flexibility so obviously desired by States.

10. Mr. McCAFFREY congratulated the Special Rapporteur on a scholarly report (A/CN.4/417) that diligently reflected the views expressed by members of the Commission.

11. It was to be hoped that the Commission could so conduct its debate as to be able to refer a substantial body of articles to the Drafting Committee at the current session. Of course, the Drafting Committee would not be able to take them up at present, but it would be in a position to begin work on them at the start of the Commission's next session. That was particularly desirable because the Commission's goal was to com-

plete consideration of the draft articles on second reading within its present members' term of office.

12. In its work on the draft articles, the Commission should focus on the four principal issues identified by the Special Rapporteur in his introductory statement (2069th meeting, para. 43). Most of the articles were not controversial and required only a little drafting work. If the Commission were to discuss each of them individually, the tendency of lawyers to find fault with even the best of formulations would militate against completion of the second reading.

13. At the risk of speaking at an inappropriate stage in the Commission's work, he wished to express his profound doubts about the wisdom of drafting an instrument on a topic which was ill-conceived and fundamentally flawed. The basis for the Commission's work had been the four codification conventions.¹ However, the Special Rapporteur observed in his report (A/CN.4/417, para. 54) that a great many States had not become parties to the 1969 Convention and the 1975 Vienna Convention. In view of that poor ratification record, taking all four conventions as the basis for the Commission's work was like sitting on a chair with only two legs.

14. Even if all four conventions had been generally accepted, however, problems would arise, because their provisions on critical points, and their functions, varied widely. When States had consciously and deliberately developed such different rules to cover different situations, it was hard to see how the objective of consolidating, harmonizing and unifying existing rules, referred to by the Special Rapporteur (*ibid.*, para. 11) could be attained.

15. It would also be extremely difficult to achieve a second objective envisaged by the Special Rapporteur, namely "to develop specific and more precise rules for situations not fully covered" by the codification conventions (*ibid.*). The fact that the most controversial provisions of the draft articles were precisely those that attempted to achieve greater precision showed that it was almost impossible to embrace a wide variety of circumstances and political relations in a set of specific and precise rules. Previous attempts to elaborate detailed rules had been abandoned. The 1961 United Nations Conference on Diplomatic Intercourse and Immunities had declined to address many details of the régime for the diplomatic bag, because attempts to settle various specific issues had created more problems than they had resolved. And the controversial nature of several key articles of the draft showed that the situation had not changed in the 27 years since the Vienna Convention on Diplomatic Relations had been concluded.

16. For all that, he was willing to admit that the main purpose, namely to facilitate the tasks of customs officials, on whom the four different régimes imposed very heavy burdens, was to some degree useful. It would be useful to harmonize most aspects of the law governing the diplomatic courier and the diplomatic bag, but not those that were most sensitive, namely, the areas dealt with in article 28, on protection of the bag.

17. On the first of the main issues identified by the Special Rapporteur and addressed in article 2, that of couriers and bags not within the scope of the present articles, in particular couriers and bags employed for the official communications of international organizations, he took the view that the text adopted on first reading should be maintained. As the Special Rapporteur pointed out in his report (*ibid.*, para. 54), the 1975 Vienna Convention on the Representation of States had not yet come into force; and in any event that Convention did not deal with international organizations of a regional, operational or quasi-commercial character. Régimes for those international organizations that needed them most had already been provided, as the Special Rapporteur stated (*ibid.*, para. 57), in the 1946 Convention on the Privileges and Immunities of the United Nations and the 1947 Convention on the Privileges and Immunities of the Specialized Agencies. That being so, he wondered whether the Commission would be well advised to delete article 2 and replace it by a new paragraph 2 to article 1, as suggested by the Special Rapporteur (*ibid.*, para. 60). Like Mr. Reuter, he feared that a blanket reference to international organizations would open a veritable Pandora's box and jeopardize any chances of acceptance the draft might possess.

18. In conclusion, he reiterated the hope that the debate would enable the Commission to refer a substantial body of articles to the Drafting Committee at the current session, so that the Committee could start work on them at the beginning of the next session.

19. Mr. OGISO said that, although he intended to discuss the four key issues identified by the Special Rapporteur (2069th meeting, para. 43), he wished also to comment on some other important points on which comments had been received from Governments.

20. On article 2, he differed from the previous speakers in having some sympathy with the Special Rapporteur's proposal for a new paragraph 2 to be added to article 1 (A/CN.4/417, para. 60). If it was the wish of the United Nations that the future instrument should permit United Nations Headquarters to use the diplomatic courier and bag for its communications with States, other international organizations of a universal character and branch offices of the United Nations, he saw no objection to such a proposal. Nevertheless, the points raised by Mr. Reuter and Mr. McCaffrey deserved careful consideration, and he hoped that the Special Rapporteur would provide a detailed explanation of his position on the matter when replying to the debate.

21. In regard to article 5, paragraph 2, he noted the Special Rapporteur's suggestion (*ibid.*, para. 82) that the second sentence could be deleted. While having no strong opinion on the matter, he wondered whether the deletion, on second reading, of the reference to the courier's "duty not to interfere in the internal affairs of the receiving State or the transit State" might not give the mistaken impression that the Commission did not consider that obligation very important. To convey such an impression would be highly undesirable, and he was therefore inclined to favour retaining paragraph 2 of article 5 as it stood.

¹ *Ibid.*, footnote 10.

22. Referring to article 7, he drew attention to the contradiction between the Special Rapporteur's view that the article codified a rule established in State practice (*ibid.*, para. 95) and the comment by a Government to the effect that the matters enunciated in the article had not previously been regulated by international agreement and did not require such regulation (*ibid.*, para. 94). It would be helpful if the Special Rapporteur could indicate how many international conventions or national legislations contained the rule set out in article 7.

23. In regard to paragraphs 1 and 2 of article 9, he remarked that among the junior members of diplomatic missions there might be some with dual nationality, who were nationals of both the sending and the receiving State. In the interests of convenience in the application of article 9, it would be useful to provide clarification, in the commentary if not in the article itself, concerning the status of a courier possessing dual nationality.

24. He had noted the general comment by the Austrian Government on article 13, referred to in the report (*ibid.*, para. 124), and wondered whether the Special Rapporteur had considered that Government's suggestion that the article might be redrafted so as "to lay down the general duty of the receiving or transit State to assist the diplomatic courier in the performance of his functions" (A/CN.4/409 and Add.1-5). His own view was that the mandatory wording of paragraph 1 of article 13 was unnecessarily strong; the provision could, for example, be interpreted to mean that, if the airport at which the courier arrived was situated at an inconvenient distance from the capital, the receiving State or transit State was under an obligation to provide him with means of transport. A text along the lines suggested by Austria might attenuate that obligation without substantially affecting the Special Rapporteur's original purpose.

25. Widely divergent views on article 17 were reported by the Special Rapporteur (A/CN.4/417, paras. 140 *et seq.*). His own opinion was that, since the Vienna Conventions of 1961 and 1963 both limited the concept of inviolability to the person of the courier and to official correspondence and documents contained in the diplomatic bag, and since neither Convention referred to temporary accommodation, the criticisms of the article deserved careful study. Indeed, he wondered whether the Commission might not reconsider whether the first sentence of paragraph 1 need be retained. If it were decided to delete that sentence, the title of the article would also have to be amended, possibly to read "Protection of temporary accommodation". As to the amendment proposed by the USSR to paragraph 3 of the article (A/CN.4/409 and Add.1-5), the stipulation appearing at the end of the proposed text, "so that its representative can be present during such inspection or search", might in practice have the effect of vetoing the inspection or search. While he agreed that temporary accommodation should not be treated as legally inviolable, and was therefore prepared to accept the Soviet proposal, he would suggest that the passage in question might be dropped, and that the proposed text should end with the words "to communicate with the mission of the sending State".

26. In introducing article 18, the Special Rapporteur had expressed willingness to accept the proposal of the German Democratic Republic for an additional sentence at the end of paragraph 2 (see 2069th meeting, para. 31). He would appreciate it if the Special Rapporteur, in his replies at the end of the debate or, better still, in the commentary to the article, would confirm that paragraph 2 should be understood to mean, first, that the courier enjoyed immunity from the civil and administrative jurisdiction of the receiving State or, as the case might be, of the transit State in respect of acts performed in the exercise of his functions; secondly, that such immunity did not apply to a civil action brought by a third party for damage arising from an accident caused by a vehicle driven by the courier; thirdly, that, to the extent that such damage was not recoverable from insurance, the courier could not invoke immunity and was subject to civil liability, in other words, that the receiving or transit State was not prevented from bringing a civil action for tort before the insurance company had paid the indemnification.

27. Lastly, he noted that the Special Rapporteur had raised five points concerning article 28 as being the "main critical issues" (A/CN.4/417, para. 222). With regard to the second point, "The admissibility of scanning of the bag", he could not agree with the provision in paragraph 1 of article 28 that the diplomatic bag "shall be inviolable wherever it may be". Neither in the 1961 Vienna Convention nor in the 1963 Vienna Convention was there any provision for inviolability of the bag. In fact, six or seven Governments had stated in their replies that scanning of the bag should be permitted in cases where the receiving State or the transit State had serious reason to believe that it contained objects not for official use. Considering the number of Governments that had made that point, he was surprised that the Special Rapporteur had not provided for the possibility of scanning the bag in any of the three alternative texts he had submitted (*ibid.*, paras. 244-253). The Commission should not exclude that possibility without a very thorough discussion.

28. He suggested that, in the three alternatives suggested for article 28, paragraph 1, the text be reworded to read: "The diplomatic bag shall not be opened or detained", removing all reference to inviolability. That text was taken from article 27, paragraph 3, of the 1961 Vienna Convention on Diplomatic Relations. There was every advantage in adhering to the language of that Convention.

29. For article 28, paragraph 2, the proposal made by the Government of the Federal Republic of Germany (A/CN.4/409 and Add.1-5) could be a fourth alternative serving as a good basis for discussion.

The law of the non-navigational uses of international watercourses (continued) (A/CN.4/406 and Add.1 and 2,⁶ A/CN.4/412 and Add.1 and 2,⁷ A/CN.4/L.420, sect. C, A/CN.4/L.421)

[Agenda item 6]

⁶ Reproduced in *Yearbook* . . . 1987, vol. II (Part One).

⁷ Reproduced in *Yearbook* . . . 1988, vol. II (Part One).

DRAFT ARTICLES PROPOSED BY THE
DRAFTING COMMITTEE

30. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the draft articles adopted by the Committee (A/CN.4/L.421).

31. Mr. TOMUSCHAT (Chairman of the Drafting Committee) expressed his appreciation to the members of the Drafting Committee and to other members of the Commission who had taken an active part in its deliberations. He was very grateful to the Special Rapporteur for his untiring efforts and constructive spirit and to the secretariat for its valuable assistance.

32. At its previous session, the Commission had provisionally adopted four of the five articles of part I (Introduction) and the first two articles of part II (General principles), namely articles 6 and 7.⁹ It had left aside article 1 (Use of terms).

33. The Drafting Committee had begun by considering article 9, referred to it by the Commission in 1984, which was now article 8. The Committee had then taken up six articles which had been referred to it at the previous session, starting with former article 10, which was now article 9. Lastly, it had dealt with article 15 [16], which the Commission had referred to it at the current session (see 2052nd meeting, para. 51). He would refer to the articles by their new numbers, followed where necessary by the former number in square brackets.

ARTICLE 8 [9] (Obligation not to cause appreciable harm)

34. The Drafting Committee proposed the following text for article 8 [9]:⁹

Article 8 [9]. Obligation not to cause appreciable harm

Watercourse States shall not utilize an international watercourse [system] in such a way as to cause appreciable harm to other watercourse States.

35. The Drafting Committee had considered at some length whether the article should be worded to take account of the possibility of conflict between the "no-harm" principle it enunciated and the principle of equitable and reasonable utilization stated in article 6. It had come to the conclusion that the two principles were not incompatible, since utilization of a watercourse could not be equitable if it caused appreciable harm—the emphasis being on the word "appreciable"—and since, should the achievement of equitable and reasonable utilization depend on one or more States tolerating a measure of harm, the accommodations required would be arrived at by way of specific agreements.

36. The Drafting Committee had considered that the no-harm principle would be more forceful if couched in terms of an obligation to ensure that no appreciable harm was caused, rather than in terms of a duty to refrain from causing harm. Hence the formulation proposed.

37. The Committee had substantially simplified the text referred to it by the Commission. It had deleted the words "within its jurisdiction" as being superfluous; it had eliminated the reference to "activities", because article 2, as provisionally adopted, did not mention "activities"; and it had replaced the concept of "uses" by that of "utilization", which was more comprehensive and appeared in article 6.

38. The Drafting Committee wished to make it clear that the expression "appreciable harm" referred to factual harm, in other words the physical, tangible and identifiable effects of the utilization of a watercourse, and not to legal injury, as meaning the infringement of rights that would entail international responsibility. Accordingly, the Committee had deleted the words "the rights or interests of". With reference to the term "appreciable", the Committee drew attention to paragraphs (15) and (16) of the commentary to article 4 as provisionally adopted, where it was said that the word "appreciable" was not used in the sense of "substantial" but was intended to convey the idea that the harm could be established by objective evidence.¹⁰

39. The concluding phrase of the former text, "unless otherwise provided for in a watercourse agreement or other agreement or arrangement" had been dropped as being unnecessary in view of the Commission's decision to prepare a framework agreement containing residual rules to be supplemented by other agreements.

40. The Drafting Committee had inserted the word "system" in square brackets after the words "international watercourse" wherever they appeared, in accordance with the Commission's decision—referred to in paragraph (2) of the commentary to article 2—to use that formula pending adoption of the definition of the term "international watercourse".¹¹

41. It should be noted that, in accordance with the Commission's statement in paragraph (3) of the commentary to article 2, the reference in article 8 [9] to an international watercourse [system] should be read as including the waters.

42. It would be recalled that, in the discussion on article 11, at the previous session, it had been asked whether the term "State" included private activities within a State, and that the Special Rapporteur had answered in the affirmative.¹² It was a basic purpose of the draft under discussion to ensure that a State should not be able to disclaim responsibility for private activities authorized or permitted by it.

43. Lastly, for reasons of consistency, the opening words of the original draft article ("A watercourse State") had been replaced by "Watercourse States".

44. Mr. RAZAFINDRALAMBO, supported by Mr. MAHIOU, suggested that the wording of article 8 [9] should be brought into closer conformity with the title of the article. Instead of stating that watercourse States "shall not utilize an international watercourse [system] in such a way as to cause appreciable harm to other

⁹ See 2050th meeting, footnote 3.

⁹ For the original text, see *Yearbook* . . . 1987, vol. II (Part Two), p. 23, footnote 80.

¹⁰ *Ibid.*, p. 29.

¹¹ *Ibid.*, p. 26.

¹² *Ibid.*, p. 24, para. 107.

watercourse States”, the text should state that watercourse States “shall utilize an international watercourse in such a way as not to cause appreciable harm to other watercourse States”.

45. Mr. YANKOV noted that the word “system”, in square brackets, was used whenever the words “international watercourse” appeared in the draft articles. But in the article under consideration, the words “watercourse State” were used without the word “system” in square brackets. He wished to know whether any change was intended.

46. There had been much discussion about the expression “appreciable harm”, but it should be remembered that the term “appreciable” had been used in State practice, in particular in certain regional agreements.

47. Mr. PAWLAK proposed that the commentary should explain that the word “appreciable” meant factual harm based on objective evidence. Understood in that sense, he could accept the term “appreciable harm”, on which the whole structure of the draft was based.

48. Mr. BENNOUNA noted that the Special Rapporteur had said that there was no contradiction between article 8 [9] and article 6, on equitable utilization, since the obligation of equitable utilization presupposed that harm would not be caused or, conversely, that utilization which caused appreciable harm would not be equitable. He entirely agreed with the relationship thus established between the two articles; indeed, it seemed to him so important that it should not only be reflected in the commentary but should also be covered in the text of the draft. The Commission might therefore wish, when reverting to article 6, to include an appropriate reference in that article to article 8, and possibly also to article 16, which dealt with the prevention of pollution and also embodied the notion of appreciable harm.

49. He endorsed Mr. Razafindralambo’s proposal: it would be far more elegant and logical to draft the first phrase of article 8 [9], dealing with utilization, in positive terms and the second, dealing with the obligation not to cause appreciable harm, in negative terms.

50. Mr. GRAEFRATH said he appreciated that it was the Special Rapporteur’s intention that the rule in article 8 [9] should generate responsibility, not liability, and that there was therefore a link between that article and article 6. Unfortunately, that link was not apparent from the text and the resultant difference between responsibility and liability was not clear.

