

Document:-
A/CN.4/L.494 [and Corr.1]

Titles and texts adopted by the Drafting Committee at the forty-fifth and forty-sixth sessions of the Commission: articles 1, 2 (subparas. (a), (b) and (c)), 11-14 bis [20 bis], 15-16 bis and 17-20 - reproduced in documents A/CN.4/SR.2362 to SR.2365

Topic:
International liability for injurious consequences arising out of acts not prohibited by international law

Extract from the Yearbook of the International Law Commission:-
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understanding that his decision would be subject to appeal.

82. Article 27, paragraph 1, provided for the case where the prosecutor considered that there was sufficient basis to proceed. He agreed that the provision could be spelt out in more detail. The question whether there was a *prima facie* case, which was a pure question of evidence in relation to the crime of which the suspect was accused, and the question whether the court should hear the case, which went beyond the question whether there was a *prima facie* case and involved other considerations, were obviously two different matters and it was right, in his view, that they should be the subject of two separate provisions, although he agreed that those provisions required coordination.

83. In his view, the definition of a "*prima facie* case" should not be included in the statute, since that would tie the hands of the court in an area where it would ultimately have to develop its approach in the light of experience. In any event, "*prima facie* case" was defined in the commentary and that definition was sufficiently broad, as the prosecutor would not only have to satisfy himself on paper that there was *prima facie* evidence, but would also have to make quite sure that the whole case "held together".

84. He agreed that, as Mr. Robinson had suggested, it should be made clear in article 27, paragraph 2, that, in arriving at the decisions referred to in subparagraphs (a) and (b), the presidency could have regard to the dossier. That could, however, simply be explained in the commentary. The presidency could, of course, always ask for further material in addition to the indictment itself.

85. It should also be made clear, either in the statute or in the commentary, what happened if the indictment was not confirmed: in that event, the prosecution lapsed and the accused, if in custody, had to be released.

86. "Probable cause", as referred to in article 28, paragraph 1 (a), should not, in his view, be defined in the body of the statute, any more than "*prima facie* case" should be and for the same reasons. There again, having regard to the diversity of cases, the officials responsible for running the system should have some degree of discretion. As to paragraph 3 (b), he agreed with Mr. Robinson that the two "special circumstances" referred to in the commentary were the ones that immediately sprang to mind and that they did not cover the whole range of situations which might arise in the future. None the less, apart from the fact that it was hard to imagine such other situations, that provision should not go into so much detail that it would make the text unduly cumbersome.

87. Similarly, in article 29, paragraph 1, it would be difficult to spell out the role of the "judicial officer". The "compensation" referred to in paragraph 3 of the article would be paid by the States parties.

88. The Working Group had decided that a paragraph 3 should be added to article 31, but it might revert to the matter.

89. With regard to article 32, it was obviously preferable for the place of the trial to be the seat of the court. It had been felt, however, that such a provision might be

too rigid and it had therefore been decided in the interests of, among other things, cost, to provide, in paragraph 2 of the article, that the court could exercise its jurisdiction on the territory of any State.

90. The question of applicable law, which was the subject of article 33, had been discussed in great detail during the past two years. While he agreed with Mr. Thiam that the wording of the French version of subparagraph (c) was awkward and should be redrafted, he would insist on the need to retain a reference to national law in the article. It would, of course, have been possible to spell out, in the provision, the choice of law rules to which the court should refer, but a deliberate decision not to do so had been taken in order to maintain a degree of flexibility.

91. Article 35, which one member had proposed should be deleted and which Mr. Robinson has suggested should be confined to a general clause, was essential, in his view, because the conclusion had been reached, after two years' work, that it was impossible to confine the court's jurisdiction merely by defining the crimes it would have to try. In point of fact, the crimes in question covered a wide range of situations, some of them rather minor; and that was why the court must be vested with the additional power not to exercise jurisdiction. That would also meet a concern which had been widely expressed in the Sixth Committee.

92. With regard to article 37, he was glad to hear that the concern for the trial to be held in the presence of the accused was not confined only to common law countries, but also existed in China. At the same time, article 37 provided for an acceptable compromise, on a vexed issue, between different systems and left it to the court to decide whether or not the trial should take place in the absence of the accused.

93. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to conclude its general discussion on the draft statute for an international criminal court, on the understanding that, when the Working Group had reviewed the relevant commentaries, they would be adopted in conjunction with the adoption of the Commission's report.

It was so agreed.

The meeting rose at 1.15 p.m.

2362nd MEETING

Friday, 8 July 1994, at 10.10 a.m.

Chairman: Mr. Vladlen VERESHCHETIN

Present: Mr. Al-Khasawneh, Mr. Barboza, Mr. Benouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda,

Mr. Pellet, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Yamada, Mr. Yankov.

International liability for injurious consequences arising out of acts not prohibited by international law (continued)* (A/CN.4/457, sect. C, A/CN.4/459,¹ A/CN.4/L.494 and Corr.1, A/CN.4/L.503 and Add.1 and 2)

[Agenda item 6]

CONSIDERATION OF THE DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE AT THE FORTY-FIFTH AND FORTY-SIXTH SESSIONS

1. The CHAIRMAN invited Mr. Bowett, Chairman of the Drafting Committee, to introduce the draft articles proposed by the Drafting Committee (A/CN.4/L.494 and Corr.1).

2. Mr. BOWETT (Chairman of the Drafting Committee) said that between 16 June and 1 July 1994 the Drafting Committee had allocated six meetings to the draft articles. He wished to thank the Special Rapporteur, Mr. Barboza, for his guidance and cooperation throughout the proceedings, as well as all the members of the Drafting Committee for their contributions and their spirit of cooperation, and also Mr. Calero Rodrigues, who had deputized for him during his brief absence from the Committee.

3. At the forty-fifth session of the Commission, the then Chairman of the Drafting Committee, Mr. Mikulka, had presented to the Commission the texts of draft articles 1, 2, 11, 12 and 14 adopted by the Drafting Committee.² At the present session, the Drafting Committee had been able to complete its work on all of the articles dealing with the question of prevention in respect of activities with a risk of transboundary harm which had been referred to the Committee since 1988. Accordingly, the Commission now had before it a complete set of articles on prevention. The texts proposed by the Drafting Committee at the forty-fifth session had been retained without change, with the exception of article 14, in which a change had proved necessary owing to the formulation of subsequent articles.

4. The Committee had thought it useful to divide the articles into two chapters, one entitled "General provisions" and the other "Prevention". The designation of those chapters was provisional, and they were thus placed in square brackets. The provisional chapters would also make it clear that those articles dealt only with one aspect of the whole topic. The Commission had before it a document (A/CN.4/L.494 and Corr.1) which reproduced all of the articles adopted by the Drafting Committee at the forty-fifth and forty-sixth sessions. Since articles 1, 2, 11 and 12 were unchanged, he had

nothing to add to the statement of the Chairman of the Drafting Committee, Mr. Mikulka, at the previous session.³

CHAPTER I (General provisions)

ARTICLE 1 (Scope of the present articles)

5. The CHAIRMAN invited members to comment on article 1, which read:

Article 1. Scope of the present articles

The present articles apply to activities not prohibited by international law and carried out in the territory or otherwise under the jurisdiction or control of a State which create a risk of causing significant transboundary harm through their physical consequences.