51. He would have preferred a word other than “appreciable”, such as “significant”. In his view, the rule laid down in the article would have been clearer had it read:

“Watercourse States shall ensure that the use of an international watercourse within their territory is in conformity with their obligations under article 6 and shall take the necessary measures to prevent significant harm from being caused to other watercourse States.”

52. Mr. ROUCOUNAS said that he had always had reservations about the term “appreciable harm” and was not sure that the explanations given by the Chair-

man of the Drafting Committee would remove the difficulties. Mr. Graefrath’s comments showed the need for further clarification concerning the threshold of responsibility for harm.

53. Like Mr. Yankov, he would welcome an explanation from the Chairman of the Drafting Committee regarding the omission of the word “system”.

54. Mr. ARANGIO-RUIZ said that, as he had already stated (2065th meeting) in connection with article 16, he disliked the word “appreciable”, not because he would prefer a stronger term, but because he thought the word “harm” should stand alone, especially when a plurality of States were concerned with an international watercourse. The fact that one State did not cause appreciable or significant harm would not preclude harm which, if cumulative, could become appreciable, or indeed disastrous. He would therefore be grateful if the Special Rapporteur could include an explanation of the term “appreciable” in his comments to article 8 [9], with particular reference to the problem of cumulative harm, whether appreciable or not, due to the fact that a plurality of States used the watercourse.

55. Mr. Sreenivasa RAO agreed that article 8 [9] should be reworded as proposed by Mr. Razafindralambo. He welcomed the clarification provided by the Chairman of the Drafting Committee regarding the use of the term “appreciable harm” and would favour explaining in the commentary that that term denoted a factual objective standard as opposed to legal injury.

56. While he had no preference for any particular qualifying word, whether “appreciable”, “substantial” or “significant”, all of which had been defined in much the same way by legal writers, he thought it would be better to retain the existing term so as not to add to the confusion in conceptual thinking.

57. With regard to the linkage between articles 8 [9] and 6, as he saw it the draft articles were interrelated and it would be better to leave certain principles as they stood, so that they could be applied and interpreted flexibly in each case. He was therefore opposed, as a matter of drafting technique and also of policy, to overburdening the articles with specific linkages.

58. With regard to the point raised by Mr. Arangio-Ruiz, the article did not preclude the possibility of treating cases of cumulative harm as appreciable harm. He would therefore prefer to leave the article as drafted, since it was in line with the thinking of the Commission and of the Sixth Committee of the General Assembly.

59. Mr. EIRIKSSON observed that, for ease of reference, some of the articles drafted at the Commission’s previous session, in particular article 6, should be included in the Commission’s report to the General Assembly. To avoid confusion, Mr. Yankov’s point, which was reflected in the commentary to article 3,¹³ should also be included in that report.

60. The CHAIRMAN, speaking as a member of the Commission, said that he too had noted with some concern the omission throughout the draft of the word “[system]”. The Commission had adopted a working

¹³ *Ibid.*, p. 26.

hypothesis as the basis for its consideration of the topic and should abide by that hypothesis. He therefore agreed entirely with Mr. Yankov's remarks.

61. He also agreed that it would be far more elegant if the first part of article 8 [9] were drafted in positive, and the second in negative terms.

62. A more substantive point concerned the word "appreciable". In Spanish, it would be more logical to replace the words *daños apreciables* by *perjuicio*, dropping the word *apreciables*. Despite his reservations about that expression, however, he would not oppose the adoption of the article, the substance of which he agreed with. The commentary to the article should, however, include a reference to the fact that some members had reservations regarding the adjective used to qualify the word "harm".

63. Mr. TOMUSCHAT (Chairman of the Drafting Committee), replying to the points raised, said that there would be no difficulty in accommodating the suggestion that the first part of article 8 [9] should be drafted in positive, and the second in negative terms.

64. The term "watercourse States" had been used rather than "watercourse system States", simply because the terms adopted in 1987, specifically in articles 3 *et seq.*, had been followed.

65. A more difficult question concerned the standard of appreciable harm. A number of suggestions had been made which, in a way, cancelled each other out. Consequently, although he too had reservations about the word "appreciable", the best solution would perhaps be to retain that word, especially as it seemed to command the widest support.

66. The linkage between articles 6 and 8 [9] was clear from the structure of the draft, since it was apparent from the sequence of the articles that article 8 [9] modified article 6, and that the two articles should be read in conjunction. He sympathized in particular with the remarks of Mr. Sreenivasa Rao and would therefore suggest that article 8 [9] be retained as drafted, without indicating a linkage with article 6.

67. Mr. MAHIOU said he agreed with the Chairman of the Drafting Committee that the omission of the word "[system]" was a logical consequence of what had been agreed in 1987, when the first articles had been adopted. The fact that the word did not appear in articles 3 *et seq.* did not, however, prejudice the matter; that was the understanding on which the articles in question had been adopted in 1987. He trusted that his explanation would obviate the need for further discussion on that point.

68. The CHAIRMAN suggested that, in the commentary to article 8 [9], a reference should be made to the reservations expressed concerning the word "appreciable".

69. Mr. BARSEGOV said that, if the commentary was to record reservations concerning the word "appreciable", it should also mention the word "substantial", to which a number of members had referred.

70. The CHAIRMAN suggested that the first part of article 8 [9] should be reworded in positive terms and the

second part in negative terms, and that members' comments and reservations should be reflected in the commentary.

It was so agreed.

71. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article 8 [9].

Article 8 [9] was adopted.

ARTICLE 9 [10] (General obligation to co-operate)

72. Mr. TOMUSCHAT (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 9 [10], which read:

Article 9 [10]. General obligation to co-operate

Watercourse States shall co-operate on the basis of sovereign equality, territorial integrity and mutual benefit in order to obtain optimum utilization and adequate protection of an international watercourse [system].

73. Article 9 corresponded to article 10 as proposed by the Special Rapporteur at the previous session.¹⁴ In considering the provision, the Drafting Committee had borne in mind that, although opinions had diverged concerning the existence of a general obligation of States to co-operate, there had been no objection, either in the Commission or in the Sixth Committee, to the inclusion in the draft of an article on that duty, which was a logical premise of the procedural obligations enunciated in subsequent articles.

74. It had been agreed in the Drafting Committee that article 9 [10] should specify both the foundations and the objective of the duty to co-operate. For the foundations, the Committee had decided to add the words "on the basis of sovereign equality, territorial integrity and mutual benefit" after the words "shall co-operate", in accordance with the proposal referred to at the end of paragraph 98 of the Commission's report on its previous session.¹⁵ It had also considered the possibility of describing the objective of co-operation in some detail, but had decided that a general formulation would be more appropriate in view of the diversity of international watercourses. The wording proposed by the Drafting Committee, "in order to obtain optimum utilization and adequate protection of an international watercourse [system]", was derived from the second sentence of paragraph 1 of article 6 as provisionally adopted in 1987. The Committee had deleted, as being superfluous, the latter part of the original text, from the words "in their relations concerning international watercourses".

75. Lastly, as suggested by a number of members at the previous session, including the Special Rapporteur, the Drafting Committee recommended that article 9 [10] should be placed in part II, on general principles.

The meeting rose at 1 p.m.

¹⁴ For the text, *ibid.*, p. 21, footnote 76.

¹⁵ *Ibid.*, p. 22.

2071st MEETING

Thursday, 30 June 1988, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Present: Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/406 and Add.1 and 2,¹ A/CN.4/412 and Add.1 and 2,² A/CN.4/L.420, sect. C, A/CN.4/L.421)

[Agenda item 6]

DRAFT ARTICLES PROPOSED BY THE
DRAFTING COMMITTEE (*continued*)

ARTICLE 9 [10]³ (General obligation to co-operate) (*concluded*)

1. Mr. EIRIKSSON said that, in the interests of consistency, the word "obtain", in the second clause of article 9 [10], should be replaced by "attain", which was the word used in article 6 in the same context.
2. Mr. TOMUSCHAT (Chairman of the Drafting Committee) said that it was undoubtedly a mistake, which would be corrected.
3. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article 9 [10].

Article 9 [10] was adopted.

4. Mr. BARSEGOV said that he had already pointed out at the previous session that, in his view, the expression "international watercourse" was mistaken and that the expression "multinational watercourse" should be used. The expression "international watercourse" implied the existence of an international régime. The instrument that was being formulated could only be a framework agreement, having the force of a recommendation for the conclusion of watercourse agreements. That remark applied to the draft articles as a whole. If at the previous meeting he had not objected to the deletion, in article 8 [9], of the words "unless otherwise provided for in a watercourse agreement or other agreement or arrangement" in the original text proposed by the Special Rapporteur, that was precisely because the Chairman of the Drafting Committee had explained (2070th meeting, para. 39) that the Committee considered that phrase unnecessary in view of the Commission's decision to prepare a framework agreement.

When the Commission reverted to that question, he would have to reserve his position in the absence of agreement by the other members.

5. The CHAIRMAN said that Mr. Barsegov's position would be reflected in the summary record of the meeting.

ARTICLE 10 [15] [16] (Regular exchange of data and information)

6. Mr. TOMUSCHAT (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 10 [15] [16], which read:

Article 10 [15] [16]. Regular exchange of data and information

1. Pursuant to article 9, watercourse States shall on a regular basis exchange reasonably available data and information on the condition of the watercourse [system], in particular that of a hydrological, meteorological, hydrogeological and ecological nature, as well as related forecasts.

2. If a watercourse State is requested to provide data or information that is not reasonably available, it shall employ its best efforts to comply with the request but may condition its compliance upon payment by the requesting watercourse State of the reasonable costs of collecting and, where appropriate, processing such data or information.

3. Watercourse States shall employ their best efforts to collect and, where appropriate, to process data and information in a manner which facilitates its utilization by the other watercourse States to which it is communicated.

7. Article 10 corresponded to article 15 [16] proposed by the Special Rapporteur at the current session (see 2050th meeting, para. 1). As indicated by the word "regular" in the title and in paragraph 1, the article provided for an ongoing and systematic exchange of information as distinct from the *ad hoc* tendering of data envisaged in part III, concerning planned measures. It was therefore a specific application of the general obligation to co-operate laid down in article 9, and it was for that reason that the Drafting Committee recommended that it be placed immediately after that article, as the last provision in part II.

8. The Commission would note that the text consisted of three paragraphs, whereas in the article originally proposed there had been five. The Drafting Committee had noted that the Special Rapporteur intended to deal in a separate part with the matter of water-related hazards or calamities and had therefore reserved paragraph 4 of the original text for later action. The Committee had made paragraph 5 into a separate article, numbered 20 (see 2073rd meeting, para. 62).

9. The Committee had started from the premise that the rule enunciated in paragraph 1 constituted a specific application of the general obligation to co-operate laid down in article 9, so that casting it in terms of an obligation to co-operate would be repetitious. It had therefore given preference to the alternative approach suggested by the Special Rapporteur in paragraph (2) of his comments (A/CN.4/412 and Add.1 and 2, para. 27). The words "Pursuant to article 9" were intended to make it clear that the obligation in paragraph 1 gave concrete expression to the obligation set forth in article 9.

10. Attention had been drawn in the context of article 10 to the possibility that direct exchanges of infor-

¹ Reproduced in *Yearbook* . . . 1987, vol. II (Part One).

² Reproduced in *Yearbook* . . . 1988, vol. II (Part One).

³ For the text, see 2070th meeting, para. 72.

mation might be precluded by such circumstances as a state of war or the absence of diplomatic relations. The Drafting Committee had given serious consideration to that question, had noted that it also arose in connection with various articles of part III, and had therefore agreed to deal with it in a separate provision, namely article 21 (Indirect procedures).

11. The Drafting Committee had also eliminated from paragraph 1 the opening phrase: "In order to ensure the equitable and reasonable utilization of an international watercourse [system] and to attain optimal utilization thereof", which it deemed superfluous, since article 6 already set out the basic rules of equitable and reasonable utilization and the fundamental goal of optimum utilization.

12. The words "reasonably available" were intended to indicate that the information which watercourse States were under an obligation to exchange was information obtainable without undue expense or effort.

13. The Drafting Committee had replaced the words "concerning the physical characteristics", which lent themselves to unduly broad interpretations, by "on the condition", which was considered more precise. It had substituted "in particular" for "including" in order to make it clear that, while the list in the text was not, and could not possibly be, exhaustive in view of the diversity of international watercourses, the types of data expressly mentioned in the text were the most important. The word "ecological" had been added to take account of the environmental concerns expressed within the Commission, particularly in regard to the living resources of watercourses. The Committee had furthermore included a reference to "related forecasts", which, like the rest of the data and information covered by the articles, were to be communicated only to the extent that they were "reasonably available".

14. Again, the Committee had eliminated the last part of the original paragraph 1 proposed by the Special Rapporteur, taking the view that the phrase "and concerning present and planned uses thereof" was superfluous. It would be noted in that connection that the question of supplying information on "planned uses" was dealt with in part III and that, as with regard to present uses, the exchange of information on uses which affected the condition of the watercourse was provided for in the first part of the paragraph. That point would be elaborated on in the commentary. The phrase "unless no watercourse State is presently using or planning to use the international watercourse [system]", had been eliminated not only because it dealt with a highly hypothetical situation but also because regular exchange of information could be useful even in the case of an unused international watercourse.

15. It had been suggested during the discussion on article 10 [15] [16] that the Drafting Committee should envisage the possibility that information on a watercourse might be in the hands of a third State, and should therefore provide for an obligation of that State to pass on such information to the watercourse States. The Committee had considered that, although the draft articles were primarily intended to regulate relations between watercourse States, that question should be kept in mind and reserved for a later stage.

16. Paragraph 2 was almost identical with that proposed by the Special Rapporteur. Minor changes included the replacement of the words "use its best efforts" by "employ its best efforts", borrowed from paragraph 3, the deletion of the words "in a spirit of co-operation", which the Committee had considered unnecessary because the concept of co-operation was implicit in the phrase "employ its best efforts", and the deletion of the words "or other entity", which had been advocated by several members of the Commission. In that connection, it would be recalled that existing administrative arrangements, such as joint commissions, would be dealt with in a subsequent part of the draft.

17. Paragraph 3 was also a close reproduction of the text proposed by the Special Rapporteur, except for the replacement of the words "where necessary" by "where appropriate", which gave the text more flexibility, and the word "disseminated" by "communicated", which brought out better the direct transmission of information from one State to another. In addition, the word "co-operative" had been deleted: the Drafting Committee had regarded it as unduly restrictive because the data and information could be used individually by the States concerned.

18. Mr. ARANGIO-RUIZ suggested that the word "condition", in paragraph 1, should be put in the plural and that the word "that" should be replaced by the more elegant "those".

19. Mr. SEPÚLVEDA GUTIÉRREZ suggested that, in paragraphs 2 and 3 of the Spanish text, the words *reunión* and *reunir* should be replaced by *recopilación* and *recopilar*.

20. Mr. YANKOV said it was surprising that the words "reasonable costs", in paragraph 2, should have been rendered in French by *coût normal*. Again, some treaties made provision for the communication of samples for the evaluation of certain situations. Did the expression "data and information" cover samples, which would appear to be particularly useful in evaluating the composition or pollution of the water?

21. Mr. EIRIKSSON said he was not satisfied with the use of the word "reasonably" to qualify the word "available" in paragraphs 1 and 2. In treaty practice, that term was generally used to avoid imposing an obligation on States to communicate data and information that was not at hand. In the present instance, the impression was that, in paragraph 2, States were being requested to do something that was not "reasonable". Perhaps the word *normalement*, used in the French text, was better suited to the purpose of the article, namely to impose an obligation on watercourse States to collect and communicate data and information which was either at hand or could be obtained easily or—as in the situation envisaged in paragraph 2—which they could use their best efforts to obtain at their cost.

22. In addition, the beginning of paragraph 2 should be reworded as follows: "If a watercourse State is requested by another watercourse State", and deleting the word "watercourse" from the words "the requesting watercourse State". Bearing in mind the comments of the Chairman of the Drafting Committee, the Commission could also delete the words "where appropriate" in

paragraph 3. Lastly, the words “to which it is communicated”, at the end of paragraph 3, were superfluous: a State which collected and processed data and information did not necessarily know to whom it would communicate it.

23. Mr. RAZAFINDRALAMBO said the formula used in French to render the expression “requesting watercourse State”, namely *Etat du cours d'eau dont la demande émane* was clumsy. It should be replaced by *Etat auteur de la demande*, and the amendment proposed by Mr. Eiriksson should also be adopted. In addition, he failed to see why the word *élaboration* had replaced the word *exploitation*, which was a more accurate term, which appeared in the text proposed by the Special Rapporteur and which was also used in article XXIX of the Helsinki Rules. Obviously, the same remark also applied to the word *élaborer* in paragraph 3.

24. Mr. KOROMA after associating himself with the comments made by Mr. Eiriksson, suggested that the word “available”, in paragraph 1, should be replaced by “obtainable”. Besides, the paragraph appeared to him to be clumsily worded.