6. Mr. PAMBOU-TCHIVOUNDA said some clarification was needed of the words "or otherwise". They should be fully explained, at least in the commentary.

7. Mr. BOWETT (Chairman of the Drafting Committee) said that the phrase in question had been explained in some considerable detail by the Chairman of the Drafting Committee, Mr. Mikulka, at the previous session.⁴ That explanation would presumably be reflected in the commentary to be drafted by the Special Rapporteur.

8. Mr. BENNOUNA said that, at the legal level, that part of the article was poorly drafted and certainly needed improving. What purpose was served by the words "or otherwise"? Could they not perhaps be deleted?

9. Mr. TOMUSCHAT said that article 1 was the most important one in the whole draft, and perhaps also the most problematical, for the exact scope of the draft was not defined with sufficient clarity. Article 1 gave a very general description of the scope, from which it was plain that some activities, for instance, the establishment of a nuclear power plant, fell within the purview of the draft articles, as might many other activities, such as a State's practice of permitting cars to be driven on its roads—an activity which undoubtedly could cause significant transboundary harm. It was thus important to specify what was envisaged, and that might not be made sufficiently precise in the commentary. Without proper clarification, the entire set of draft articles could well suffer from an inherent ambiguity, a possibility that he found disturbing.

10. The CHAIRMAN referred members to the statement made by the Chairman of the Drafting Committee at the previous session, Mr. Mikulka, which read:

The Drafting Committee had felt that territorial jurisdiction should be the dominant criterion. Consequently, when an activity occurred within the territory of a State, that State must comply with its obligations to take preventive measures. Territory was therefore decisive evidence of jurisdiction. Consequently, in cases of competing jurisdictions over an activity covered in the articles, the territorially-based jurisdiction prevailed. He drew attention to the fact that the words "or otherwise" after the word "territory" were intended to signify the special relation of the concept "territory" to the concept "jurisdiction or control". In cases where jurisdiction was not territorially based,

* Resumed from the 2351st meeting.

¹ Reproduced in *Yearbook* . . . 1994, vol. II (Part One).

² *Yearbook* . . . 1993, vol. I, 2318th meeting, para. 58.

³ *Ibid.*, paras. 56-91.

⁴ *Ibid.*, paras. 59-69.

jurisdiction was determined in accordance with the relevant principles of international law.⁵

11. Speaking as a member of the Commission, he cited space activities as one example of activities carried out "otherwise under the jurisdiction or control of a State". Such activities could clearly lead to very significant transboundary harm. However, they were carried out, not in the territory of the State, but elsewhere, in a place otherwise under that State's jurisdiction or control.

12. Mr. BARBOZA (Special Rapporteur) said he endorsed the remark of the Chairman, speaking as a member of the Commission. It was important to specify that if the activity, although not carried out in the State's territory, was carried out otherwise under the jurisdiction or control of the State, it also fell within the scope of the articles.

13. Mr. BOWETT (Chairman of the Drafting Committee) pointed out that there were areas of the Earth's surface in relation to which no territorial title was generally recognized. Antarctica was a prime example. States could also construct artificial islands for purposes such as waste disposal. It would not have sovereignty over those islands, yet could carry out activities on them that involved a quite serious risk of harm to other States. The phrase was therefore important.

14. Mr. MAHIOU said that he too was not entirely satisfied with the wording of the article. Perhaps it should be stated in the commentary that some members had hoped that a better formulation than the ambiguous phrase "or otherwise" could be found before the draft articles were submitted for second reading.

15. Mr. de SARAM said that he had no difficulty with the expression "territory or otherwise under the jurisdiction or control". With regard to the very important question raised by Mr. Tomuschat, he favoured retention of the existing broad scope of the draft, since the adjective "significant", before "transboundary harm", placed reasonable limits on that scope. However, article 1 would read more smoothly if commas were inserted after the word "activities" and the word "State".

16. Mr. PAMBOU-TCHIVOUNDA said that the important elements of article 1 were, first, the location of the activity, and second, the relationship of imputability that must be established between the State and the activity, if that activity did not take place in the State's territory. With a view to reducing the number of words that might give rise to difficulties, he suggested amending the phrase to read "and carried out in the territory or under the control of a State ...".

17. Mr. ROSENSTOCK said that, for the reasons set forth by Mr. Tomuschat, it was exceedingly difficult to accept the articles piecemeal. Article 1 pointed the way to their scope, as did article 2, but it did not really answer the question Mr. Tomuschat had raised, namely, whether the scope of the draft articles would extend to the construction of a nuclear power plant or to the construction of a highway. He recognized that in a previous quinquennium the Commission had decided, for under-

standable reasons, not to elaborate a list of hazardous activities. However, the problem of making a distinction remained unsolved, and although the word "significant" was helpful in a non-finite context, it left one nervous in a finite context. Consequently, Mr. de Saram's remark did not solve the problem. Perhaps, when they became available, it would be seen that the commentaries provided proper guidance as to whether the articles covered pollution from a nuclear power plant, or automobile pollution—which, very arguably, could be said to create a risk of causing harm other than disastrous harm. It was none the less a heavy burden to place on the commentaries. Until such time as it had had an opportunity to scrutinize the draft articles in their entirety, the Commission's acceptance of article 1 must be more than usually provisional. In any event, the issue raised by Mr. Tomuschat must be resolved at some point.

18. Mr. RAZAFINDRALAMBO said that the doubts expressed about the wording of article 1, initially raised by Mr. Pambou-Tchivounda, seemed principally to apply to the French version, since English speakers had said they were satisfied with the wording. What French expression was usually employed in conventions to translate the English formulation, and would it be appropriate to use it in the present case? The purpose of the expression was clearly to contrast activities carried out in the territory of a State with activities carried out only under the jurisdiction or control of that State. As a tentative suggestion, it might be possible to remove some of the ambiguity in the French formulation by using the phrase ... *sur le territoire ou tout au moins sous la juridiction ou le contrôle*.

19. Mr. BARBOZA (Special Rapporteur) said he did not really understand Mr. Tomuschat's concern. Two different problems arose: first, a distinction must be drawn between activities which created a risk of causing transboundary harm, and activities which, in the normal course of operations, actually did cause such harm. Cars constituted a continuous source of pollution, and did not therefore fall within the scope of the articles. Then there was the second, different, problem raised by Mr. Rosenstock, namely, which hazardous activities were included in the scope of the articles. Article 1 constituted a first attempt to answer that question. Mr. Rosenstock was right to say that the Commission should work on a sharper definition of activities falling within the scope of the articles. He himself had proposed drawing up a list of activities and substances, along the lines of the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment and the European conventions. The Commission had rejected the idea of such a precise scope. A working group should be set up to address the issue next year. Meanwhile, article 1 attempted to separate the activities that actually caused transboundary harm from the activities that might cause such harm as a result of an accident. Continuous pollution from cars constituted quite a different hypothesis from that of hazardous activities that might cause harm, and the words "create a risk of causing" were simply a first approach to the question. The Commission would subsequently have to attempt to come up with a precise definition of the activities that fell within the purview of the articles.

⁵ Ibid., para. 63.