25. Mr. BARSEGOV pointed out that the word *normalement*, which qualified the adjective *disponibles* in paragraphs 1 and 2 of the French text, corresponded exactly to the word used in the Russian text. Accordingly, the word “reasonably”, in the English text, should be replaced by “normally”.

26. Mr. BENNOUNA said that the word *normalement* should be deleted because it was not clear: either the information was available, or it was not. Paragraph 2 was cumbersome and inelegant. It could perhaps be improved by adopting the suggestions made by Mr. Eiriksson and Mr. Razafindralambo. Lastly, the order of the paragraphs should be altered: paragraph 3, which stated the general obligation to collect information, should precede paragraph 2.

27. The CHAIRMAN, speaking as a member of the Commission, said that in the interests of clarity he supported the suggestion to delete the word “reasonably” (*normalement*) in paragraphs 1 and 2. In a legal text, it was always delicate to make use of a word which implied a subjective assessment. In any case, the word “reasonable” should be replaced by “normal”, and, in the Spanish text, the word *razonables* by *normales*.

28. Mr. TOMUSCHAT (Chairman of the Drafting Committee) said he had no objection to the proposal by Mr. Sepúlveda Gutiérrez to replace *reunión* by *recopilación* in the Spanish version.

29. The Drafting Committee had already examined the question raised by Mr. Arangio-Ruiz regarding the word “that”: according to the English-speaking members of the Committee, it was the grammatically correct term to use. Similarly, the use of the word “condition” in the singular appeared to be correct. It also had the advantage of corresponding to the word *état*, in the French text, which was also in the singular.

30. Mr. Yankov had mentioned the possibility of watercourse States exchanging samples, not only data and information. It had to be remembered, however,

that the Commission was preparing a framework agreement and that it would be for the signatory States of watercourse agreements to agree on the precise nature of their communications.

31. Mr. Yankov, Mr. Barsegov and Mr. Bennouna had questioned the use in languages other than French of the word “reasonably”, or rather its equivalent, when the word used in the French text was *normalement*. The word “reasonably” had been used in order to give the text a measure of flexibility. It was necessary to avoid two pitfalls. In the first place, States should not be required to exchange all the data available to them: for example, a State possessing advanced technology would, for the part of the watercourse on its territory, have extremely full analyses that would be of doubtful use for neighbouring States. But it was also necessary to avoid a situation in which a State would collect no data at all on the watercourse: in accordance with the text, it was “reasonably” supposed to furnish data. The Drafting Committee had considered that the English term “reasonably” and its Spanish equivalent were useful and well-balanced, despite their subjective appearance, but perhaps it would be better to consult the Special Rapporteur on that point. In the French text, the term *normalement* appeared to be required by usage. *Raisonnement* had different connotations and was little used in French law. Moreover, it was not necessarily a drawback for the various language versions to differ slightly because, when read together, they shed light on each other and brought out the nuances.

32. Mr. Razafindralambo's suggestion to replace *l'Etat du cours d'eau dont la demande émane*, in the French text of paragraph 2, by *l'Etat du cours d'eau auteur de la demande* constituted an improvement.

33. The choice between *élaborer les données* and *exploiter les données* had been discussed in the Drafting Committee and the French-speaking members had deemed the term *élaborer* to be the appropriate one.

34. With regard to Mr. Koroma's suggestion to replace the words “reasonably available” by “reasonably obtainable”, it had to be borne in mind that some data were already available to the State.

35. Mr. Eiriksson had proposed an extensive recasting of paragraph 3. The present wording was quite cumbersome, but precision should not be sacrificed in the interests of elegance. The Commission was in the process of adopting the draft articles and it could not review the concept of the articles at the present stage.

36. Mr. McCaffrey (Special Rapporteur) pointed out that the expression “reasonably available” was to be found in numerous international instruments, in particular in the 1966 Helsinki Rules on the Uses of the Waters of International Rivers. As used in article 10, it was intended to introduce some measure of flexibility. Moreover, it designated both information that a watercourse State already possessed and information that was easily accessible, whereas the expression “reasonably obtainable” would cover only the second category. Lastly, the notion expressed by “reasonably” was much used by English-speaking lawyers and the term *normalement*, used in French law, would have no meaning in

English in the context. He therefore urged that the word "reasonably" should be kept.

37. In addition, article 10 did not seek to impose any burden on the States that concluded a watercourse agreement; the aim was simply to express with precision the terms of their co-operation by emphasizing the need to exchange data and information. It was precisely the desire to avoid laying down an unduly strict obligation which explained the use of the words "where appropriate" in paragraphs 2 and 3.

38. Mr. BARSEGOV endorsed the Special Rapporteur's remarks confirming that paragraph 1 dealt with data and information which the State concerned already had in its possession or could collect without special effort. In his view, the word "available" was too vague.

39. Mr. ROUCOUNAS said that he too shared the Special Rapporteur's views on the use of the adverb "reasonably". The term had the merit of implying a principle of diligence: States were presumed to be in possession of some information, and it was that information they were to communicate to other States.

40. With regard to the French version of the words "requesting watercourse State", in paragraph 2, it could be improved along the lines suggested by Mr. Razafindralambo, but the words *l'Etat du cours d'eau qui fait la demande* would be just as clear and even simpler.

41. Mr. KOROMA proposed the deletion of the words "reasonably available" in paragraph 1, which might then be slightly altered to read: "watercourse States shall on a regular basis and when necessary exchange data and information on the condition of the watercourse [system]".

42. Mr. REUTER said that what the proponents of the word "reasonably" doubtless had in mind was to avoid imposing an obligation to provide a specific amount of information. If the text read simply "provide available data and information", it was conceivable that the requested State might reply to the requesting State that the requested data was, as statisticians were fond of saying, "not available". The point of the adverb "reasonably" was precisely that it enabled the requesting State, in such a case, to say that the requested information should exist and that the requested State had not entirely fulfilled its obligation. In that way, the dialogue could continue, which after all was the object of article 10.

43. The adverb *normalement* employed in the French text was not wholly objective; its meaning could vary, for example, depending on whether the State concerned was a highly developed or a developing one.

44. Mr. Sreenivasa RAO said that, by and large, he agreed with the explanations given by the Chairman of the Drafting Committee and the Special Rapporteur concerning the expression "reasonably available". Many other variations or synonyms were possible, but the basic point was that the obligation to exchange data and information stemmed from the obligation to co-operate. Since States did not necessarily have the same watercourse management requirements, in all likelihood

they did not all have the same information at their disposal. However, the concept of co-operation involved that of reciprocity; all States bound by an agreement were supposed to collect data concerning the watercourse in question, data that could be said to be "available". The word had the advantage of applying simultaneously to existing data already collected and to data which could easily be collected. Nevertheless, any other wording would be acceptable, provided that it properly reflected the purpose of article 10.

45. Mr. YANKOV referred to paragraph 8 of article 5 of the 1958 Geneva Convention on the Continental Shelf,⁴ where it was stated that "the coastal State shall not *normally** withhold its consent". In his view, the adverb "normally" was more objective than "reasonably". The English text should be in line with the French, since the use of different words might give rise to different interpretations.

46. Mr. EIRIKSSON said that article 10 tried to say too many things in too few words. Explanations would have to be provided in the commentary; in particular, the Special Rapporteur would have to specify what meaning was to be attached to "reasonable". The requested State might still think that the request was not "reasonable" in view of its situation.

47. Agreeing with the view expressed by the Chairman of the Drafting Committee, he said that he would abandon the pursuit of elegance in the formulation of paragraph 3.

48. The CHAIRMAN, speaking as a member of the Commission, said he agreed with the statements made by the Chairman of the Drafting Committee and the Special Rapporteur, except on one point. The Commission was in the process of drafting a text which was to serve as a basis for conventions and agreements that would be interpreted, not by linguists, but by lawyers. Clearly, therefore, the various language versions should be as close as possible to one another, it being unlikely that lawyers would seek clarification of a text in another text drafted in a different language. A compromise solution, consisting in replacing "reasonably" by "normally" in all languages except English, might be adopted in order to reconcile the various versions.

49. Mr. TOMUSCHAT (Chairman of the Drafting Committee) said that Mr. Bennouna's proposal to reverse the order of paragraphs 2 and 3 seemed reasonable, as the situation dealt with in paragraph 2 formed an exception. Mr. Eiriksson's drafting proposals concerning paragraph 2 would likewise facilitate an understanding of the text. So far as the French text was concerned, the French-speaking members of the Commission would have to choose between the alternatives *l'Etat du cours d'eau auteur de la demande* and *l'Etat du cours d'eau qui fait la demande*. Replying to Mr. Koroma, he said that he did not propose to change the wording of paragraph 1. Mr. Reuter had correctly defined the meaning which should be attached to the expression "reasonably available": it covered both data and information already available and data and information which could easily be obtained. The outcome of the discussion seemed to be that a qualifying adverb

⁴ United Nations, *Treaty Series*, vol. 499, p. 311.

should be retained; it would be for the Special Rapporteur to comment on the use of the term “normally” in the English text.

50. Mr. CALERO RODRIGUES considered that paragraph 3, which applied both to the data and information referred to in paragraph 1 and to that envisaged in paragraph 2, should be maintained in its present position.

51. Mr. TOMUSCHAT (Chairman of the Drafting Committee) agreed with that view.

52. Mr. McCAFFREY (Special Rapporteur) recalled that he had already had occasion to explain the various connotations attached in legal English to the terms “reasonably” and “normally”. Would the word “normally” imply that, where data and information was in fact at a watercourse State’s disposal but not “normally” available to it, the State was not obliged to communicate it? He did not think that that was the idea the Commission wished to convey. In any case, the term “reasonably” was broader and covered all possible situations: information that was difficult to obtain, for example, or difficult to provide because of its great bulk. The term could thus be said to possess considerable legal elasticity, which explained its presence in many instruments. As to Mr. Yankov’s allusion to article 5, paragraph 8, of the Convention on the Continental Shelf, the word “reasonably” could not have been employed in that case because the context was quite different.

53. Mr. SOLARI TUDELA said that the word *razonablemente* (“reasonably”) added nothing to the Spanish text of article 10 because in Spanish the expression “available information” was rendered as information of which States *puedan disponer*. Thus the adverb merely introduced an element of subjectivity, especially as not all States were on an equal footing in terms of the possibility of obtaining data and information. He was therefore in favour of deleting it.

54. The CHAIRMAN, speaking as a member of the Commission, said that he would have preferred the adverb to be deleted from all the provisions, or at least to have the word *razonablemente* in the Spanish text replaced by *normalmente*, because he too thought the former word was too subjective.

55. Mr. BARSEGOV said he deplored the drawn-out debate taking place on article 10. He suggested that the present text should be maintained and that the meaning attached in English to the words “reasonably available” should be explained in the commentary.

56. Mr. REUTER said he shared Mr. Barsegov’s view. The word “reasonably” corresponded to a basic concept in common law, and it would be a pity not to take advantage of the resources offered by that law. The commentary should explain the meaning of the expressions “reasonably available” and *normalement disponibles*, namely that they referred to data and information already in existence or easily obtainable.

57. Mr. SEPÚLVEDA GUTIÉRREZ said that the French word *normalement* and the Spanish word *normalmente* did not have the same meaning. They had been discussed at length in the Drafting Committee, and

the members had agreed to use the terms now appearing in the document under consideration. Furthermore, the word *razonablemente* was employed in a number of Latin-American—or at any rate Mexican—documents pertaining to criminal law, civil law and international law. The solution proposed by Mr. Barsegov and supported by Mr. Reuter was therefore logical and timely.

58. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article 10 [15] [16] as amended in the various languages during the discussion, on the understanding that all necessary explanations of the meaning of the terms “reasonably available” and *normalement disponibles* would be supplied in the commentary.

It was so agreed.

Article 10 [15] [16] was adopted.

ARTICLE 11 (Information concerning planned measures)

59. Mr. TOMUSCHAT (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 11, which read:

Article 11. Information concerning planned measures

Watercourse States shall exchange information and consult each other on the possible effects of planned measures on the condition of the watercourse [system].

60. The Drafting Committee was proposing that article 11 should serve as an introduction to part III of the draft, because it considered that the procedural rules set out in the subsequent articles should be preceded by the enunciation of the general obligation of watercourse States to provide each other with information on measures which any of them might plan. The expression “planned measures” had a twofold advantage over the expression “planned uses” appearing in the previous text—that of being all-embracing and that of making it clear that the element triggering the obligation to inform was the launching of the planning process. The phrase “possible effects” encompassed all possible effects of the planned measures, whether adverse or beneficial, thus avoiding the problems inherent in the unilateral character of assessments that would be made by States. Lastly, the words “the condition of the watercourse [system]”, which also appeared in paragraph 1 of article 10, applied to characteristics such as water quantity and quality.

61. Mr. KOROMA drew attention to a difficulty arising from the remarks by the Chairman of the Drafting Committee. If “possible effects” meant both adverse and beneficial effects, did not article 11 impose on the watercourse State which knew that the measures it was planning would have adverse effects upon other States the duty to admit that it was about to breach an international obligation? He wished to be assured that the explanations given by the Chairman of the Drafting Committee would not constitute the Commission’s commentary to article 11.

62. The CHAIRMAN said that the Commission’s commentary would be drafted after the adoption of the draft articles and in agreement with the Special Rapporteur.

63. Mr. TOMUSCHAT (Chairman of the Drafting Committee) reiterated that it had been the Drafting Committee's intention to place an article enunciating a general obligation to exchange information at the beginning of part III of the draft, before the articles specifically dealing with possible adverse effects of planned measures.

64. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article 11.

Article 11 was adopted.

ARTICLE 12 [11] (Notification concerning planned measures with possible adverse effects)

65. Mr. TOMUSCHAT (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 12 [11], which read:

Article 12 [11]. Notification concerning planned measures with possible adverse effects

Before a watercourse State implements or permits the implementation of planned measures which may have an appreciable adverse effect upon other watercourse States, it shall provide those States with timely notification thereof. Such notification shall be accompanied by available technical data and information in order to enable the notified States to evaluate the possible effects of the planned measures.

66. Article 12 as proposed by the Drafting Committee was based on article 11 as submitted by the Special Rapporteur at the previous session.¹ All the changes made in that text by the Drafting Committee were designed to make it more precise. The words "If a State contemplates", in the first sentence, had been replaced by "Before a watercourse State implements", which described more accurately the chronological sequence of events. The word "contemplates", which at the previous session had been deemed too vague, had been replaced by "implements or permits the implementation of", so that the article covered not only State activities but also private activities.

67. In the interests of consistency, the Committee had replaced the concept of "new uses" by the broader one of "planned measures". The expression "which may cause appreciable harm" had been replaced by "which may have an appreciable adverse effect", in accordance with the suggestion made by the Special Rapporteur at the previous session in response to the argument that States could not be expected to admit to the intent to commit an internationally wrongful act. The word "notice" had been replaced by "notification", which also appeared in the title.

68. The adjective "available", qualifying "technical data and information", was intended to make it clear that the planning State was bound to communicate only such information as was in its possession or easily accessible to it, as distinct from the totality of relevant information.

69. The changes in the second sentence were largely consequential on the reformulation of the first sentence. The word "notice" had again been replaced by "notification" and in consequence the word "other"

had been replaced by "notified". The Committee had also replaced the word "determine", which implied something binding, by the word "evaluate". It had also harmonized the end of the sentence with the first sentence by replacing the word "harm" by "possible effects" and "proposed new use" by "planned measures". It had decided to delete the adjective "sufficient", which in some cases might be difficult to reconcile with the concept of availability enunciated earlier in the text. Lastly, the Committee had altered the title of the article to bring it into line with the content.

70. Mr. EIRIKSSON said that the word "timely" was too vague and might give rise to confusion if set against the six-month period laid down in articles 13 and 17.

71. Furthermore, the explanations given by the Chairman of the Drafting Committee as to the meaning of the word "available" were highly reminiscent of those he had given concerning the expression "reasonably available" in article 10 (see para. 49 above). The Commission's commentary on that point would have to be drafted with a great deal of care so as to remove all ambiguity.

72. Mr. KOROMA said that, in his view, the use of the words "appreciable adverse effect" did not eliminate the need for a watercourse State to admit in advance that it was planning something that would cause harm to another State. Moreover, since the obligation to notify existed only for a State which foresaw that the planned measures would have an adverse effect, difficulties as to the burden of proof were bound to arise because the State taking the measures could always allege that it did not expect them to have such an effect: in that case, who would have to bear the burden of proof?

73. The CHAIRMAN, speaking as a member of the Commission, said he endorsed Mr. Eiriksson's remark regarding the word "timely" and suggested that, in the Spanish text, the word *oportunamente* should be replaced by *a su debido tiempo*. With regard to the word "appreciable", he would reiterate his comments during the discussion on draft article 8 (2070th meeting, para. 62). He associated himself also with Mr. Eiriksson's observations on the word "available" and urged that the Commission's commentary, or at least the observations it would be submitting to the General Assembly, should clearly emphasize the interpretation to be given to that term.