20. Mr. BENNOUNA said that it was a question of form, not substance, that was giving rise to doubts about article 1. In its present form, the French version was ambiguous, and it was unfair to expect readers to turn to the commentary for clarification. The difficulty lay in the expression *d'une autre façon* (otherwise), which could be wrongly interpreted to mean that some activities were being carried out in a manner different from activities which were being carried out in the territory of the State. To compound the problem, that expression appeared elsewhere in the draft articles, including in article 11.

21. Any activities which were carried out in the territory of a State were by definition under its jurisdiction and control. However, a State might also have under its jurisdiction and control other activities that it was carrying out elsewhere than in its territory. It had to be made clear that the draft articles applied in both circumstances. He proposed therefore that, in the French version, the words *s'exercent sur le territoire ou d'une autre façon sous la juridiction ou le contrôle* should be replaced by *s'exercent sur le territoire et/ou sont sous la juridiction ou le contrôle*.

22. It was important to examine article 1 in the light of article 2, which defined the terms and expressions used in the draft. The two articles were complementary and should probably be considered together.

23. The CHAIRMAN said that the Drafting Committee was not entirely responsible for the manner in which the scope of the articles had been defined. He recalled in that connection, at the forty-fourth session, the Commission had decided that attention should be focused for the time being on drafting articles in respect of activities having a risk of causing transboundary harm and that it should not deal at the present stage with other activities which caused transboundary harm.⁶ The draft articles as they now stood were an accurate reflection of that decision. The commentary should explain that the articles currently under consideration represented the first phase of the work and that other activities would be dealt with later on.

24. Mr. TOMUSCHAT said that there was no clear dividing line between activities which caused transboundary harm and activities which created a risk of causing transboundary harm. In fact, in many instances harm could even be avoided by using appropriate environmental impact assessment procedures, as provided for in draft article 12. Consequently, the distinction between the two types of activities was to a large extent artificial.

25. Mr. CRAWFORD said that the decision mentioned by the Chairman had proved to be unfortunate, thus confirming the view he had held at the time. As to the wording of the article, he proposed that the phrase "carried out in the territory or otherwise under the jurisdiction or control of a State" should be replaced by "carried out either in the territory of the State or in places under its jurisdiction or control", which would have the advantage of corresponding to the language used in article 2.

26. Mr. BARBOZA (Special Rapporteur) said that the English version of article 1 seemed clear enough: when

an activity was being carried out in the territory of a State, it was by definition under the jurisdiction or control of the State. That activity could also be carried out in other places while still being under the jurisdiction or control of the State, but in a different manner. It appeared that only the French version needed modification and, to that end, he suggested that a small group of French-speaking members might agree on the wording in French that best corresponded to the English.

27. Mr. ROSENSTOCK said that he agreed with the Special Rapporteur. The English version of article 1 was acceptable in its present form.

28. Mr. BENNOUNA said that it was best not to redraft article 1 in French because that would then require changes in the English version. He would, therefore, prefer to retain the present wording in French, even though it was not entirely satisfactory, and perhaps provide some explanation in the commentary.

29. Mr. EIRIKSSON pointed out that, in elaborating the draft articles, the Drafting Committee had taken into account the wording of the United Nations Convention on the Law of the Sea.

30. Mr. BARBOZA (Special Rapporteur) said that the United Nations Convention on the Law of the Sea used the expression "under the jurisdiction or control" and did not make any reference to territory. However, some members of the Drafting Committee had considered it essential to include in the draft articles some reference to activities carried out in the territory of the State, reasoning that a case might arise in which territorial jurisdiction might prevail over another sort of jurisdiction. Article 1 as it stood thus represented a compromise solution. In his own view, the reference to territory was superfluous, as the expression "under the jurisdiction or control" included, by definition, activities carried out in the territory of a State.

31. Mr. EIRIKSSON said that, in drafting article 1, the Drafting Committee had begun by defining the articles as applying to activities being carried out under the jurisdiction or control of the State. It had subsequently decided to add the explicit reference to the territory of the State, which had therefore made it necessary to add the word "otherwise".

32. Mr. MAHIOU said that, in the French version, the words *ou d'une autre façon sous la juridiction* should be replaced by *ou à un autre titre sous la juridiction*, which corresponded more closely to the English version. His colleagues, Mr. Bennouna and Mr. Pambou-Tchivounda, would presumably support his proposal.

33. The CHAIRMAN said that, as he understood it, Mr. Mahiou's proposal would not require any amendment to the English text.

34. Mr. de SARAM proposed that, in the English version, the words "otherwise under the jurisdiction or control" should be replaced by "elsewhere under its jurisdiction or control".

35. The CHAIRMAN said that, since the proposed amendment to the French version appeared to be accept-

⁶ *Yearbook* . . . 1992, vol. II (Part Two), para. 346.

able to the Commission, there appeared to be no need to alter the English version.

36. Mr. HE said that the word "otherwise" appeared at first glance to be ambiguous. A full explanation should therefore be provided in the commentary. He would have preferred the word "elsewhere". The commentary to article 1 should also make it clear that the word "risk" meant that the activity might cause harm.

37. Mr. ROSENSTOCK said that using the word "elsewhere" would give rise to difficulties because it implied that the physical location of the activity was somehow relevant to the legal situation of jurisdiction or control. The English version should remain as it stood, while the French version could be amended as had been suggested.

38. Mr. HE said that it might be preferable to place the word "otherwise" in square brackets.

39. The CHAIRMAN said that, in the light of the discussion, such a course would not seem appropriate.

40. Mr. PELLET said that, in the French text, the expression *qui créent un risque de causer* was redundant and, moreover, was not the way the idea would normally be expressed in French. He accordingly proposed that it should be replaced by *qui risque de causer*.

41. The CHAIRMAN said that, as he had already mentioned, the Commission's decision on the scope of the articles had been taken at the forty-fourth session.⁷

42. Mr. PELLET said that he had no reservations about the scope of the articles, which was accurately reflected in the French version of article 1 by the words *un risque de causer un dommage*. Rather, his concern was with the expression *créent un risque*, which was not the best translation of the English.

43. Mr. BARBOZA (Special Rapporteur) said that Mr. Pellet's point was relevant only to the French version. In English and Spanish, the idea of activities which "create a risk" was acceptable.

44. Mr. BENNOUNA said that, while the phrase *qui créent un risque de causer* was perhaps not the most elegant French, it was consistent with article 1 and article 2, subparagraph (a), of the English text, in which the word "risk" was used as a noun.

45. Mr. PELLET said that, in view of Mr. Bennouna's comment, he would propose as an alternative that the words *qui créent un risque de causer* should be replaced by *qui comporte un risque de causer*.

46. Mr. de SARAM said that it would be preferable for article 1 to speak of activities which "have a risk", rather than "create a risk", of causing harm. The former expression reflected the wording used in the Commission's decision. However, if a satisfactory solution had already been decided on, he would not press his proposal.

⁷ Ibid.

47. Mr. FOMBA said that if risk was considered to be inherent in the dangerous nature of the activity, creation of the risk could also be considered as stemming from the dangerous nature of the activity. On that basis, he did not think that the words *qui créent un risque* were appropriate, and he would favour some wording along the lines proposed by Mr. Pellet.

48. The CHAIRMAN suggested that the word "create" should be replaced by "involve" or its equivalent in other languages.

It was so agreed.

Article 1, as amended, was adopted.

ARTICLE 2 (Use of terms)

49. The CHAIRMAN invited members to comment on article 2, which read:

Article 2. Use of terms

For the purposes of the present articles:

(a) "risk of causing significant transboundary harm" encompasses a low probability of causing disastrous harm and a high probability of causing other significant harm;

(b) "transboundary harm" means harm caused in the territory of or in places under the jurisdiction or control of a State other than the State of origin, whether or not the States concerned share a common border;

(c) "State of origin" means the State in the territory or otherwise under the jurisdiction or control of which the activities referred to in article 1 are carried out.

...

50. Following a point raised by Mr. PELLET, Mrs. DAUCHY (Secretary to the Commission) said that the French version of the article was unsatisfactory and should be redrafted.

51. Mr. BENNOUNA said he noted that, whereas subparagraph (b) referred to "the territory of or in places under the jurisdiction or control of a State other than the State of origin", subparagraph (c) spoke of "the State in the territory or otherwise under the jurisdiction or control of which the activities". The language of the two subparagraphs should therefore be harmonized.

52. Mr. EIRIKSSON said that the word "places" in subparagraph (b) should be amended to read "other places". As to the difference in the wording of article 1 and article 2, subparagraph (b), it should be noted that, whereas the former was concerned with the attribution of an activity to a State, the latter was concerned with the geographical context. A ship or an aircraft might be covered, therefore, but not the water over which or the air through which they passed, since the global commons were excluded. The position would, however, no doubt be fully explained in the commentary.

53. Mr. MAHIU asked whether there was any special reason for the difference in wording of the reference in subparagraph (b) to "places" or, as rightly suggested, "other places", and the reference in subparagraph (c) to jurisdiction or control. That remark applied to both the French and the English versions of the article.

54. Mr. BARBOZA (Special Rapporteur) said that, as already pointed out by Mr. Eiriksson, the wording of subparagraph (b) dealt with the geographical aspect: the harm in question was done not to the jurisdiction of a State as such but to the places under its jurisdiction. On the other hand, subparagraph (c), which used the same wording as that employed in article 1, was concerned with the actual consequences of an activity.

55. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt article 2 subject to any necessary drafting changes in the French text.

It was so agreed.

Article 2 was adopted on that understanding.

CHAPTER II (Prevention)

ARTICLE 11 (Prior authorization)

56. The CHAIRMAN invited members to comment on article 11, which read:

Article 11. Prior authorization

States shall ensure that activities referred to in article 1 are not carried out in their territory or otherwise under their jurisdiction or control without their prior authorization. Such authorization shall also be required when a major change in the activity is planned.

57. Mr. EIRIKSSON said he was pleased to note that the Commission had reached the stage at which it could consider the adoption of a comprehensive set of articles on a significant part of the topic and could submit those articles to the General Assembly. While he supported the substance of the articles in chapter II, he considered that, in some of them, more direct language could have been considered.

58. Article 11 should, in his view, have been combined with article 13 in a single article dealing with authorization and not just with prior authorization.

59. Mr. RAZAFINDRALAMBO, referring to the French text, proposed that article 11 should be brought into line with article 1 by replacing the words *d'une autre façon* by *à un autre titre*.

It was so agreed.

60. Mr. PAMBOU-TCHIVOUNDA, also referring to the French text, said that he was concerned about the words *visées à l'article premier*, for article 1 was a neutral article and did not spell out the activities with which the draft was designed to deal. Consequently, article 11 made reference to activities that were not mentioned anywhere. He wondered whether some better term could be found to reflect the content of article 1.

61. The CHAIRMAN pointed out that the wording in question had been agreed in the Drafting Committee, and it would be difficult to reopen a discussion on the question at the present stage.

62. After a brief discussion in which Mr. CALERO RODRIGUES, Mr. MAHIOU and Mrs. DAUCHY (Secretary to the Commission) took part, Mr. PAMBOU-TCHIVOUNDA said that he would not press the point.

63. Mr. PELLET said that the second sentence of the article contemplated a change in activity only when that activity involved risk from the outset. It thus left out of account an activity that did not involve risk at the outset but did involve risk following a major change. The sentence should therefore be redrafted to provide that authorization would also be required when a major change in an activity of any kind was planned and such change meant that the activity would involve risk.

64. The CHAIRMAN suggested that a small group, consisting of Mr. Bowett (Chairman of the Drafting Committee), Mr. Barboza (Special Rapporteur) and Mr. Pellet, should meet informally to agree on a suitable wording for the second sentence.

The meeting was suspended at 11.45 a.m. and resumed at noon.

65. Mr. BARBOZA (Special Rapporteur) said that, following the informal meeting with Mr. Bowett and Mr. Pellet, he would propose that the second sentence of article 11 should be reworded to read "Such authorization shall also be required in cases where major changes in activities are planned".

66. Mr. MAHIOU said that, normally, an activity would fall within the scope of the articles only if a change in that activity created a risk of transboundary harm. The reference to activity in the second sentence must be qualified, failing which it would open the door to all other activities.

67. Mr. BENNOUNA proposed that the second sentence should be deleted as it added nothing to the article and merely created confusion.

68. Mr. BARBOZA (Special Rapporteur) said that Mr. Bennouna's proposal required further reflection. He therefore suggested that a decision on it should be postponed.

69. The CHAIRMAN suggested that the second sentence of article 11 should be placed between square brackets and that the Commission should revert to the matter at a later meeting.

It was so agreed.

ARTICLE 12 (Risk assessment)

70. The CHAIRMAN invited members to comment on article 12, which read:

Article 12. Risk assessment

Before taking a decision to authorize an activity referred to in article 1, a State shall ensure that an assessment is undertaken of the risk of the activity causing significant transboundary harm. Such an assessment shall include an evaluation of the possible impact of that activity on persons or property as well as on the environment of other States.

71. Mr. de SARAM said that the phrase "risk of the activity causing significant transboundary harm", in the first sentence, seemed to refer only to existing activities and not to future activities.

72. Mr. BARBOZA (Special Rapporteur) said the meaning of the sentence was that the State would ensure that an assessment was undertaken to ascertain whether in effect an activity presented a risk of causing harm.

73. Mr. de SARAM said that, in that case, he would propose that the words "the risk of the activity causing significant" should be replaced by "the risk of the activity's causing significant". He would not press the point, however, if his proposal was not acceptable to the Chairman of the Drafting Committee.

74. Mr. BOWETT (Chairman of the Drafting Committee) said that the article did not specify whether the activity was already in existence or whether it was being planned. In his view, therefore, it was broad enough to cover both circumstances.

75. Mr. PAMBOU-TCHIVOUNDA said that, with a view to the harmonization of the French text, he would suggest that the word *présente* should be replaced by *comporte*, which was used in the amended form of article 1. Alternatively, the word *présente* should be used both in article 1 and in article 12.

76. Mr. TOMUSCHAT said that the expression "activity causing significant transboundary harm", in the first sentence, was inconsistent with the corresponding definition of that term.

77. Mr. BARBOZA (Special Rapporteur) said that, in his view, the expression was correct in the context.

78. The CHAIRMAN, speaking as a member of the Commission, said that Mr. Tomuschat had raised a valid point: it was not clear to him whether the assessment made would be of the risk or of the activity or of both.