74. Mr. McCaffrey (Special Rapporteur) said he agreed with Mr. Koroma that the use of the expression "appreciable adverse effect" did not completely resolve the difficulty. That expression, however, had attracted a broad measure of support at the previous session and the Drafting Committee had not found a better one. The main thing was to avoid using in article 12 the same terms as in article 8 and thus avoid the problem mentioned by Mr. Koroma. Moreover, an "appreciable adverse effect" would presumably be less serious than "appreciable harm" and, by planning the measures in question, the State did not intend to go beyond its proper share in the equitable utilization of the watercourse. In any case, the adverse effect involved would be potential rather than definite.

¹ See *Yearbook* . . . 1987, vol. II (Part Two), p. 22, footnote 77.

75. With regard to the onus of proof, if a watercourse State thought that another State was planning measures likely to have an appreciable adverse effect, it could initiate the procedure specified in article 18. The Commission would have an opportunity to revert to that question when it came to examine article 18.

76. Mr. TOMUSCHAT (Chairman of the Drafting Committee), responding to the Chairman's remark, said he was not sure that *oportunamente* was the exact Spanish translation of the English word "timely". Nevertheless, it was important to keep the word "timely" in the English version. The notification had to be made as early as possible in order to avoid the project reaching too advanced a stage to be suspended.

77. With reference to Mr. Eiriksson's comment, the "available" information and technical data was in fact that which existed already. A careful distinction had to be made between the "available" information mentioned in article 12 and the "reasonably available" information referred to in article 10.

78. Mr. Sreenivasa RAO suggested that the word "available" might simply be replaced by "existing".

79. Mr. McCAFFREY (Special Rapporteur) pointed out that the data and information mentioned in article 10 covered a wide range of subjects and that it was therefore necessary to use a more restrictive qualification than in article 12, in which the data and information mentioned was of a more limited nature. For that reason, the Drafting Committee had deemed it sufficient to say "available". A precedent could be found in article 2 (b) of the 1986 Convention on Early Notification of a Nuclear Accident,⁶ in which it was stated that, in the event of an accident, the State in question had to provide the other States and IAEA with "such available information relevant to". The reason for the wording was that, in that case too, the information was narrowly circumscribed. All those explanations would appear in the Commission's commentary.

80. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article 12 [11].

Article 12 [11] was adopted.

Co-operation with other bodies (continued)*

[Agenda item 10]

STATEMENT BY THE OBSERVER FOR THE EUROPEAN COMMITTEE ON LEGAL CO-OPERATION

81. The CHAIRMAN stressed the Commission's long-standing ties with the European Committee on Legal Co-operation and pointed out that the members of the Commission had often had occasion to take into account the solutions adopted by the Committee in the conventions and other legal texts resulting from its work. It was significant that the General Assembly, in paragraph 12 of its resolution 42/156 of 7 December 1987, had reaffirmed its wish that the Commission should continue to enhance its co-operation with in-

tergovernmental legal bodies whose work was of interest for the progressive development of international law and its codification.

82. Mr. HONDIUS (Observer for the European Committee on Legal Co-operation) said he welcomed the visit to the Council of Europe in May by Mr. Roucounas as representative of the Commission and wished first to summarize the current situation with regard to treaties. It was through treaties that regional organizations like the Council of Europe expressed their determination to translate into facts the common European values and ideals, and it was through ratification of those treaties that the member States of the Council of Europe demonstrated their determination to take seriously their obligations under the Statute of the Council of Europe. In accordance with the Statute, membership in a regional organization did not in any way prevent membership in other organizations: that was true in particular for the United Nations, to which most of the members of the Council of Europe belonged and for the European Communities, to which 12 of the Council's 21 members belonged. Accordingly, the International Law Commission, which played a decisive role in the construction of the modern law of treaties, would be interested to see how member States of the Council of Europe applied the law of treaties.

83. The practices of the Council of Europe, like those of the Commission, were anchored in reality, i.e. in the facts and in the interpretation of the facts—a situation which explained the emphasis placed on the spadework in the preparation of treaties. The Council of Europe also attached great importance to the present state of the law, in particular the constitutional law of its member States. That law governed the manner in which those States expressed their consent to be bound by treaty obligations. The procedures involved were in some cases lengthy and complicated, but they were part of the life of European nations and must be respected.

84. Reality also meant "political reality". No amount of agreement between experts could move Governments to ratify a treaty if there was no political will to do so. Acknowledgement of that fact had taught the Council of Europe two lessons. The first was to take advantage of opportunities when they occurred. The conclusion in 1985, three months after the tragedy in the Heysel stadium, of the European Convention on Spectator Violence and Misbehaviour at Sports Events and in Particular Football Matches⁷ provided a good illustration. The Convention had entered into force at the beginning of the following football season and had been ratified by 13 States, including the United Kingdom. Secondly, the Council of Europe was aware of the fact that it could not skip stages in the treaty-making process. With a view to obtaining optimum participation in treaties, it did not try to impose too many obligations too soon, but endeavoured instead to include in a treaty the seed that would later make it blossom forth, as had been done with the most important of European treaties, namely the European Convention on Human Rights.⁸

⁷ Council of Europe, European Treaty Series, No. 120.

⁸ Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 1950) (United Nations, *Treaty Series*, vol. 213, p. 221).

* Resumed from the 2047th meeting.

⁶ See IAEA, Legal Series No. 14 (Vienna, 1987).

85. As from 1 January 1988, the European conventions and agreements which were computer stored were published in loose-leaf form, so that they could be kept constantly up to date with regard to signatures, ratifications, entry into force, reservations and declarations. In the course of the past year, four new treaties⁹ had been opened for signature: the European Convention for the Protection of Pet Animals; the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, which provided for the establishment of an international committee empowered to visit all places holding persons deprived of their liberty by a public authority; the Convention on Mutual Administrative Assistance in Tax Matters, prepared by the Council jointly with OECD; and the Additional Protocol to the European Social Charter. Furthermore, Cyprus, following the example of the other States members of the Council of Europe, had on 21 June last announced its intention to grant the individual right of petition provided for in the European Convention on Human Rights, a right that was fundamental to the truly international protection of human rights.

86. Of the total number of 128 conventions in the European Treaty Series, 107 were in force. Nine draft conventions were at present pending before various organs of the Council of Europe, six of them in the legal field: two on civil and trade law, two on the law relating to asylum and two on criminal law.

87. With regard to the application of treaties, the European Committee on Legal Co-operation had recently drawn the attention of the Committee of Ministers to the delay being experienced in the entry into force of some of those instruments. On that point, the European Committee had arrived at the conclusion that it would be desirable to add to the Council's model final clauses for European conventions and agreements an "opting-out" clause which would help, in particular, to speed up the entry into force of technical protocols amending a convention or a treaty. The European Committee would see to it that reasonable time-limits were laid down in those clauses so as not to create difficulties for States which preferred to go through the conventional procedure of ratification.

88. The European Ministers of Justice, at their sixteenth Conference, held the previous week in Lisbon, had dealt with certain general questions relating to the European conventions. In the first place, they had given their support to the initiative to consolidate in a single instrument, and at the same time simplify and update, the provisions of a dozen different treaties in the field of criminal law dealing with extradition, recognition of judgments, transfer of prisoners and mutual co-operation. In doing so, the European Committee remained sensitive to fundamental political interests, which should not be sacrificed on the altar of efficiency. For that reason, the Council had excluded such treaties as the European Convention on the Suppression of Terrorism,¹⁰ which dealt with subjects that were much too delicate.

89. In regard to private law, the European Ministers of Justice had received a report from the Austrian Minister of Justice analysing the reasons for the success or failure of certain conventions. The Ministers had accordingly proposed a series of practical steps to promote the ratification and practical application of conventions, such as improved information for those who might wish to use those treaties—for instance, judges and lawyers—and to favour requests from non-member States for accession to private law treaties. It seemed appropriate that the Council of Europe, which was endeavouring to achieve closer unity between its member States, should not neglect the benefit which other States, inside and outside Europe, could obtain from participation in certain European treaties. It was in that spirit that the Council was co-operating with countries in other parts of the world and was strengthening its ties with the States of Eastern Europe.

90. The legal work of the Council of Europe reflected the main preoccupations of its member States with the challenges to democratic society, many of which were of international concern: terrorism, drugs, AIDS, traffic in children and young women, and environmental hazards. When a new subject was approached, the first stage often consisted in a statement by the Committee of Ministers of the basic principles enunciated in recommendations or declarations, i.e. non-mandatory instruments. The States members thereupon elaborated their national legislations on the basis of those principles, and it was only after that process that the question arose whether the national laws should be harmonized and strengthened by the adoption of a European convention. A good example of that graded approach was the current work on bio-ethics. On that topic, which touched at the same time on law, ethics and science, and on which there was hardly any national legislation, the Council was as yet formulating principles. He was convinced, however, that sooner or later a convention on the subject would have to be formulated, since it was the future of the whole of mankind that was at stake.

91. The Council's legal activities also touched on issues resulting directly from the movement towards European unity. One of the priority questions in that regard was that of multiple nationality, which was to be studied by a new committee of experts that would be starting work shortly.

92. In the field of direct interest to the International Law Commission, the Council's Committee of Experts on Public International Law, which continued to be very active, served as a clearing-house for information to the member States. One of the standing items on its agenda was precisely the progress of the work of the Commission. The Committee of Experts also acted as the adviser to the Council on important matters of international law. In the past year, it had held exchanges of views on the question of the international liability which might arise from accidents such as that of Chernobyl. It had adopted an opinion on the implications in international law of the measures taken to avoid abuses of diplomatic or consular privileges and immunities in connection with terrorist activities; it had examined the problems of reciprocity in the application of the 1961 and 1963 Vienna Conventions on diplomatic relations

⁹ Council of Europe, European Treaty Series, Nos. 125, 126, 127 and 128.

¹⁰ *Ibid.*, No. 90.

and on consular relations and had undertaken a new study of the privileges and immunities to be granted to international organizations of a technical or commercial nature. That study had resulted from the fact that, among the international organizations that were constantly being developed, some had quite original and very surprising structures.

93. Lastly, he wished to place the report of the Secretary-General of the Council of Europe on the Council's legal activities from May 1986 to May 1988 at the disposal of the members of the Commission, and he invited the members and the secretariat to visit the Maison de l'Europe in Strasbourg.

94. The CHAIRMAN thanked the Observer for the European Committee on Legal Co-operation for his interesting statement on the activities on progressive development and codification of the law being conducted by that prestigious organization, the Council of Europe.

95. Mr. ROUCOUNAS said that he had welcomed the opportunity of representing the Commission at the forty-ninth session of the European Committee on Legal Co-operation. He had been particularly interested in the Committee's work on multiple nationality, on the international aspects of bankruptcy, on liability in the event of accidents to the environment, on medical research and the law, and on violence in the media. He had noted with interest the statement by Mr. Hondius on the "opting-out" formula to speed up the entry into force of conventions. With that formula, the Council of Europe was applying methods suited to its special needs, which were those of a regional organization with only a limited number of member States. The methods used by the International Law Commission were no less anchored in reality, but in a very different reality, because the drafts on which the Commission was working were intended for the whole of the international community.

96. It was gratifying to note the links which bound the European Committee on Legal Co-operation and the International Law Commission and he looked forward to continued co-operation between the Commission and the organs which, in different parts of the world, were engaged in the harmonizing and developing of the law.

The meeting rose at 1 p.m.

2072nd MEETING

Friday, 1 July 1988, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Present: Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/406 and Add.1 and 2,¹ A/CN.4/412 and Add.1 and 2,² A/CN.4/L.420, sect. C, A/CN.4/L.421)

[Agenda item 6]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE
(*continued*)

ARTICLE 13 [12] (Period for reply to notification)

1. Mr. TOMUSCHAT (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 13 [12], which read:

Article 13 [12]. Period for reply to notification

Unless otherwise agreed, a watercourse State providing a notification under article 12 shall allow the notified States a period of six months within which to study and evaluate the possible effects of the planned measures and to communicate their findings to it.

2. The present article was based on article 12, submitted by the Special Rapporteur at the previous session,³ which had dealt with two issues: the period within which the notified State could study and evaluate the effects of planned measures and reply to the notification of the notifying State, and the obligations of the notifying State during that period. The Drafting Committee had decided, in the light of the comments made in plenary meeting, that the second of those issues involved an important obligation and should be given more prominence in a separate article, which would be introduced later as article 14.

3. The new article 13 dealt with the first issue and was closer to alternative B of paragraph 1 of the former article 12. The Drafting Committee had retained the six-month period within which notified States could examine the possible effects of planned measures and give their replies. As the rule laid down was residual and hence effective only in the absence of any agreement, States could always agree on a shorter or longer period. The purpose of the words "Unless otherwise agreed", at the beginning of the article, was to encourage States to negotiate the requisite period; the six-month period would apply only if they failed to do so. Consequently, paragraph 3 of the former article 12 was superfluous and had been deleted. To bring the text of article 13 into line with that of article 12, the word "determinations" had been replaced by "findings", which did not convey the idea of a binding determination.

4. Mr. EIRIKSSON said that, as he read article 13, the main point in regard to the period for reply to notification was that no implementation of the planned measures would be permitted until that period had expired; that being so, he would have preferred a separate article rather than a radical redrafting of the provision. He therefore proposed that articles 13 and 14 should be combined in the following manner: article 13 would become the first sentence of paragraph 1 of the com-

¹ Reproduced in *Yearbook* . . . 1987, vol. II (Part One).

² Reproduced in *Yearbook* . . . 1988, vol. II (Part One).

³ See *Yearbook* . . . 1987, vol. II (Part Two), p. 22, footnote 77.

bined article, the second sentence of which, taken from article 14, would read:

“During this period the notifying State shall provide the notified States, on request, with any additional data and information that is available and necessary for an accurate evaluation.”

Paragraph 2 of the combined article, taken from the remainder of article 14, would read:

“2. During this period the notifying State shall not implement or permit the implementation of the planned measures without the consent of the notified States.”

5. Mr. TOMUSCHAT (Chairman of the Drafting Committee) said that the Drafting Committee had discussed at length the possibility of having a single article, but had decided on two provisions, as embodied in articles 13 and 14. That decision should stand, in his view, unless there was support for Mr. Eiriksson's proposal.

6. Mr. EIRIKSSON said he regarded it as essential to provide for a more definite link between article 13 and article 14. If the notified State wished to make certain comments after the period for reply, it should be allowed to do so.

7. Mr. AL-QAYSI said that a link between articles 13 and 14 was provided by the opening words of article 14: “During the period referred to in article 13”. In any event, it was a cardinal rule of interpretation that articles should be considered in relation to one another rather than in isolation.

8. The CHAIRMAN invited the Commission provisionally to adopt article 13 [12], on the understanding that Mr. Eiriksson's proposal would be recorded in the summary record.

It was so agreed.

Article 13 [12] was adopted.

ARTICLE 14 [12] (Obligations of the notifying State during the period for reply)

9. Mr. TOMUSCHAT (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 14 [12], which read:

Article 14 [12]. Obligations of the notifying State during the period for reply

During the period referred to in article 13, the notifying State shall co-operate with the notified States by providing them, on request, with any additional data and information that is available and necessary for an accurate evaluation, and shall not implement, or permit the implementation of, the planned measures without the consent of the notified States.

10. The present article reproduced the text of paragraph 2 of the former article 12, with some minor drafting changes. The core of the article was reflected in its title.

11. Mr. EIRIKSSON said that the article would be clearer if, as in the article combining articles 13 and 14 which he had proposed, it read: “the notifying State shall provide the notified States, on request, with any

additional data . . .”, the words “shall co-operate with” being deleted.

12. The commas after the words “implement” and “implementation of” were unnecessary and inconsistent with the language of the other articles.

13. The CHAIRMAN suggested that the Commission should provisionally adopt article 14 [12], on the understanding that Mr. Eiriksson's suggestion would be reflected in the summary record and that the secretariat would attend to the minor point of drafting he had raised.

It was so agreed.

Article 14 [12] was adopted.

ARTICLE 15 [13] (Reply to notification)

14. Mr. TOMUSCHAT (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 15 [13], which read:

Article 15 [13]. Reply to notification

1. The notified States shall communicate their findings to the notifying State as early as possible.

2. If a notified State finds that implementation of the planned measures would be inconsistent with the provisions of articles 6 or 8, it shall provide the notifying State with a reasoned and documented explanation of such finding within the period provided for in article 13.

15. To take account of the comments made at the Commission's previous session and with a view to greater clarity, the Drafting Committee had decided to divide the article 13 submitted by the Special Rapporteur at that session⁴ into two articles, now numbered 15 and 17. Former article 13 had regulated the three stages of the interaction between the notifying and notified States regarding planned measures. First, the notifying State made an assessment as to whether or not its planned measures would have appreciable adverse effects on the other watercourse States and communicated its findings to them. Secondly, if the notified State was not satisfied with that assessment or if there were discrepancies between the findings of the two States, they were required to negotiate with a view to reaching agreement. Thirdly, if the States concerned were unable to resolve their differences through consultation and negotiation, they would resort to the most expeditious procedure for the settlement of disputes binding on them or, in the absence of such binding procedure, to procedures provided for in the articles.

16. The Drafting Committee had decided not to deal at the present time with the third stage—the procedure for the settlement of disputes—since it was still not clear whether it would be covered in the body of the draft, in a separate optional protocol or, indeed, at all. Paragraph 4 of the former article 13, which dealt with that procedure, had therefore been deleted. The Commission might, however, wish to revert to the matter later.

17. The two other stages—reply to notification and consultation—were dealt with in articles 15 and 17 respectively. Article 15 corresponded to paragraphs 1

⁴ *Ibid.*

and 2 of the former article 13. When a notifying State made a notification under article 12, there were two possibilities: either the notified State would be satisfied that there would be no appreciable adverse effects, or it would not. Paragraph 1 provided for both situations. Since the six-month suspension pending a reply from the notified State operated as a restriction on the sovereign right of the notifying State, the expectation of a reply "as early as possible" seemed reasonable.

18. Paragraph 2 of article 15, which corresponded to the second situation, laid down certain requirements when the notified State found that there would be adverse effects. Those requirements related to the time within which the reply had to be made, to the substance of the reply, and to the principle of good faith. Thus, if the findings of the notified State indicated possible adverse effects, that State would have to reply within the six-month period laid down in article 13. It would also have to indicate in its findings that the planned measures would be inconsistent with articles 6 or 8, which set out, respectively, the principle of equitable and reasonable utilization and the obligation not to cause appreciable harm; reference had been made to those articles to obviate the need for lengthy explanations of what constituted appreciable adverse effects and equitable utilization. Lastly, good faith required, first, that a notified State foreseeing adverse effects should determine that the effects of the planned measures "would be inconsistent with the provisions of articles 6 or 8", the verb "would" being intended to indicate a serious and considered assessment by the notified State; and secondly, that the assessment should be supported by a "reasoned and documented explanation".

19. The title of article 15 was that of the former article 13, in shortened form.

20. Mr. EIRIKSSON proposed that, for the sake of clarity, the first part of paragraph 2 of article 15 should be reworded to read: "If a notified State communicates to the notifying State that it finds that implementation of the planned measures . . .", and that in the same paragraph the words "provided for" should be replaced by the words "referred to", to bring the text into line with article 14.

21. Mr. KOROMA, referring to the expression "reasoned and documented" in paragraph 2, proposed that the conjunctive "and" should be replaced by the disjunctive "or". There was no reason why a State that lacked resources should be required to produce a documented explanation, which could involve considerable expense. States in a position to do so could produce both reasons and documentation, but those not in such a position should be allowed to produce either a reasoned or a documented explanation.

22. Mr. TOMUSCHAT (Chairman of the Drafting Committee) said that he could agree to Mr. Eiriksson's second proposal. With regard to the first, however, since it was clear that paragraph 2 of article 15 was an instance of the application of paragraph 1, there could be no doubt as to its meaning. Besides, the insertion of additional wording might make the text too heavy. He was therefore in favour of retaining the text as drafted.

23. He understood Mr. Koroma's difficulty, but thought that the expression "reasoned or documented" sounded a little strange. Possibly the words "and documented" could be deleted, since the word "reasoned" would imply that documentation could be added if necessary.

24. Mr. BARSEGOV said that he was sympathetic to the interests of those countries that might have difficulties, but the situation was very complex, and any prohibition that prevented a State from building something in its own territory must be well-founded. Mere objections were not enough; proof was needed to show why a State should have its most essential sovereign rights restricted, especially in its own territory. In his view, it would be wrong to delete the words "and documented". The problem could perhaps be resolved by introducing a requirement of agreement between the States concerned. He did not, however, have any ready-made form of words to suggest.

25. Mr. KOROMA said that, inasmuch as the problem arose from the juxtaposition of the words "reasoned" and "documented", he would suggest that the former be deleted and the latter retained.

26. Mr. McCAFFREY (Special Rapporteur) explained that the idea behind the expression "reasoned and documented explanation" was that a requirement should be imposed on a State which asked another State to abstain from certain measures to show that it had good reason for making its request. The Commission had also considered, as was clear from its discussion at the previous session, that some balance should be introduced between the State that was planning measures and the potentially affected State, so as to prevent the latter from simply holding up a planned project at its whim. The requirement that it should provide a reasoned and documented explanation went at least some way towards restoring a balance between the positions of the two States. It was a delicate balance, however, and any attempt to change it might upset the equilibrium, which he for one would be reluctant to do.

27. Mr. BENNOUNA said he fully agreed that the words "reasoned and documented" should be retained in the interests of maintaining a balance between the countries concerned. A finding that was not reasoned, in the sense of the French word *motivé*, might consist simply of the finding, plus any supporting documents; the grounds for the finding would not be known, and that could place the notifying State in a weak position.

28. Mr. KOROMA said that he maintained his position since, in his view, it would not disturb the balance between watercourse States. If a State wished to buttress its case by providing diagrams and maps, and had the facilities to do so, well and good; but if it did not have such facilities, it should suffice if it provided reasons for its objections. It should not be further encumbered by having to provide documents.

29. Mr. HAYES said that both terms, "reasoned" and "documented", should be retained. Clearly, a State should not be allowed to prevent another State from proceeding with a project simply by contending that it would be adversely affected; it must be required to advance arguments, which was what was meant by

"reasoned", and to provide evidence that it was not making a frivolous claim. A State that claimed it would be adversely affected would have made some kind of study or examination of the situation; the material on which it had based its conclusions should be provided in support; that was what was meant by a "documented explanation". It was not too onerous a burden to place on a State, and the provision could be complied with fairly easily.

30. Mr. FRANCIS suggested that the phrase "reasoned and documented explanation" be placed in square brackets provisionally; the Commission might vote to delete it at a later stage, as had been done on other occasions. There was obviously a consensus in favour of retaining the phrase, but the concern expressed by Mr. Koroma should be taken into account. By placing the phrase in square brackets, the Commission would give Mr. Koroma time to decide whether he wished to maintain his objections, and give the Special Rapporteur an opportunity for detailing, in the commentary, the arguments advanced concerning that phrase.

31. Mr. AL-QAYSI said he did not think the phrase should be placed in square brackets; that would imply, for the Sixth Committee and other readers, that the Commission was not convinced that a State that feared it would be adversely affected should provide an explanation of its position. He strongly sympathized with the concern expressed by Mr. Koroma, but thought it should be allayed by the argument put forward by Mr. Hayes. The phrase in question signified that a State could not simply announce that it was about to be harmed; it had to make a case, and in doing so it would, as a matter of course, produce some sort of documentation. Changing the wording, as the Special Rapporteur had noted, entailed tampering with a delicate balance; in practical terms, it might discourage an upstream State from signing the future instrument.

32. The CHAIRMAN said that, in view of the explanations given by the Chairman of the Drafting Committee and the Special Rapporteur, and of the position adopted by most members of the Commission, he would recommend that the article be approved without alteration. The use of square brackets might indeed give the Sixth Committee a wrong impression, and in any case the article still had to be considered on second reading.

33. Mr. BARSEGOV said that the Commission was drafting a framework agreement on the basis of which States would conclude specific agreements reflecting their own concerns. The African countries, for example, could make the necessary adjustments in their regional, subregional and bilateral agreements.

34. Mr. FRANCIS, speaking on a point of order, said a request by even one member of the Commission for square brackets to be incorporated in a text should be given immediate and careful consideration. A decision to incorporate square brackets would not prejudice the consideration of the article on second reading because the reasons for it could be stated in the commentary, which was designed for precisely such expressions of position. Hence the incorporation of square brackets would not give the Sixth Committee a wrong impression.

35. Mr. YANKOV said that the Commission should try to restrict the use of square brackets in its texts to serious differences of opinion on substantive issues. The problem being discussed was really one of semantics and did not justify the use of square brackets. As Mr. Barsegov had pointed out, the specific agreements adopted on the basis of the Commission's text would spell out the necessary arrangements.

36. Mr. KOROMA remarked that the problem might have arisen because "reasoned and documented explanation" was a phrase the Commission had never used before. He proposed that it be replaced either by "written explanation" or by "reasoned and as far as possible documented explanation". He maintained his view that unnecessary burdens should not be imposed on States that were not in a position to provide documented evidence. As a trial lawyer, he well knew that a case could be lost on failure to produce documentation.

37. Mr. McCAFFREY (Special Rapporteur) pointed out that the phrase "reasoned and documented explanation", or its equivalent, was used in a number of watercourse agreements and in several major trade agreements, including the Multifibre Arrangement concluded under the auspices of GATT. In most cases the terms were even more rigorous, requiring much more detailed explanation than in the present formulation. A State would not have to produce original maps, charts or displays; the reasons for its findings could simply be articulated and accompanied by any supporting material it possessed.

38. It should be remembered that it was not only the potentially affected State that was inconvenienced; a burden was also imposed on the State that was asked to halt a project. Any State, whether upstream or downstream, could be placed in such a position: the construction of a dam, for example, might have consequences for an upstream State. Thus the article was directed at any measures taken by a watercourse State, regardless of whether it was upstream or downstream, that affected another watercourse State.

39. The balance reflected in the text had been achieved after much hard work and discussion, and he appealed to members not to abandon it by incorporating substantive changes or square brackets. It should be sufficient to explain in the commentary that the "reasoned and documented explanation" contemplated was not one that would be onerous, but that a number of members had reservations about that requirement, believing it might impose an undue burden on the potentially affected State.

40. Mr. TOMUSCHAT (Chairman of the Drafting Committee) agreed that Mr. Koroma's concern might be met by explaining in the commentary that the phrase "reasoned and documented explanation" established, not an absolute standard, but one that would vary according to circumstances and referred to the documents in which a good administration would give the factual basis for its assessment. The material might of course vary according to the capabilities of the administration concerned, but no watercourse State should be obliged to hire foreign experts at high cost.

41. Mr. GRAEFRATH said it should be kept in mind that the Commission was trying to draft an instrument that could be accepted by as many States as possible and would in any case be only a framework for specific watercourse agreements. Many States had difficulties even in feeding their populations and would hardly have sufficient resources to produce a well-documented argument. The Commission should do more to take account of the concern expressed by Mr. Koroma than simply place the phrase in square brackets. True, an adequate explanation must be given for preventing a State from carrying out a project, but all States, irrespective of their economic situation, should be enabled to make such a request. The Commission should explain in the commentary not that a number of members had reservations concerning the phrase "documented explanation", but that it construed that phrase as allowing a certain flexibility, as was fitting in a framework agreement, its meaning being adaptable to the situations of the States concerned.

42. Mr. Sreenivasa RAO said that, in drafting articles for adoption by States, the Commission should take into consideration the special circumstances of developing countries—their economic capabilities and levels of expertise in complex fields. He fully sympathized with the concern expressed by Mr. Koroma and Mr. Francis. Clearly, there were cases in which a State would be unable to furnish a sophisticated analysis of a situation or to provide evidence based on elements that were beyond its grasp. In such cases, an explanation that was as reasoned and as documented as possible should be acceptable, and the Commission might wish to make that clear in the commentary by explaining that the phrase should be construed as meaning as reasoned and documented an explanation as possible in the circumstances.

43. It should also be recalled that the articles would impose strict obligations, under which developing countries trying to achieve progress might find their projects arrested. The interests of developing countries were thus engaged on both sides of the issue.

44. Mr. FRANCIS explained that he had not been making a formal proposal, but merely a suggestion, regarding the incorporation of square brackets.

45. Mr. BEESLEY said the discussion showed why the text must take the form of a framework agreement: it would have to be adapted to particular circumstances. Article 15 might be made more acceptable if the words "reasoned and documented explanation" were replaced by the words "reasoned explanation which is documented to the extent feasible". That would cover not only the situations being discussed, but also a number of others: for example, when there were differences of opinion among engineers, scientists or technicians. He would even favour deletion of the word "reasoned", since it was unlikely that a State would make an unreasoned explanation.

46. Mr. NJENGA said he believed the text of the article as it stood was adequate for the Commission's purposes. He understood the concern expressed by Mr. Koroma and others, but thought that States could be relied on to produce well-founded arguments for

stopping a project. He endorsed the proposal that the concern expressed during the discussion should be reflected in the commentary.

47. Mr. PAWLAK said that the points raised required serious attention and should perhaps be dealt with in the commentary. Alternatively, the fears expressed by Mr. Koroma could perhaps be allayed by inserting the words "as far as possible" before the word "documented" in paragraph 2.

48. The CHAIRMAN, noting that that proposal was very similar to the proposals put forward by Mr. Hayes and Mr. Beesley and also corresponded to the spirit of Mr. Sreenivasa Rao's remarks, asked whether the Commission was prepared to accept it on the understanding that an appropriate explanation would be included in the commentary. The draft article could of course be amended further on second reading.

49. Mr. ARANGIO-RUIZ suggested that it might be simpler to speak of a "reasonably documented" explanation.

50. Mr. BARSEGOV observed that the various proposals before the Commission were not identical. The text proposed by Mr. Pawlak and taken up by the Chairman would be appropriate for relations between countries that would have genuine difficulty in documenting a finding, but not under the conditions of, say, the countries of Western Europe. Would a project in that part of the world really have to be held up when a notified State claimed that it could not provide a documented explanation? While recognizing the need to proceed quickly with the discussion, he thought it would be worth spending a little more time trying to find wording applicable to all cases.

51. Mr. BEESLEY agreed that the proposals before the Commission differed, and reiterated his view that the word "feasible" was more appropriate than the word "possible".

52. Mr. BENNOUNA, supported by Mr. YANKOV, proposed that members having suggestions for the wording of article 15, paragraph 2, should meet with the Chairman of the Drafting Committee and the Special Rapporteur during the break, with a view to producing an agreed text.

It was so agreed.

The meeting was suspended at 11.30 a.m. and resumed at 12.10 p.m.

53. The CHAIRMAN announced that attempts to redraft article 15, paragraph 2, had not yet been successful. He suggested that the Commission should suspend consideration of that article and revert to it after consideration of the other articles proposed by the Drafting Committee.

It was so agreed.

54. Mr. EIRIKSSON stressed the importance of using very precise language in paragraph 2 of article 15, because of the references to that paragraph in articles 16 and 17. It did not matter very much if a text read a little heavily, provided it was unambiguous. An attempt to say too many things in too few words was to be deprecated.

ARTICLE 16 [14] (Absence of reply to notification)

55. Mr. TOMUSCHAT (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 16 [14], which read:

Article 16 [14]. Absence of reply to notification

If, within the period provided for in article 13, the notifying State receives no communication under paragraph 2 of article 15, it may, subject to its obligations under articles 6 and 8, proceed with the implementation of the planned measures, in accordance with the notification and any other data and information provided to the notified States.

56. The article corresponded to and closely followed paragraph 2 of article 14 as submitted by the Special Rapporteur at the previous session.⁵ As the title indicated, it dealt with the case in which a notification under article 12 failed to elicit any reply from the notified State within the period of six months provided for in article 13.

57. The idea underlying the article was that in such a case the notified State was estopped from claiming the benefit of the protective régime provided for in the draft. The notifying State might therefore proceed with the implementation of the planned measures subject, however, to two important provisos: first, the notifying State remained bound to comply with articles 6 and 8; secondly, the implementation of the planned measures had to be in accordance with the notification and the data and information communicated to the notified State. The rationale for the second proviso was that the silence of the notified State could be interpreted as passive consent only to planned measures which had been brought to its knowledge.

58. The Drafting Committee had redrafted the opening part of the original text in order to make it clear that, if there were a plurality of notified States, the notifying State might proceed with the implementation of the planned measures only if it had received no communication under paragraph 2 of article 15, in other words a communication which stated certain objections.

59. The other changes made by the Drafting Committee had been aimed at simplifying the text or ensuring its consistency with the articles previously adopted. The Committee had considered that the formulation would be tighter if the concluding phrase, "provided that the notifying State is in full compliance with articles 12 and 13", were removed and the references to articles 12 and 13 transferred to a more appropriate position in the text. For the sake of consistency, the words "the initiation of the contemplated use" had been replaced by the words "the implementation of the planned measures".