79. Mr. de SARAM suggested that the difficulty could be solved by replacing the words "such activities" by "the activity".

80. Mr. ROSENSTOCK said that Mr. de Saram's suggestion would work up to a point, but the provision would still be concerned only with the assessment of risk. The assessment should be broader than that.

81. Mr. BARBOZA (Special Rapporteur) said that Mr. de Saram's suggestion made the text even clearer. The point raised by Mr. Rosenstock was answered in the second part of the article, from which it was plain that the assessment should cover actual harm as well as risk of harm.

82. Mr. PELLET said that he could accept Mr. de Saram's suggestion, but could not endorse Mr. Rosenstock's point because the notion of risk related to an activity which was not yet being carried out.

83. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt Mr. de Saram's suggestion.

It was so agreed.

84. Mr. EIRIKSSON said that, in his view, the only authorization required by article 12 was prior authorization for pre-existing activities, a matter dealt with in article 13.

85. Mr. PELLET said that the second sentence had not been in the Special Rapporteur's original proposal. It did make the first sentence clearer but was badly drafted: the phrase "of other States" clearly applied to "persons", "property" and "the environment", but the text could not properly talk of persons or property of other States.

86. The CHAIRMAN suggested that the phrase should be amended to read "in other States".

It was so agreed.

Article 12, as amended, was adopted.

ARTICLE 13 (Pre-existing activities)

87. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce article 13, which read:

Article 13. Pre-existing activities

If a State, after becoming bound by these articles, ascertains that an activity involving a risk of causing significant transboundary harm is being carried out in its territory or otherwise under its jurisdiction or control without the authorization as required by article 11, it shall direct those responsible for carrying out the activity that they must obtain the necessary authorization. Pending such compliance, the State may permit the continuation of the activity in question at its own risk.

88. Mr. BOWETT (Chairman of the Drafting Committee) said that the pre-existing activities dealt with in the article were activities undertaken prior to the entry into force of the articles for the State of origin. When the State learned of the existence of an activity of that sort, it should direct those responsible for carrying out the activity to obtain the necessary authorization. The expression "necessary authorization" meant the permit required under the domestic law of the State so as to implement its obligations under the articles.

89. Obviously, a period of time might be needed for the operator of the activity to comply with the authorization requirements. The Drafting Committee was of the view that the choice between whether the activity should be stopped pending authorization or should continue while the operator went through the process of obtaining authorization should be left to the State of origin. If it chose to allow the activity to continue, it did so at its own risk. The expression "at its own risk" was a compromise which replaced the Special Rapporteur's original wording to the effect that, during the interim period, the State of origin would be liable for the damage if an accident occurred. However, the Drafting Committee felt that, since the regime of liability proposed in the Special Rapporteur's tenth report (A/CN.4/459) had not yet been examined by the Commission, the Committee could not prejudge the issue of liability. At the same time, in the absence of any form of language indicating possible repercussions, the State of origin would have no incentive to comply with the requirements. The expression "at its own risk" was intended to leave the possibility open (a) for any liability which the future draft articles on the topic might impose on the State of origin in such circumstances, and (b) for the application of any other rule of international law on liability. The title of the article remained unchanged.

90. Mr. BENNOUNA suggested that the phrase "after becoming bound by these articles" should be deleted from the first line, since it went without saying that the draft articles applied to States parties.

91. Mr. PELLET said that he had initially been of the same opinion as Mr. Bennouna on that point. However, if the phrase was deleted, the article would have no point

because it applied only to activities existing before the entry into force of the draft articles.

92. Mr. EIRIKSSON, Mr. GÜNEY and Mr. TOMUSCHAT said that they endorsed Mr. Pellet's remark.

93. Mr. BENNOUNA said that he was not convinced by Mr. Pellet's argument, since the article could cover unauthorized activities which had started after the entry into force of the draft. However, the problem was one of form rather than substance and he would not press his proposal. It might make things clearer if the first sentence, by analogy with articles 11 and 12, spoke of an activity "referred to in article 1".

94. Mr. ROSENSTOCK said he agreed that it would be better to retain the phrase "after becoming bound by these articles", but the article would be irrelevant unless the draft eventually took the form of a treaty. The Commission had deferred its decision on that point. At the very least, the situation must be explained in a footnote. The Commission must constantly remind itself of the possibility that it might be producing something other than a draft text to be sent to the General Assembly with a view to the convening of a diplomatic conference.

95. Mr. EIRIKSSON said that he endorsed Mr. Bennouna's second proposal. He had himself been going to propose the following text for article 11, with a footnote as suggested by Mr. Rosenstock: "States shall also require authorization for activities referred to in article 1 which are being carried out upon their becoming bound by these articles".

96. Mr. Bennouna had also raised the question of activities which were being carried out without, for a number of possible reasons, prior authorization being obtained. The draft articles must cover cases in which it was too late to authorize an activity because it was already under way by providing that authorization must be obtained for the continuation of the activity. He suggested a formulation that would read: "States which permit the continuation of the activity pending the obtaining of such authorization do so at their own risk".

97. Mr. BARBOZA (Special Rapporteur) said that it was important to maintain the distinction between activities started after entry into force of the draft articles (art. 11) and pre-existing activities (art. 13). Therefore, either the present text should remain unchanged or the phrase "after becoming bound by these articles" in article 13 should be replaced by a reference to activities carried out before entry into force.

98. He disagreed with Mr. Rosenstock that article 13 would be relevant only if the draft articles took the form of a treaty. In fact, the wording of the draft articles would not be substantially affected by the Commission's decision on that point. The Commission had never proceeded in the way Mr. Rosenstock was suggesting with regard to any other set of draft articles.

99. Mr. BENNOUNA said that Mr. Eiriksson's first proposal made the meaning of the article much clearer and should be adopted.

100. Mr. BOWETT (Chairman of the Drafting Committee) said that neither of Mr. Eiriksson's proposals involved any change of substance in the present text.

There was no point in redrafting just for the sake of redrafting.

101. Mr. de SARAM said that he agreed with the Chairman of the Drafting Committee. The phrase "after becoming bound by these articles" was needed in the first sentence of article 13 precisely because of the second sentence. With that second sentence, the Commission was raising the important question of allocation of risk between the parties involved, that is to say the question of liability, a matter with which the article was not concerned. One solution would be to delete "after becoming bound by these articles" from the first sentence and to eliminate the whole of the second sentence. The issue raised in the second sentence should be dealt with in the commentary.

102. Mr. TOMUSCHAT said that he did not agree with the Chairman of the Drafting Committee that Mr. Eiriksson's proposals involved no change of substance. Article 13 spoke of a State "ascertaining" that an activity was being carried out, but the Commission was trying to draft objective provisions which did not depend on ascertainties made by States. States had a general duty to exercise due diligence, but article 13 introduced an element of uncertainty in that requirement. In any event, the whole issue was subject to the interpretation of article 1. The draft articles would not be workable unless their scope as defined in article 1 was clear and limited.

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/457, sect. E, A/CN.4/462,⁸ A/CN.4/L.492 and Corr.1 and 3 and Add.1, A/CN.4/L.493 and Add.1 and Add.1/Corr.1 and Add.2)**

[Agenda item 5]

CONSIDERATION OF THE DRAFT ARTICLES ON SECOND READING AND DRAFT RESOLUTION PROPOSED BY THE DRAFTING COMMITTEE (*concluded*)***

103. The CHAIRMAN said that, when the Commission had adopted the draft articles on the law of the non-navigational uses of international watercourses on second reading⁹ and a draft resolution on confined groundwater (A/CN.4/L.492/Add.1)¹⁰ he had indicated that he would in due course invite the Commission to take a decision on the recommendation to be addressed to the General Assembly with respect to what was to be done with the draft articles and the resolution. The officers of the Commission had agreed on the following draft recommendation:

"The Commission, in conformity with article 23 of its Statute, decides to recommend the draft articles on the law of the non-navigational uses of international

** Resumed from the 2356th meeting.

*** Resumed from the 2355th and 2356th meetings respectively.

⁸ Reproduced in *Yearbook* . . . 1994, vol. II (Part One).

⁹ For the titles and texts of articles 1 to 33 as adopted by the Drafting Committee on second reading, see 2353rd meeting, para. 46.

¹⁰ See 2356th meeting, para. 38.

watercourses and the resolution on confined groundwater to the General Assembly with a view to the elaboration of a convention by the Assembly or by an international conference of plenipotentiaries.”

104. If he heard no objection, he would take it that the Commission agreed to include that text in the relevant chapter of its report under the heading “Recommendation of the Commission”.

It was so agreed.

The meeting rose at 1.05 p.m.

2363rd MEETING

Tuesday, 12 July 1994, at 10.20 a.m.

Chairman: Mr. Vladlen VERESHCHETIN

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Jacovides, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Yamada, Mr. Yankov.

Tribute to the memory of Mr. José María Ruda

1. The CHAIRMAN said that it was his sad duty to inform the members of the Commission of the death, on 8 July 1994, of Mr. José María Ruda, who had been a member of the Commission from 1964 to 1973 as well as its Chairman in 1968. Mr. Ruda had been elected in 1973 to ICJ where he had served for two consecutive terms and over which he had presided from 1988 to 1991. An experienced diplomat who had represented his country in many international forums, Mr. Ruda had also published a number of valuable studies on matters of international law. Special mention should be made of the course Mr. Ruda had given in 1975 at the Hague Academy of International Law on reservations to treaties,¹ which would undoubtedly be extremely valuable to the Commission in its forthcoming consideration of the topic.

At the invitation of the Chairman, the members of the Commission observed a minute of silence in tribute to the memory of Mr. José María Ruda.

¹ “Reservations to Treaties”, *Collected Courses of The Hague Academy of International Law, 1975-III* (Leiden, Sijthoff, 1977), vol. 146, pp. 95-218.

2. Mr. BARBOZA said that he was particularly saddened by Mr. Ruda’s death, not only as a member of the international legal community, but also as a compatriot and a friend. He had been co-holder of a chair at Buenos Aires University with Mr. Ruda before Mr. Ruda had become Under-Secretary for Foreign Affairs and then representative of Argentina to the United Nations Security Council and General Assembly at a delicate time in his country’s history. Mr. Ruda had always been noted for his integrity and his dedication to the public interest both at the national and international levels.

3. Having risen through the hierarchy of the Department of Legal Affairs of the United Nations, he had then sat as a judge at ICJ for 18 years. His whole life had been devoted to diplomacy, teaching and writing, and it set an example for future generations.

4. Mr. THIAM said that he too wished to pay a tribute to Mr. Ruda, who had been his colleague for one year on the Commission before he had become a judge at the Court. He would stress in particular Mr. Ruda’s human and social qualities, his keen mind and his special interest in relations between Africa and Latin America.

5. The CHAIRMAN said that, on behalf of the Commission, he would address a letter of condolences to Mr. Ruda’s family and enclose a copy of the summary record of the meeting.

Statement by the Under-Secretary-General, Director-General of the United Nations Office at Geneva

6. The CHAIRMAN said that it was his pleasure to welcome the Under-Secretary-General, Director-General of the United Nations Office at Geneva, who had been associated throughout his career with United Nations efforts to develop international law and thus improve international relations and whose work was held in high esteem by the entire international legal community.

7. Mr. PETROVSKY (Under-Secretary-General, Director-General of the United Nations Office at Geneva) said that he first wished to convey to the Commission the wishes of the Secretary-General, who had himself been a member of the Commission.

8. It was an honour for him to speak before the Commission, which had established its reputation as the world’s leading body in the field of international law-making and included in its membership some of the best experts in that field. Fourteen multilateral conventions had been concluded on the basis of drafts prepared by the Commission. At the current time, in the new international environment, the Commission continued to make a vital contribution to the strengthening of international law through its involvement in a number of important topics, such as the preparation of a statute for an international criminal court, State responsibility, international liability for injurious consequences arising out of acts not prohibited by international law and the law of the non-navigational uses of international watercourses.

9. That involvement in efforts to strengthen international law was a difficult but gratifying experience. He recalled that, in 1989, as Soviet Deputy Foreign Minister, he had had occasion at the forty-fourth session of the General Assembly to present a memorandum setting forth concrete proposals on enhancing the role of international law and, although it had taken some time for those ideas to gain support, they were now becoming a reality.

10. One of the characteristics of the current international scene was the continuous flow of new and important developments affecting all fields of international law. The changes that were taking place at the economic, social and political levels were transforming civilization. That acceleration of history was characterized by increased democratization and the creation of a more human-oriented society which would, it was hoped, lead to the dawn of an era of *pax multilateralis* and the strengthening of the United Nations. But it was also generating some alarming tendencies, such as the multiplication of regional conflicts and the rise of extremist and aggressive nationalistic ideologies.

11. In the current situation, international law had to play an increasingly important role. There was already an evident trend towards the proliferation of international rules and standards, extending to virtually every field of human activity. However, much remained to be done and there was an urgent need to further strengthen the international juridical system. At the present time of global transformation, it could provide guidelines to minimize destabilizing tendencies and to promote peaceful change. As the United Nations Secretary-General had said in a recent statement, the universal aspirations and values common to all societies were proclaimed through international law, which taught peoples how to talk to each other and how to understand each other better.

12. The Secretary-General had also defined the three major fields in which the development of international law was most vital: protection of the rights and human dignity of the individual; promotion of mutual respect among nations; and enhancing prospects for international economic development. The goal of a new world order would be unattainable without a solid legal foundation and its stability could only be maintained by law. In practical terms, that meant that there was a need to facilitate the transformation of existing international law—the law of coexistence based on the balance of power—into a new international law based on partnership and a balance of interests among nations. It also meant that there should be much closer ties between theoretical deliberations on legal matters and practical political activities. He stressed that affirming the primacy of international law had always been one of the main aims of the United Nations. The major purpose of the Organization was in fact to counteract force with law.