60. Mr. EIRIKSSON said that, first, he did not consider the phrase "under paragraph 2 of article 15" sufficiently precise. Secondly, the words "within the period provided for in article 13" seemed unnecessary, because the same words appeared in paragraph 2 of article 15, which was referred to in the same sentence. Thirdly, with regard to the words "proceed with the implementation of the planned measures", he pointed out that articles 12 and 14 spoke of implementing or permitting the

implementation of planned measures and that article 19 used the words "immediately proceed to implementation". In order to avoid confusion, the same wording should be used throughout the draft.

61. Mr. TOMUSCHAT (Chairman of the Drafting Committee) agreed that the words "within the period provided for in article 13" were not strictly necessary. In his opinion, however, the words "proceed with the implementation of the planned measures", should be retained, it being explained in the commentary that the term "implementation" was used in a broad sense, which included permitting implementation.

62. Mr. McCAFFREY (Special Rapporteur) said that, although the words "within the period provided for in article 13" could indeed be considered redundant, the feeling in the Drafting Committee had been that the point was an important one and should be re-emphasized. He would not press for retention of those words, but he wondered whether Mr. Eiriksson's suggestion did not run counter to the point Mr. Eiriksson had just made about article 15.

63. Mr. AL-QAYSI said that the passage in question related to the period of six months referred to in article 13, whereas the reference to a communication under paragraph 2 of article 15 related to the nature of the communication provided by the notified State. In his opinion, the reference was helpful and should be retained.

64. Mr. HAYES suggested that, if the phrase in question were omitted, the words "under paragraph 2", in the following phrase, should be replaced by "as provided for in paragraph 2". Thus worded, the reference to paragraph 2 of article 15 would embrace the period provided for in article 13. If, however, it was decided to retain the text of article 16 as it stood, the words "provided for" should be replaced by the words "referred to", so as to bring the text into line with the revised version of article 15, paragraph 2.

65. Mr. BARSEGOV remarked that what seemed clear to members of the Commission might not be clear to all future readers of the draft articles. At the present stage, the clarity of the text was a more important consideration than a highly polished style.

66. Mr. McCAFFREY (Special Rapporteur) agreed with Mr. Al-Qaysi that the deletion of the words "within the period provided for in article 13" would change the emphasis and thus create a risk of losing an important point. He appealed to the Commission to retain the text as it stood.

67. Mr. TOMUSCHAT (Chairman of the Drafting Committee) said that the views expressed by the preceding speakers had convinced him of the usefulness of retaining the phrase in question.

68. Mr. CALERO RODRIGUES associated himself with the views expressed by Mr. Al-Qaysi, the Special Rapporteur and the Chairman of the Drafting Committee.

69. Mr. EIRIKSSON said that he would not press for the suggested deletion. However, the remarks made by

⁵ *Ibid.*

Mr. Hayes had reinforced his view that paragraph 2 of article 15 should be drafted more clearly.

70. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article 16 [14] as proposed by the Drafting Committee.

Article 16 [14] was adopted.

ARTICLE 17 [13] (Consultations and negotiations concerning planned measures)

71. Mr. TOMUSCHAT (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 17 [13], which read:

Article 17 [13]. Consultations and negotiations concerning planned measures

1. If a communication is made under paragraph 2 of article 15, the watercourse States concerned shall enter into consultations and negotiations with a view to arriving at an equitable resolution of the situation.

2. The consultations and negotiations provided for in paragraph 1 shall be conducted on the basis that each State must in good faith pay reasonable regard to the rights and legitimate interests of the other State.

3. During the course of the consultations and negotiations, the notifying State shall, if so requested by the notified State at the time of making the communication under paragraph 2 of article 15, refrain from implementing or permitting the implementation of the planned measures for a period not exceeding six months.

72. The present article was based on paragraphs 3 and 4 of article 13 as submitted by the Special Rapporteur at the previous session,⁶ which had dealt with consultations and negotiations between the watercourse State that was planning measures and the other watercourse States, in case of disagreement about their findings concerning the effects of those measures. The requirements for those consultations and negotiations, and the conditions under which they should take place, constituted the core of article 17.

73. Paragraph 1 stated the general requirement of entering into consultations and negotiations in case of disagreement between the watercourse States concerned. Those States were the ones referred to in paragraph 2 of article 15. Paragraph 1 also stated the purpose of such consultations and negotiations, namely, to arrive at "an equitable resolution of the situation".

74. Paragraph 2 related to the conduct of consultations and negotiations. The language of that paragraph—which corresponded to that of paragraph 4 of the former article 13—had been taken from the award in the *Lake Lanoux* case. That explained the introduction of the word "interests", which had not previously been used in other draft articles. The Drafting Committee had thought it useful to include that word in article 17, qualifying it with the adjective "legitimate". The purpose of the article was to set in motion a process of consultations and negotiations between the States concerned with the aim of arriving at an equitable solution. Each State was asked to pay "reasonable regard" to the

other State's interests. All the obligations provided for under paragraph 2 had been given sufficient flexibility to maintain a balance between the interests of both parties. Furthermore, the fact that the word "interests" was qualified by the adjective "legitimate" provided a useful safeguard. For in the context of a general convention, the word "interests" could have a very broad meaning and it would perhaps be best to limit it to "legitimate" interests.

75. Paragraph 3 introduced two elements in the process of consultation and negotiation. One was the suspension of the implementation of planned measures during the consultations and negotiations; the other was the duration of that suspension. The Drafting Committee had found that those two elements were necessary to enhance the purpose of the article and to maintain a reasonable balance in protecting the interests of the parties concerned. The suspension of implementation of the planned measures was necessary because the consultations and negotiations would have no purpose if the State planning the measures could go ahead and implement them. At the same time, the Drafting Committee had considered that the suspension should be only for a reasonable period. It had been well aware that the determination of that period might appear somewhat arbitrary and that the States concerned were in a better position to decide the duration of the suspension in each case. Nevertheless, the Committee had decided that it would be prudent to set a maximum period, in case the States concerned were unable to agree. Six months seemed a reasonable maximum period for suspension of the implementation of planned measures and for consultations to resolve the differences.

76. The six-month suspension could come into effect only if, first, it was requested by the notified State and, secondly, the request was made when the notified State made a communication under paragraph 2 of article 15, indicating that the planned measures were inconsistent with the provisions of articles 6 and 8. The maximum six-month period of suspension would run from the date of that communication.

77. After that suspension period, the State planning the measures could go ahead with the implementation of its plans without being in violation of article 17. Of course, the article was without prejudice to the obligations of the State planning the measures under articles 6 and 8. The Drafting Committee had considered that paragraph 3 brought the objects of article 17 into much sharper focus and made it possible to comply with the article more effectively.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (*continued*)*
(A/CN.4/409 and Add.1-5,⁷ A/CN.4/417,⁸ A/CN.4/L.420, sect. F.3)

[Agenda item 4]

* Resumed from the 2070th meeting.

⁷ Reproduced in *Yearbook* . . . 1988, vol. II (Part One).

⁸ *Ibid.*

⁶ *Ibid.*

EIGHTH REPORT OF THE SPECIAL RAPPORTEUR
(continued)

CONSIDERATION OF THE DRAFT ARTICLES⁹
ON SECOND READING (continued)

78. The CHAIRMAN said that, as Mr. Pawlak would be absent during the coming week, when the Commission proposed to discuss agenda item 4, he would call on him to speak on that item.

79. Mr. PAWLAK thanked the Chairman for giving him an opportunity of speaking on item 4 and congratulated the Special Rapporteur on his excellent eighth report (A/CN.4/417).

80. The draft articles submitted by the Special Rapporteur, with the amendments he had introduced at the current session, reflected the views of many States and could be referred to the Drafting Committee for further refining. At the present stage he wished to make some general comments on methodological questions and the final form the draft articles should take.

81. In the first place, he believed that the Commission should continue its work with a view to completing consideration of item 4 during the current term of office of its members. The topic was of practical importance to all States and to the international community as a whole. Notwithstanding some doubts expressed by a few members, there was a need to work out a universal international legal instrument for the effective protection of the diplomatic courier and the diplomatic bag, which at the same time would help to prevent possible abuses. The existing universal agreements, in particular the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations, did not fully cover all aspects of contemporary communication, especially between States, through the courier and the bag.

82. Moreover, the increasing number of violations of diplomatic law made it imperative to seek a more comprehensive and coherent regulation of the status of all types of official couriers and official bags and to guarantee them the same degree of international legal protection. He fully shared the Commission's view, expressed in paragraph (1) of the commentary to article I, that:

... This comprehensive approach rests on the common denominator provided by the relevant provisions on the treatment of the diplomatic courier and the diplomatic bag contained in the multilateral conventions in the field of diplomatic law, which constitute the legal basis for the uniform treatment of the various couriers and bags. . . .¹⁰

83. At the same time, it was necessary to take into consideration the practice of States, in most bilateral consular agreements, of treating consular couriers basically in the same way as diplomatic couriers. He accordingly supported the Special Rapporteur's proposal that the scope of the draft articles should not be confined to diplomatic couriers and diplomatic bags, but should also cover consular couriers and bags, as well as couriers and bags of the important international organizations of a universal character.

84. Article III, section 10, of the 1946 Convention on the Privileges and Immunities of the United Nations, quoted in the eighth report (*ibid.*, para. 58) provided that:

The United Nations shall have the right to use codes and to dispatch and receive its correspondence by courier or in bags, which shall have the same immunities and privileges as diplomatic couriers and bags.

Similar provisions were to be found in the conventions on the privileges and immunities of some other organizations. He therefore supported the Special Rapporteur's proposal to introduce in article 1 a new paragraph 2 extending uniform legal treatment to the couriers and bags of some international organizations (*ibid.*, para. 60). It was necessary, however, to be very cautious about that extension; it should cover only the couriers and bags of the important international organizations of a universal character, namely the United Nations, the specialized agencies and a very few other organizations.

85. He believed that the draft articles should eventually become an independent convention. The status of the official courier and the bag was only partly regulated by existing conventions; a new convention could contribute to the promotion of international relations, harmonize the frequently opposing interests of the receiving and sending States and help to overcome many practical problems. The new convention should, however, be closely linked with the existing conventions on diplomatic and consular law.

86. In his view, the official courier should have not only personal protection, but also complete inviolability. He therefore strongly recommended that article 17, on the inviolability of the temporary accommodation of the courier, should be retained, as proposed by the Special Rapporteur. That text struck an adequate balance between the interests of the sending, transit and receiving States.

87. Any limitation of the inviolability of the courier to his person alone, which would allow a receiving or transit State to inspect and search his temporary quarters, would undermine the whole concept of the inviolability of the courier as an important instrument of international communication.

88. Article 18, on immunity from jurisdiction, was one of the most important provisions of the whole draft. In conformity with the functional approach, he supported the view that the courier should enjoy immunity from criminal, civil and administrative jurisdiction in respect of all acts performed in the exercise of his functions.

89. Paragraph 2 of article 18 should be carefully revised to make it cover such matters as the requirement of third-party liability insurance for a motor vehicle used by a courier. On that point, he drew attention to the proposal made by the German Democratic Republic in its comments (A/CN.4/409 and Add.1-5).

90. Article 28, on the protection of the diplomatic bag, called for further consideration. The Special Rapporteur had drawn attention to the very real difficulties involved and had presented three alternative texts (A/CN.4/417, paras. 244-253). He himself preferred

⁹ For the texts, see 2069th meeting, para. 6.

¹⁰ Yearbook . . . 1983, vol. II (Part Two), p. 53.

alternative A, which in practice covered both diplomatic and consular bags. It could be criticized for that reason, but in his view a pragmatic approach should be adopted. As stated in the comments by the Italian Government, “the distinction between diplomatic and consular bags has become obsolete in international practice” (A/CN.4/409 and Add.1-5).

The meeting rose at 1.20 p.m.

2073rd MEETING

Tuesday, 5 July 1988, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Present: Mr. Al-Baharna, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/406 and Add.1 and 2,¹ A/CN.4/412 and Add.1 and 2,² A/CN.4/L.420, sect. C, A/CN.4/L.421)

[Agenda item 6]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE
(*concluded*)

ARTICLE 17 [13] (Consultations and negotiations concerning planned measures)³ (*concluded*)

1. Mr. EIRIKSSON said that, although he did not intend at the present stage to propose amendments to article 17, he wished to make a few comments on the text. First, the expression “the watercourse States concerned”, in paragraph 1, was much too vague and he would have preferred “the notifying State and the State making the communication”. In paragraph 2, it would have been preferable to replace the words “The consultations and negotiations provided for in paragraph 1” by “These consultations and negotiations”, and, in paragraph 3, to replace the words “if so requested by the notified State at the time of making the communication under paragraph 2 of article 15” by “if the other State so requests at the time it makes the communication”. Lastly, he wondered whether the members who had pressed for the retention in article 16 of the words “within the period provided for in article

13” might not be concerned that the same words did not appear in article 17.

2. Mr. AL-QAYSI, supported by Mr. KOROMA and Mr. MAHIOU, proposed that the words “the watercourse States concerned”, in paragraph 1, should be replaced by the form of words suggested by Mr. Eiriksson.

3. Mr. TOMUSCHAT (Chairman of the Drafting Committee) said that the proposal was acceptable. On the other hand, he thought it necessary to retain the present wording of paragraph 2 and keep the words “provided for in paragraph 1”.

4. Mr. KOROMA suggested the deletion, in paragraph 2, of the adjective “legitimate” before “interests”. The adjective was pointless, since the State invoking an interest had in any case to establish that the interest was a valid one.

5. Mr. TOMUSCHAT (Chairman of the Drafting Committee) said that the Drafting Committee had considered that the word “interests” on its own would be much too broad, because it could also apply to interests not in conformity with the principles of international law.

6. Mr. KOROMA said that, although he was not convinced, he would not press his proposal.

7. The CHAIRMAN suggested that the Commission should provisionally adopt article 17 [13] with the amendment proposed by Mr. Al-Qaysi, and accepted by the Chairman of the Drafting Committee, to replace the words “the watercourse States concerned”, in paragraph 1, by “the notifying State and the State making the communication.”

It was so agreed.

Article 17 [13] was adopted.

ARTICLE 19 [15] (Measures of utmost urgency)

8. Mr. TOMUSCHAT (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 19 [15], which read:

Article 19 [15]. Measures of utmost urgency

1. In the event that the implementation of planned measures is of the utmost urgency in order to protect public health, safety or other equally important interests, the State planning the measures may, subject to articles 6 and 8, immediately proceed to implementation, notwithstanding the provisions of article 14 and paragraph 3 of article 17.

2. In such cases, a formal declaration of the urgency of the measures shall be communicated to the other watercourse States referred to in article 12 together with the relevant data and information.

3. The State planning the measures shall, at the request of the other States, promptly enter into consultations and negotiations with them in the manner indicated in paragraphs 1 and 2 of article 17.

9. Article 15 submitted by the Special Rapporteur at the previous session⁴ dealt with measures of extreme urgency which the State had to implement immediately, without waiting for the expiration of the period allowed to other States for reply and for study and evalua-

¹ Reproduced in *Yearbook* . . . 1987, vol. II (Part One).

² Reproduced in *Yearbook* . . . 1988, vol. II (Part One).

³ For the text, see 2072nd meeting, para. 71.

⁴ See *Yearbook* . . . 1987, vol. II (Part Two), pp. 22-23, footnote 77.

tion of the effects of those measures. The measures were considered urgent if there were a threat to public health, safety or other similar considerations. The debate at the previous session had indicated some differences of opinion on the usefulness of the article. Some members had considered that it would be unfair to penalize a State in such exceptional situations and had therefore wanted those situations to be dealt with in the draft. Others had been concerned that the article was too broad and feared that States might invoke it in order to avoid their obligations. The Drafting Committee had thought that it would be useful to have an article on exceptional situations but that it should be drafted carefully to eliminate or minimize abuse. The three paragraphs of article 19 took account of those considerations.

10. Paragraph 1 contained a definition of the situation of utmost urgency: since the Drafting Committee had judged that it would be impossible to list all such situations, it had preferred to lay down criteria. The Committee had found the criteria originally proposed by the Special Rapporteur viable for that purpose. Nevertheless, to avoid too broad an interpretation of the provision, it had decided to alter it slightly and replace the words "similar considerations" by "equally important interests".

11. In addition, paragraph 1 waived the waiting period provided for in article 14 and in paragraph 3 of article 17, subject of course to articles 6 and 8, the application of which was not suspended even for measures of utmost urgency.

12. Paragraph 2 corresponded to the last part of paragraph 1 and the opening of paragraph 2 of former article 15: a State having to implement measures of utmost urgency was required to make a formal declaration to the potentially affected watercourse States mentioned in article 12, and that declaration must be accompanied by relevant information and data. Under the new paragraph 2, as opposed to the original text, there was no obligation of notification under article 12. The whole point was that the State implementing measures of utmost urgency did not have the time to follow the normal procedures. Nevertheless, the other watercourse States should not be left completely helpless, and they should be given some data and information on urgent measures.

13. Paragraph 3 was concerned with situations in which the other watercourse States believed, after receiving the information and data, that the urgent measures would have appreciable adverse effects upon them. The Drafting Committee had considered that all that could reasonably be expected in such situations was to require the States concerned promptly to enter into consultations with each other "in the manner indicated in paragraphs 1 and 2 of article 17". That wording, which helped to avoid a long repetition, referred only to the purpose and conduct of consultations; it referred neither to the obligation triggered by the provisions of article 17, nor to the applicability of paragraph 2 of article 15 mentioned therein.

14. Paragraph 3 of the original article 15 had been deleted, since the Drafting Committee had taken the

view that, in an article on procedures for evaluating the effects of planned measures, it was inappropriate to refer to the liability arising from those effects.

15. With regard to the title of article 19, the Drafting Committee had thought it more logical to drop the word "planned", since the article dealt with emergency situations in which States did not have time to plan measures. Consequently, the article was entitled "Measures of utmost urgency". In the text of the article, however, the expression "planned measures" continued to be used.

16. Mr. AL-QAYSI said that, although he understood the Drafting Committee's reasons for using the expression "equally important interests" in paragraph 1, he was bound to point out that an interest could be important without necessarily being urgent. It was therefore necessary to find some other qualifier that would bring out the idea of urgency.

17. Mr. EIRIKSSON said he did not like the formula "immediately proceed to implementation", in paragraph 1, for the reasons he had already indicated in connection with article 16 (2072nd meeting, para. 60). He would have preferred the phrase: "implement or permit the implementation".

18. Paragraph 2 mentioned the "watercourse States referred to in article 12". In fact, the States referred to in article 12 were the States on which the planned measures could have an adverse effect and which had to be notified. A more precise formula should therefore have been used, such as "on which the measures may have an appreciable adverse effect".

19. In paragraph 3, the words "shall, at the request of the other States, promptly enter into consultations and negotiations with them" should be replaced by "shall, at the request of a State referred to in paragraph 2, promptly enter into consultations and negotiations with it". Again, instead of saying "in the manner indicated in paragraphs 1 and 2 of article 17", the present wording of those paragraphs should be used, namely "with a view to arriving at an equitable resolution of the situation. These consultations and negotiations shall be conducted on the basis that each State must in good faith pay reasonable regard to the rights and legitimate interests of the other State". That remark applied also to paragraph 2 of article 18.

20. Lastly, since paragraph 3 of article 18 also provided for a six-month waiting period, might it not be appropriate to add a reference to that paragraph at the end of paragraph 1 of draft article 19?

21. Mr. BARSEGOV urged that, in future, amendments as complex as those which had just been submitted should either be submitted to the Drafting Committee or communicated in advance to the Commission so that the Commission might have time to reflect on them.

22. Mr. SOLARI TUDELA pointed out that, in the Spanish text, the word *seguridad* was ambiguous: it could be interpreted in the sense of security, whereas in the present instance it meant the safety of the population—in the event of the risk of flood, for example.

23. Mr. McCaffrey (Special Rapporteur) explained that, in the English text, the adjective "public" qualified the two words that followed, namely "health" and "safety". He would ensure that the commentary brought out that idea clearly.

24. Mr. KOROMA said that the wording proposed by the Drafting Committee did not adequately express the basic idea of the article, namely the utmost urgency of the measures planned for the protection of public health and safety or other important interests, rather than the implementation of those measures. Without pressing the matter, he would suggest that paragraph 1 should be recast to read:

"1. When, as a matter of utmost urgency, in order to protect public health, safety or other equally important interests, it becomes necessary to implement such planned measures, subject to articles 6 and 8, the State planning the measures may . . .".

25. Mr. Sreenivasa RAO said that he was prepared to accept article 19 as submitted by the Drafting Committee. As the title indicated, the article concerned measures of utmost urgency, whether or not those measures were planned. The only change that might perhaps be made for the sake of greater clarity would be to delete from paragraph 3 the reference to paragraphs 1 and 2 of article 17. Mr. Koroma's suggestion could be considered on second reading.

26. The CHAIRMAN, replying to Mr. Barsegov, said that Mr. Eiriksson had not formally proposed an amendment to the text under consideration and that Mr. Koroma and Mr. Sreenivasa Rao had merely made some suggestions.

27. Mr. TOMUSCHAT (Chairman of the Drafting Committee) said that Mr. Koroma and Mr. Sreenivasa Rao had drawn attention to what was visibly a problem. In contrast to the actual text of the article, which spoke of "planned measures", the title of article 19 referred to "measures of utmost urgency"; hence it would not be impossible to argue that the article dealt only with measures of utmost urgency that were not planned. The Special Rapporteur might perhaps explain his thinking on that point on second reading.

28. On the subject of the wording of paragraph 1, he replied to Mr. Al-Qaysi that the measures referred to were subject to two conditions: they must, in the first place, be of the utmost urgency and, secondly, they must aim at one of the goals set out in paragraph 1. To replace the expression "other equally important interests" by "other equally urgent interests" would therefore be redundant. The problem raised by Mr. Solari Tudela in connection with the Spanish text of the same paragraph did not affect the English text, which was the original version, and in which the words "public safety" would be understood to apply to flooding; the Spanish text could perhaps be rendered more clearly.

29. He did not think that there could be any misunderstanding with regard to paragraph 2: the States referred to were clearly those States on which the planned measures might have an adverse effect.

30. As to paragraph 3, the Drafting Committee, in referring to paragraphs 1 and 2 of article 17, had simply wanted to avoid making the text too cumbersome.

31. Mr. EIRIKSSON, taking up Mr. Barsegov's comments on the methods of work, said that the Commission had two possibilities before it, discounting a third, rather impracticable one, that would require all amendments to texts proposed by the Drafting Committee to be submitted in writing. Once the texts had been adopted by the Drafting Committee, either the Committee could hold a special meeting in which all members of the Commission would be invited to participate, or else the Chairman of the Drafting Committee could introduce them to the Commission for consideration and comments, as was done at present, after which the Drafting Committee would discuss the comments made and report back to the Commission on the outcome of its deliberations.

32. The CHAIRMAN suggested that the Planning Group should consider those suggestions within the framework of the consideration of the Commission's programme, procedures and methods of work.

33. Mr. AL-QAYSI said that he was satisfied by the clarification given by the Chairman of the Drafting Committee concerning the expression "other equally important interests".

34. As to the nature of the measures covered by the article, a problem the Chairman of the Drafting Committee had recognized, the measures were undoubtedly planned measures of the utmost urgency. After all, part III of the draft, of which the article formed part, was entitled "Planned measures". The adjective "planned", which already appeared in the titles of articles 11, 12 and 17, might therefore be added to the title of article 19 in the interests of greater clarity.

35. Mr. BARSEGOV said that, in his earlier remarks, he had raised no objection to the Commission's discussing facts pertaining to Mr. Eiriksson's proposals on the article under consideration. He simply thought it desirable that the Commission should in future find a simpler procedure for the consideration of proposals concerning the actual structure of the texts before it.

36. On the question of measures of utmost urgency, he shared Mr. Sreenivasa Rao's views: the term could be applied equally to planned and to unplanned measures. It would be useful to specify, either in the commentary or in the actual text of the article if the Commission decided to amend it, that the measures in question were in fact planned measures of utmost urgency.

37. Mr. GRAEFRATH said that the Commission's report to the General Assembly should reflect Mr. Eiriksson's suggestions on the subject of methods of work, with the explanation that the Commission had not had time to consider them at the current session and would do so at the next session.

38. He would like to know why paragraph 1 of article 19 did not refer also to paragraph 3 of article 18.

39. The CHAIRMAN said he did not think it would be appropriate at the present stage to open a discussion on Mr. Eiriksson's interesting suggestions, which would

in any event be mentioned in the Commission's report under the heading "Programme, procedures and working methods of the Commission, and its documentation".

40. Mr. McCAFFREY (Special Rapporteur) said he agreed that measures of utmost urgency would be planned in some cases and not planned in many others. As that part of the draft was entitled "Planned measures", he had originally included the adjective "planned" in the title as well as in the text of the article. It had to be acknowledged, however, that sometimes, because of the urgency of the situation, there would be no time to plan anything whatsoever. Normally, it was true, a measure that might have an appreciable adverse effect on another watercourse State required some planning, no matter how rapid or how minimal. In that sense, the adjective "planned" could be retained. But it could also be deleted from paragraph 1 without doing violence to the article as a whole. The dilemma was obvious: if the word "planned" was maintained, it would have to be admitted that in certain cases there was almost no time to plan measures of the type envisaged in that part of the draft; if the word was dropped, it would have to be admitted that in certain cases measures had to be planned very rapidly and that there was no time for the entire process envisaged in the other articles, not only because of the urgency of the situation but also because of the interests at stake. In conclusion, the Commission could either maintain the text submitted by the Drafting Committee or delete the word "planned" from paragraph 1.

41. As to the absence of a reference to paragraph 3 of article 18, without wishing to encroach upon the prerogatives of the Chairman of the Drafting Committee, he would point out that the reason was that article 18 dealt with procedures in the absence of notification—in other words, with procedures set in motion by watercourse States which believed that they might be affected by a planned measure. That situation presumably would not obtain in the cases of utmost urgency envisaged in article 19, where there would be no standstill period of any kind. Nevertheless, he saw no objection to including a reference to paragraph 3 of article 18.

42. His own view, as a member of the Commission, regarding Mr. Eiriksson's remarks on methods of work, was that the simplest solution would be to encourage members of the Commission to take part in the work of the Drafting Committee; it had been done in the past and it could be done in the future.

43. Mr. AL-QAYSI said that the problem referred to by the Special Rapporteur could be resolved on second reading, possibly by including an explanation in the commentary. However, the wording of the article would have to be adjusted in the light of the comments made.

44. Mr. NJENGA said that the text proposed by the Drafting Committee could be improved in two ways. First, in order to remove any contradiction, the word "planned" might be deleted from paragraph 1, as the Special Rapporteur had suggested, without waiting for the second reading. Secondly, the addition of a reference to paragraph 3 of article 18 would be more in

keeping with the intentions of the members of the Commission.

45. Mr. BENNOUNA said that the mechanism envisaged in article 19 was logical: it was the implementation of the planned measures referred to in the preceding articles that was a matter of urgency, not the measures themselves. The basic idea was that the implementation of planned measures was normally subject to a fairly lengthy procedure of consultation; but when a situation of utmost urgency supervened, such measures were implemented immediately—in other words, without applying the provisions of articles 14 and 17, but taking into account those of articles 6 and 8. Thus the provisions of article 19 were no more than an exception to the normal procedure. The only requirement was for a formal declaration of the urgency of the measures concerned. In short, consultations which should have been held *a priori* were entered into *a posteriori* because of the urgency of the situation. The word "planned" in the text should therefore be maintained. If the Special Rapporteur wished to envisage other situations, such as *force majeure* or absolute urgency, where there were no planned measures, he should deal with them in another part of the draft.

46. Mr. AL-QAYSI remarked that if the word "planned" were deleted, the reference to article 14 and to paragraph 3 of article 17, which concerned planned measures rather than urgent situations, would have to be deleted too. The question was: could the watercourse State, because an urgent situation had arisen, proceed immediately to the implementation of the measures it was planning, notwithstanding the provisions of article 14 and of paragraph 3 of article 17? In order to answer that question, it would be best to leave the text as it was, with the possible addition of the adjective "planned" in the title for greater clarity.

47. Mr. BEESLEY said he wondered whether the article dealt with planned measures whose implementation became urgent, or with measures of urgency which were not planned. If planned measures were not the point at issue, the words "planned" and "planning" should be deleted from paragraphs 1 and 3.

48. Mr. KOROMA, noting that the text could be interpreted in two different ways and having already given his own interpretation, suggested that the Commission should adopt the article as it stood, on the understanding that the matter would be reconsidered on second reading.

49. Mr. MAHIOU said that article 19 appeared to be open to two interpretations: the Special Rapporteur's, which was rather broad, and Mr. Bennouna's, which was somewhat restrictive. Since explanations in the commentary or reconsideration of the issue on second reading would not remove that ambiguity, it must be ensured that a provision of such importance should not lend itself to diverging interpretations.

50. Mr. TOMUSCHAT (Chairman of the Drafting Committee) explained that the reason why article 19 did not refer to paragraph 3 of article 18 was that the two articles dealt with two different situations. Article 18 was concerned with the State which had "serious reason to believe that another watercourse State [was] planning

measures”, and article 19 with the State which actually implemented measures.

51. The Drafting Committee had considered at length the possibility of a separate article on measures taken urgently by a State without prior planning, a question that led on to the rights which would then be open to the other watercourse States. The need for a separate article had been disputed by some of the Committee’s members. In interpreting article 19, it was essential to view it within the framework of planned measures which, even at the planning stage, could become of the utmost urgency. He was therefore opposed to deleting the words “planned” and “the State planning the measures”.

52. Mr. McCAFFREY (Special Rapporteur) said that the object of article 19 was to enable watercourse States, if circumstances so required, to proceed as a matter of urgency with the implementation of measures they had planned. The situation thus fell between a situation of normal planned measures and a situation of *force majeure*, those being the two ends of a continuum. The extent to which planning was necessary for the article to become applicable was impossible to define inasmuch as the planning might be very prolonged, or accelerated, or even non-existent.

53. He therefore thought that article 19 should be maintained in its present form in order to avoid disturbing the general economy of the text, particularly in regard to cross-references between articles. The commentary would reflect all the considerations put forward at the meeting.

54. Mr. REUTER wondered what would happen if the word “planned” was replaced by “envisaged”.

55. Mr. CALERO RODRIGUES said that the discussion showed that article 19 dealt exclusively with the urgent implementation of measures that were already planned and not with the planning of urgent measures or the implementation of unplanned measures. Furthermore, there seemed to be agreement on the need for an article dealing specifically with the measures that the watercourse State could take in the event, quite simply, of an urgent situation. That being apparently the general interpretation of the article, the title should refer to “planned” measures.

56. Mr. TOMUSCHAT (Chairman of the Drafting Committee) said that the Commission’s debate clearly showed that the scope of article 19 was limited.

57. The English version of paragraph 1 used the expression “public health, safety or other . . .”. The Drafting Committee had seen the adjective “public” as applying not only to health but also to safety. The phrase should therefore be modified slightly to read: “to protect public health, public safety or other equally important interests”.

58. The CHAIRMAN pointed out that, in the Spanish text of paragraph 1, the use of the plural—*la salud y la seguridad públicas*—made it unnecessary to repeat the adjective *pública*.

59. Mr. SEPÚLVEDA GUTIÉRREZ and Mr. HAYES, referring to the title of article 19 in Spanish

and English respectively, said that the exact wording should be “Urgent implementation of planned measures”.

60. Mr. NJENGA said he was prepared to accept article 19 as it stood, so long as the commentary brought out the distinction between cases of real emergency and cases of *force majeure*.

61. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article 19 [15] as proposed by the Drafting Committee and with the corrections to the title, it being understood that the considerations raised during the discussion would be taken into account on second reading and that a new article would be drafted to deal with situations not covered by article 19.

It was so agreed.

Article 19 [15] was adopted.

ARTICLE 20 [15] [16] (Data and information vital to national defence or security)

62. Mr. TOMUSCHAT (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 20 [15] [16], which read:

Article 20 [15] [16]. Data and information vital to national defence or security

Nothing contained in articles 10 to 19 shall oblige a watercourse State to provide data or information vital to its national defence or security. Nevertheless, that State shall co-operate in good faith with the other watercourse States with a view to providing as much information as possible under the circumstances.

63. Article 20 corresponded to paragraph 5 of article 15 [16] proposed by the Special Rapporteur at the current session (see 2050th meeting, para. 1). Its present place in the text was logical, since the exception it contained applied both to the regular exchange of data and information under article 10 and to the machinery provided for under part III (Planned measures).

64. The Drafting Committee believed that the idea underlying the original text should be retained, for two reasons: first, expressly excluding sensitive material from the data and information States were under an obligation to provide was preferable to tacitly tolerating non-compliance with that obligation; secondly, in the particular situation dealt with in the article, exemption from the normal obligation to provide information should not result in complete suppression of information. The two ideas were reflected in the two sentences composing the article. In order to overcome the apparent contradiction in the original text, the Drafting Committee had cast the first sentence in the form of a saving clause.

65. Concerning the phrase “information vital to its national defence or security”, some members of the Drafting Committee had favoured deletion of the words “defence or”. Others had said that information vital to national defence did not necessarily qualify as information vital to national security, and that, since article 20 provided for an exception, it should be as limited in scope as possible. It had also been pointed out that the concept of defence was included in that of security, as

evidenced by the fact that the system of collective security established under the Charter of the United Nations was dealt with in both Article 51, on the right of self-defence, and Article 2, paragraph 4, on the prohibition of the use of force. The majority of members of the Committee had favoured retention of the term "defence".