13. It was difficult to overestimate the role of the United Nations in the international legal process. The San Francisco Conference had approved the inclusion, in Article 13 of the Charter of the United Nations, of a clause which read: “The General Assembly shall initiate studies and make recommendations for the purpose of

... encouraging the progressive development of international law and its codification”. By including the words “progressive development” in the Article, the Conference had recognized for the first time that an international organization had a role to play in the creation of new legal norms. Since that time, United Nations organs had made an immense contribution to the development of international law and, indeed, were playing a decisive role in the creation and elaboration of international legal norms. For example, the General Assembly had adopted such fundamental documents as the Vienna Convention on the Law of Treaties, the Vienna Convention on Diplomatic Relations, the Vienna Convention on Consular Relations and four conventions on the law of the sea.² It had contributed to the protection of human rights by adopting the Universal Declaration of Human Rights,³ the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and a number of other basic conventions aimed at the elimination of discrimination based on race, sex or religious belief. A considerable quantity of international regulations had also been developed by the United Nations specialized agencies.

14. One difficulty was that United Nations bodies produced a vast amount of resolutions, decisions, declarations and codes on various subjects, which did not have binding force. As a rule, such documents were adopted in response to urgent political problems and reflected the most recent developments in the international political situation. Because of their non-binding character, they were more readily accepted by most Governments. In fact, they played an important role and often filled the gap between negotiated treaties and customary law. None the less, their quantity was sometimes frightening and, as Sir Robert Jennings, the President of ICJ, had remarked, there was a danger that international law might be “submerged” under the mass of paper emanating from international assemblies. Also, those documents often used vague language and contradicted each other, as a result of which they lost some of their weight and significance. It might be worth considering the introduction of some kind of legal appraisal of major United Nations resolutions before they were approved by the relevant organ.

15. Another problem concerned the under-utilization of the capabilities of United Nations legal bodies and institutions for the solution of international political crises. Thus far, legal means had been implemented far less frequently than was desirable in the settlement of disputes. For example, at the beginning of 1994, some 10 cases had been pending before ICJ. While that was perhaps an achievement as compared with recent years, it was still considerably lower than the potential of the Court. It was worth noting in that connection that the United Nations was currently attempting to settle by political means 79 existing and potential crises.

² Convention on the Territorial Sea and the Contiguous Zone, Convention on the High Seas, Convention on Fishing and Conservation of the Living Resources of the High Seas and Convention on the Continental Shelf.

³ General Assembly resolution 217 A (III).

16. Since the First World War, there had been a number of disputes of a very diverse nature in the settlement of which legal procedures had been instrumental, even in recent decades. For instance, in 1965, the Soviet Union had acted as mediator in securing a cease-fire between India and Pakistan in their conflict over Kashmir. In 1980, Iceland and Norway had settled their dispute over the continental shelf by conciliation. In 1986, the United Nations Secretary-General had himself acted as arbitrator in the "Rainbow Warrior"⁴ case between France and New Zealand. Those examples showed that all legal means of dispute settlement, including mediation, conciliation, arbitration and adjudication, had considerable potential in the settlement of disputes between States and, if properly used, could help to improve significantly the international political climate. Very often, the mere act of submitting a dispute to a juridical body prevented it from deteriorating and thereby transforming a heated political dispute into a normal legal case.

17. The aim should be to put in place an international system of judicial bodies which would include the Commission, ICJ and the Permanent Court of Arbitration as well as other institutions which could together activate the whole range of legal means for settling disputes. The proposal by the Permanent Court of Arbitration the year before that a new Hague convention should be concluded to coincide with the centenary of the Convention for the Pacific Settlement of International Disputes seemed to have considerable support and, if implemented, could help to achieve that goal.

18. It was satisfying to note that, despite all the problems, States increasingly regulated their conduct by reference to an international system of justice. The idea of international justice should be popularized. Political leaders must understand that recourse to juridical bodies was just another pillar in the structure of inter-State relations. International legal organs could assist them in that respect by emphasizing the pedagogical aspect of their work. In that connection, it would seem that the time had come to make another step forward and to enhance respect for international law by linking it to moral values. In ancient times, ethics were separate from the law. The time had now come, however, for a new synthesis.

19. Moral considerations were now one of the major factors in international politics. Nothing united people more than a common understanding of what was evil and what was good. And nothing divided them more than ethical norms that placed a certain group in a privileged position while depriving others of their human dignity and the right to be treated as equals. Ethics was one of the major driving forces that determined human behaviour and political judgement and it had always had a considerable impact on foreign policy.

20. The contemporary world was becoming increasingly interdependent and that interdependence influenced more than just the economic and social spheres. With the intermingling of cultures, an international moral code had come about, whose major norms were

accepted by all the nations of the world. Elements of that code were incorporated in a number of fundamental international accords such as the Charter of the United Nations and the Universal Declaration of Human Rights. That however, was only a first step. There was a need to merge law and ethics in international politics and to create a political mentality of a new kind that would unite rather than divide people and produce a feeling of solidarity among them. The mentality of the political leaders in particular must be changed and they must be made to understand that it was as reprehensible to violate a moral prohibition as to break a norm of international law. If the international community achieved that end, its impact on political life would be comparable to that of the Enlightenment on European culture.

21. Halfway through the United Nations Decade of International Law⁵—one aim of which was to make legal considerations an integral part of the work of all United Nations bodies and not just of the Sixth Committee—the time had perhaps come to review the plans for the rest of the Decade in an attempt to achieve more substantive results by the time it ended. The Commission, the most respected body in its field of activity, had considerable freedom in the choice of topics that it considered and could play a key role in that process.

22. The United Nations had already introduced a considerable amount of morality into international politics and the law and had made political relations more open. The behaviour of States in the various United Nations forums was subject to certain rules of conduct that were based on the highly moral principles of the Charter.

23. The CHAIRMAN thanked the Under-Secretary-General, Director-General of the United Nations Office at Geneva, for his most interesting statement.

24. The Commission greatly appreciated the hospitality of the United Nations Office at Geneva, which provided it with conference services of a high quality.

International liability for injurious consequences arising out of acts not prohibited by international law (continued) (A/CN.4/457, sect. C, A/CN.4/459,⁶ A/CN.4/L.494 and Corr.1, A/CN.4/L.503 and Add.1 and 2)

[Agenda item 6]

CONSIDERATION OF THE DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE AT THE FORTY-FIFTH AND FORTY-SIXTH SESSIONS (continued)

CHAPTER II (Prevention) (continued)

ARTICLE 13 (Pre-existing activities) (continued)

25. The CHAIRMAN suggested that consideration of article 13 should be suspended until later in the discussion.

It was so agreed.

⁴ Ruling of 6 July 1986 by the Secretary-General (UNRIAA, vol. XIX (Sales No. E/F.90.V.7), pp. 197 *et seq.*).

⁵ Proclaimed by the General Assembly in its resolution 44/23.

⁶ Reproduced in *Yearbook* . . . 1994, vol. II (Part One).

ARTICLE 14 (Measures to prevent or minimize the risk)

26. The CHAIRMAN said that the consideration of the article also concerned the corrigendum which had been issued to the article (A/CN.4/L.494/Corr.1), and invited the Chairman of the Drafting Committee to introduce article 14, which read:

*Article 14. Measures to prevent or minimize the risk**

States shall take legislative, administrative or other actions to ensure that all necessary measures are adopted to prevent or minimize the risk of transboundary harm of activities referred to in article 1.

* The expression "prevent or minimize the risk" of transboundary harm in this and other articles will be reconsidered in the light of the decision by the Commission as to whether the concept of prevention includes, in addition to measures aimed at preventing or minimizing the risk of occurrence of an accident, measures taken after the occurrence of an accident to prevent or minimize the harm caused.