66. It had been further suggested that the word "concerning" should be substituted for "vital to", but the Drafting Committee had thought that such a change would unduly broaden the scope of the article.

67. The second sentence closely followed the original text, except that the phrase "concerning the general subjects to which the withheld material relates", which would have had an unduly restrictive effect on the discretion of States, had been deleted.

68. Mr. KOROMA, expressing a desire to "demilitarize" the text of an article that had nothing to do with national defence, proposed that the word "defence" should be deleted, since the concept of "national security" encompassed that of "defence".

69. As to the second sentence, the word "Nevertheless", with which it began, seemed to refer to the possibility of an entirely different situation arising, and that shed doubt on the meaning of the expression "under the circumstances", at the end of the sentence. Was it not inconsistent to affirm in the same article that a State was not obliged to provide information, only to add straightaway that it must "co-operate . . . with a view to providing as much information as possible"?

70. Mr. McCAFFREY (Special Rapporteur) said that he shared Mr. Koroma's concern. Article 20 in fact attempted to say too much in too few words and to cover two very distinct situations. The intention was to deal first with circumstances in which it was permissible not to provide substantive information, and then to express the idea that a State which availed itself of that permission must nevertheless furnish, in good faith, general information on the potential consequences of the measures it adopted.

71. The "circumstances" qualifying the obligation set out in the second sentence were obviously the very ones that necessitated the withholding of information for reasons of national defence or security. The object was to leave no loophole in the proposed régime that would enable a watercourse State to use the pretext of defence secrets indiscriminately; under the second sentence, the State was still required to inform its neighbours of the possible consequences of its action.

72. Mr. AL-QAYSI said he feared that deletion of the term "defence" would unduly enlarge the scope of the provision. When taken alone, the expression "national security" could be interpreted as also referring to economic security, which would open up a multitude of possibilities, whereas the purpose of article 20 was to restrict the circumstances in which a State could maintain that it should be exonerated from the obligation of informing its neighbours.

73. Mr. TOMUSCHAT (Chairman of the Drafting Committee) said he thought it was clear to all members

of the Commission that article 20 was intended to deal with "national defence". Mr. Koroma would prefer the Commission not to use a term that had strong military connotations. However, if that was precisely the concept the Commission had in mind, it should expressly say so.

74. Mr. REUTER said he believed article 20 should be adopted as it stood. As to matters of form, the French text of article 19 referred to *sécurité publique*, while article 20 spoke of *sécurité nationale*; it should be made clear in the commentary that the former referred to the safety of the population, while the latter related to the security of the State.

75. The CHAIRMAN remarked that the same comment applied to the Spanish text.

76. If there were no objections, he would take it that the Commission agreed provisionally to adopt article 20 [15] [16] as proposed by the Drafting Committee, it being understood that the necessary explanations would be incorporated in the commentary.

Article 20 [15] [16] was adopted.

ARTICLE 21 (Indirect procedures)

77. Mr. TOMUSCHAT (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 21, which read:

Article 21. Indirect procedures

In cases where there are serious obstacles to direct contacts between watercourse States, the States concerned shall proceed to any exchange of data and information, notification, communication, consultations and negotiations provided for in articles 10 to 20 through any indirect procedure accepted by them.

78. As he had indicated in connection with article 10 (2071st meeting, para. 10), the Drafting Committee had thought it appropriate to provide for cases in which direct contacts could not be established between the parties, and in which indirect procedures must therefore be used to channel modifications and communications to the parties concerned and to conduct consultations and negotiations. The phrase "serious obstacles to direct contacts" applied to circumstances such as a state of war or the absence of diplomatic relations, and the various procedural moves referred to were listed in the order in which they appeared in articles 10 to 20.

79. The additional data and information provided for under article 14 was to take the form of a notification, in accordance with article 12, and the reasoned and documented explanation of findings provided for under article 15, paragraph 2, as well as the formal declaration provided for in article 19, were to take the form of a communication. The list given in article 21 was thus complete.

80. The CHAIRMAN, speaking as a member of the Commission, said he would have preferred the phrase "direct communication between" to "direct contacts between".

81. Speaking as Chairman, he said that, if there were no objections, he would take it that the Commission

agreed provisionally to adopt article 21 as proposed by the Drafting Committee.

Article 21 was adopted.

82. Mr. TOMUSCHAT (Chairman of the Drafting Committee) said that the Drafting Committee had briefly discussed the question of including a new article to deal with cases in which a watercourse State became aware of measures that might have an appreciable adverse effect on it after those measures had been initiated. The Committee had had before it an article on the subject proposed by the Special Rapporteur, but the discussion had been inconclusive due to lack of time. He suggested that the question be considered in greater detail at a later stage.

It was so agreed.

ARTICLE 15 [13] (Reply to notification)⁵ (*concluded*)

83. The CHAIRMAN invited the Commission to resume its consideration of article 15 [13].

84. Mr. TOMUSCHAT (Chairman of the Drafting Committee) said that, as the solution envisaged by the working group appointed to examine article 15 had created some difficulties with regard to article 18, the Special Rapporteur had suggested a compromise solution whereby the words “a reasoned and documented explanation of such finding” would be replaced by “a documented explanation setting forth the reasons for such finding to the extent possible”. Many members were prepared to accept that solution, but others preferred the original wording because the objection raised by a State must be based on serious grounds and because article 15 should reflect that requirement.

85. Mr. KOROMA proposed that the phrase “it shall provide . . . in article 13”, in paragraph 2, should be replaced by “it shall provide the notifying State within the period referred to in article 13 with a documented explanation setting forth the reasons for such finding to the extent possible”.

86. Mr. BARSEGOV said that Mr. Koroma’s amendment was acceptable, but that he did not see the point of the words “to the extent possible”.

87. Mr. KOROMA said he agreed that the final words of the proposal were perhaps superfluous and could be deleted.

88. Mr. AL-QAYSI said that the proposed wording of paragraph 2 did not seem to meet the objection raised during the original discussion on article 15, which had centred on the “documented” nature of the explanation. Yet the compromise text was based on that very term, although the second element in the phrase—the “reasoned” aspect of the explanation—had not been dropped.

89. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article 15 [13] as amended by Mr. Koroma.

It was so agreed.

Article 15 [13] was adopted.

ARTICLE 18 [14] (Procedures in the absence of notification)

90. Mr. TOMUSCHAT (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 18 [14], which read:

Article 18 [14]. Procedures in the absence of notification

1. If a watercourse State has serious reason to believe that another watercourse State is planning measures that may have an appreciable adverse effect upon it, the former State may request the latter to apply the provisions of article 12. The request shall be accompanied by a reasoned and documented explanation of the grounds for such belief.

2. In the event that the State planning the measures nevertheless finds that it is not under an obligation to provide a notification under article 12, it shall so inform the other State, providing a reasoned and documented explanation of the grounds for such finding. If this finding does not satisfy the other State, the States concerned shall, at the request of that other State, promptly enter into consultations and negotiations in the manner indicated in paragraphs 1 and 2 of article 17.

3. During the course of the consultations and negotiations, the State planning the measures shall, if so requested by the other State at the time it requests the initiation of consultations and negotiations, refrain from implementing or permitting the implementation of those measures for a period not exceeding six months.

91. The present article corresponded to paragraph 1 of article 14 submitted by the Special Rapporteur at the previous session.⁶ It provided for cases in which a watercourse State feared that the planned measures, of which it had not been notified under article 12, would have appreciable adverse effects for it. The purpose of the article was to enable a State which found itself in such a situation to seek the benefit of the protective régime provided for under article 12. The Drafting Committee had noted that the first two sentences of paragraph 1 of article 14, as originally proposed by the Special Rapporteur, referred to two successive stages, the first being that at which the potentially affected State sought the application of the provisions of article 12, and the second that at which the State which planned the measures responded. The Drafting Committee had deemed it appropriate to deal with those two stages in two separate paragraphs.

92. In formulating the article, the Committee had taken account of the view of several members of the Commission that the text proposed by the Special Rapporteur was too favourable to the potentially affected State.

93. The Committee had noted that the opening words of the original text of paragraph 1, “If a State contemplating a new use fails to provide notice thereof to other States as required by article 12 [11]”, had been based on the assumption that the obligation of notification under article 12 had been disregarded. Such an assumption was not necessarily correct, however, inasmuch as the absence of notification could be the consequence of a determination on the part of the State concerned, made in good faith, that the planned measures would have no appreciable adverse effects on the other watercourse States. The Drafting Committee had therefore deleted the words in question.

⁵ For the text, see 2072nd meeting, para. 14.

⁶ See *Yearbook* . . . 1987, vol. II (Part Two), p. 22, footnote 77.

94. The Committee had also noted that the original text had been criticized for giving watercourse States the right to seek the application of article 12 on the vague basis of a "belief". Accordingly, the State wishing to assert the right provided for under paragraph 1 had to comply with two conditions: first, it had to have "serious reason to believe", and no longer simply "believe"; secondly, it was required to provide a reasoned and documented explanation of the grounds for its position.

95. Further, in the text proposed by the Special Rapporteur, the potentially affected State had been entitled to "invoke the obligations of the former State under article 12 [11]". The Drafting Committee had considered that the word "invoke" did not indicate clearly what the rights and obligations of the States concerned would be in the situation contemplated. It had therefore replaced the phrase by "request the latter to apply the provisions of article 12", which did not prejudice the question whether the planning State had complied with its obligations under article 12.

96. The other changes made to the original text were designed to bring paragraph 1 into line with the other articles prepared by the Drafting Committee. Thus the concept of "contemplated use" had been replaced by "measures being planned", and the concept of "appreciable harm" by that of "appreciable adverse effect".

97. Paragraph 2, which corresponded to the second sentence of paragraph 1 of the original text, dealt in the first sentence with cases in which the State planning the measures reacted negatively to the request addressed to it and, in the second sentence, with the consequences to which that reaction might give rise.

98. The Drafting Committee had considered it necessary to link the first sentence of the paragraph more closely to the preceding provision by including a reference to the object of the request of the potentially affected State, namely the notification provided for under article 12. There again, the Committee had used a neutral formula which did not prejudge the question whether the planning State had applied article 12 correctly. The second part of the same sentence sought to maintain a fair balance between the States concerned by requiring the planning State to justify its reaction, as the potentially affected State was required to do under paragraph 1.

99. The second sentence of paragraph 2 related to cases in which the finding of the planning State did not satisfy the other State. Apart from the opening clause, which, as in the first sentence, was intended to describe clearly the chronology of events, the second sentence of paragraph 2 closely followed the original text. For the sake of consistency, however, the words "consultations and" had been added before the word "negotiations", and the words "at the request of that other State" had been added after "the State concerned shall", in order to make it clear that the process of negotiations and consultations was triggered by the initiative of the potentially affected State. The Drafting Committee had also introduced more flexibility in the last part of the original text by replacing the words "in the manner re-

quired by paragraphs 3 and 4 of article..." by "in the manner indicated in paragraphs 1 and 2 of article . . .". The text had also been simplified by eliminating the phrase "with a view to resolving their differences", which had been considered unnecessary since the purpose of the consultations and negotiations was already described in paragraph 1 of article 17.

100. Paragraph 3 of article 18 was modelled on paragraph 3 of article 17. In that connection, the Drafting Committee had considered whether the six-month standstill period could be specified simply by a cross-reference to paragraph 3 of article 17. Since, however, the starting point for that period was not the same in the cases envisaged under articles 17 and 18, the Committee had deemed it preferable to include a separate provision on the matter and make it clear that, in the context of article 18, the six months started to run from the time of the request for consultations and negotiations.

101. Finally, the title of article 18 had been formulated in neutral terms to avoid any implication that the planning State might have failed to comply with the obligations set forth in article 12.

102. Mr. EIRIKSSON proposed that the words "apply the provisions of article 12", in paragraph 1, should be replaced by "provide a notification under article 12". In addition, for the sake of clarity, the words "the States concerned", in paragraph 2, should be replaced by "the two States".

103. Mr. KOROMA said that articles 15 and 18 should be harmonized in the light of the agreement reached on article 15.

104. Mr. Sreenivasa RAO said that he had no objection to the wording proposed for article 18, although it was not particularly felicitous from the standpoint of the chronology of events, which occurred in two stages. In the first stage, a State planned measures which, in its view, would not have appreciable adverse effects for the other watercourse States, and therefore implemented them; in a second stage, the other watercourse States, fearing adverse effects, sought the application of article 12. However, that was not the sequence of events contemplated in article 18.

105. Mr. TOMUSCHAT (Chairman of the Drafting Committee) said that articles 15 and 18 would of course have to be harmonized. The formula accepted for article 15 would read as follows in paragraph 1 of article 18: "The request shall be accompanied by a documented explanation setting forth the reasons for such belief." Similarly, in paragraph 2, the end of the first sentence would read: "providing a documented explanation setting forth the reasons for such finding". The difference between paragraphs 1 and 2, which referred respectively to "belief" and "finding", reflected the fact that the State referred to in paragraph 1 had certain vague fears, whereas the State which was planning measures had concrete data and information at its disposal and so could make a finding.

106. In reply to Mr. Eiriksson, he said that the Drafting Committee had been careful, in the first sentence of paragraph 1, to avoid requiring the State planning the measures to make a notification under ar-

ticle 12. That State first had to evaluate the situation, as was also provided for under article 12: only then could notification take place. Accordingly, paragraph 1 set forth the general obligation to apply article 12 in different stages. If the State planning the measures considered that they would have no appreciable adverse effects, it would not make a notification. The language used had been chosen after due reflection, and any change could lead to errors. Mr. Eiriksson's second proposal, on the other hand, appeared acceptable. Although there might well be more than two States concerned, article 18 contemplated only a bilateral relationship. Bearing in mind the changes to the same effect made in article 17, the words "the States concerned" would be replaced by "the two States".

107. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article 18 [14], as amended.

It was so agreed.

Article 18 [14] was adopted.

TITLES OF PARTS II and III OF THE DRAFT ARTICLES

108. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt the titles proposed by the Drafting Committee for parts II and III of the draft articles, reading respectively: "General principles" and "Planned measures".

The titles of parts II and III of the draft articles were adopted.

The meeting rose at 1.10 p.m.

2074th MEETING

Wednesday, 6 July 1988, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

International liability for injurious consequences arising out of acts not prohibited by international law (*continued*)* (A/CN.4/384,¹ A/CN.4/405,² A/CN.4/413,³ A/CN.4/L.420, sect. D)⁴

[Agenda item 7]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 1 (Scope of the present articles)

ARTICLE 2 (Use of terms)

ARTICLE 3 (Attribution)

ARTICLE 4 (Relationship between the present articles and other international agreements)

ARTICLE 5 (Absence of effect upon other rules of international law)

ARTICLE 6 (Freedom of action and the limits thereto)

ARTICLE 7 (Co-operation)

ARTICLE 8 (Participation)

ARTICLE 9 (Prevention) and

ARTICLE 10 (Reparation)⁵ (*continued*)

1. Mr. HAYES thanked the Special Rapporteur for his very thorough and thoughtful fourth report (A/CN.4/413) and for the draft articles contained therein, the first five of which were revisions of those considered at the previous session.

2. As he saw it, the principle *sic utere tuo ut alienum non laedas* constituted the conceptual basis of the topic. That principle meant recognition that an act, although lawful in itself, could nevertheless be a source of potential or actual harm calling for measures of prevention and reparation. The draft articles provided a means of effective implementation of that principle.

3. He agreed with the Special Rapporteur's conclusion (*ibid.*, paras. 1-7) that it would be not only undesirable, but also impossible to draw up a list of the activities covered by the draft articles. He was concerned, however, at the excessive emphasis in the draft on the "risk" element. "Risk", "appreciable risk" and "activities involving risk" were all defined in draft article 2 and were carried into the substantive articles. The definitions were such that the application of the articles would be significantly limited. Certain passages in the report increased his concern, such as the statements that "the risk referred to is one which involves a greater than normal likelihood of causing transboundary injury" (*ibid.*, para. 30) and that "it is precisely because of the risk created—which is greater than is normal in other human activities—. . ." (*ibid.*, para. 44).

* Resumed from the 2049th meeting.

¹ Reproduced in *Yearbook* . . . 1985, vol. II (Part One)/Add.1.

² Reproduced in *Yearbook* . . . 1987, vol. II (Part One).

³ Reproduced in *Yearbook* . . . 1988, vol. II (Part One).

⁴ Consideration of the present topic is based in part on the schematic outline submitted by the previous Special Rapporteur, R. Q. Quentin-Baxter, at the Commission's thirty-fourth session. The text is reproduced in *Yearbook* . . . 1982, vol. II (Part Two), pp. 83-85, para. 109, and the changes made to it are indicated in *Yearbook* . . . 1983, vol. II (Part Two), pp. 84-85, para. 294.

⁵ For the texts, see 2044th meeting, para. 13.