27. Mr. BOWETT (Chairman of the Drafting Committee) said that the Drafting Committee recommended two changes in the article, as adopted by the Drafting Committee at the forty-fifth session. The first change, the purpose of which was merely to ensure consistency in the use of terms throughout the draft articles, involved the addition of the words "prevent or" before the word "minimize" in the text of the article and in the title.

28. The other change concerned the addition of a footnote. During the discussion in plenary at the forty-fifth session, the majority view in the Commission had opted for a narrow conception of prevention, which was confined to measures taken prior to the occurrence of an accident in order to prevent or minimize the risk of such an accident.⁷ In his tenth report (A/CN.4/459), the Special Rapporteur had raised the issue again and had presented strong arguments in favour of a broader concept of prevention which would also include measures taken after the occurrence of an accident in order to prevent or minimize the harm caused. The Drafting Committee had had to keep in mind the possibility that, after having considered the report of the Special Rapporteur at its next session, the Commission might opt for that broader concept of prevention. In that event, the wording of the articles would have to be modified wherever the phrase "to prevent or minimize the risk of transboundary harm" occurred and some wording would have to be included to provide for the need to prevent or minimize transboundary harm. That was the reason for the footnote to article 14, which also applied to all the articles in which the expression "to prevent or minimize the risk of transboundary harm" occurred.

29. Mr. ROSENSTOCK said that the new wording of the article raised problems in that it tended to transform an obligation of conduct into an obligation of result, which was not consistent with the Special Rapporteur's tenth report. Far from improving the text, the Drafting Committee had helped to remove it further from *lex lata* and to make it more difficult to accept.

30. He therefore proposed that the word "necessary" should at least be replaced by the word "appropriate"

and, that the words "prevent or" should if possible, be deleted.

31. Mr. HE said that he had two points to make, the first of which concerned the asterisk and the footnote. Although the question of a narrow or broad interpretation of article 14 was still in abeyance, he would prefer a broad interpretation for the reasons explained by the Special Rapporteur in his tenth report. In view of that uncertainty, the explanation given in the footnote should be transferred to the commentary.

32. His second comment concerned the word "necessary". Originally, he had considered that it could be replaced by the word "possible" to take account of the fact that the standards applicable in the developed countries with respect to "necessary measures" were perhaps not suitable for the developing countries, having regard to the stage of their technology. In the light of Mr. Rosenstock's proposal, he could agree that the word "necessary" should be replaced either by the word "possible" or by the word "appropriate".

33. Mr. BARBOZA (Special Rapporteur) said that either word would be acceptable to him. With regard to Mr. He's second comment, he would remind members that he had proposed that a rule should be included in the general principles to provide that in assessing the conduct of a State, the court or any other body responsible for interpreting the law or the treaty should take account of the special situation of the developing countries. A general provision of that kind would cover virtually all the articles.

34. Mr. BOWETT (Chairman of the Drafting Committee) said that, in his view, the addition of the word "possible" in the article would create the impression that an even higher duty was placed on States, in which case an explanation would be required in the commentary to eliminate that interpretation. In view of that risk, it would be preferable to retain the word "appropriate".

35. Mr. ROSENSTOCK said he would agree that his proposal to delete the words "prevent or" should be dropped if it was made clear in the commentary that the article dealt with an obligation of conduct and not of result.

36. Mr. de SARAM, stressing the importance of the question under discussion, said that it was the first reading of the draft articles and he would like his view to be reflected in the commentary. With regard, first, to the words "all necessary measures", there was a gradation between the three words "possible", "appropriate" and "necessary" even if the distinction was sometimes difficult to make.

37. Further, he trusted that the words "or other actions" would not be interpreted to mean that the other measures should be *ejusdem generis* with the legislative and administrative measures. He would prefer the beginning of the sentence to be re-worded to read: "States shall take all [necessary] measures to prevent . . .". He saw no reason for the Commission to determine that a measure should be of a legislative, administrative or any other nature.

38. With regard to Mr. Rosenstock's second proposal, his own view was that the inclusion of the words "pre-

⁷ See *Yearbook . . . 1993*, vol. I, 2302nd meeting.

vent or” was important, since, otherwise, the text would convey the impression that the only obligation was to minimize the risk and not to prevent it. All those points would, moreover, have an implication for the way in which the Commission dealt with liability for damage and for the question whether the obligation of the State of origin should be higher than an obligation of due diligence. That debate was still open. The Commission had still not entered into it and it should do nothing that might prejudice the position it would take during its consideration of liability at the forty-seventh session.

39. Mr. YANKOV said it stood to reason that the expression “all measures” included legislative, administrative and other measures. But it was also important—and it was the practice in many legal instruments on the environment—to refer expressly to legislative, administrative and other measures because one of the most reliable ways of ensuring stability with regard to the protection of the environment and the avoidance of risk and damage was through legislation supported by administrative, technical, financial, demographic and other measures. If the Commission should decide on a general form of wording for the article, the commentary must make it clear that it had in mind all legislative, administrative, technical, financial and other measures.

40. His second point concerned the replacement of the word “necessary” by the word “appropriate”. In a spirit of compromise, he was prepared to go along with that replacement, although “necessary” was the proper term in his view.

41. It was also necessary to consider more closely the problem of double standards. Where there was a risk or damage to the environment or to human health, there could be no question of providing one standard for the poor, one for the less fortunate and a third for all the rest. The Commission should try to achieve harmonization and unification in the rules that protected, for instance, the global environment, security and stability, and health. He would therefore suggest, at the current stage, that the Commission should keep the words “prevent or minimize”, which were, in any event not its invention and which dated back to the Stockholm Declaration.⁸ When the Commission took up that part of the Special Rapporteur’s tenth report dealing with liability, it could see how that fitted in to the draft articles.

42. Mr. THIAM said he understood that some might want to drop the word “necessary”, although, basically, it was the most suitable. What he found extraordinary, however, was that there were those who wanted to drop the word “possible”, since it meant, precisely, that States were not being asked to do the impossible. The word “appropriate” was very vague and open to many interpretations.

43. He would therefore prefer to retain the word “necessary”, but, as a concession, would agree to its replacement by the word “possible”.

44. Mr. AL-BAHARNA pointed out that there had been agreement in the Drafting Committee on the word

“necessary”, which, in any event, the text required. He was not prepared to agree to its replacement without an explanation from the Special Rapporteur or the Chairman of the Drafting Committee as to the difference in that context between the various terms.

45. Mr. EIRIKSSON said that, whichever adjective was chosen, the nature of the obligation behind the article was not clear from the wording. Some explanation should be given of what the Commission meant by that obligation and which standards it intended to set.

46. Mr. BARBOZA (Special Rapporteur) said that he did not see the point of the discussion, since it was clear, as explained in detail in the comments made in the tenth report, that article 14 dealt only with an obligation of due diligence. Whichever word was adopted, the nature of that obligation would not change. The Commission could therefore equally well choose any one of the three words, although, perhaps, the Chairman of the Drafting Committee had pointed out, the word “possible” implied a higher degree of commitment.

47. Mr. TOMUSCHAT said that he objected to the word “possible”, as it would place too great a burden on the State. On the other hand, he saw little difference between the word “necessary” and the word “appropriate”, apart from the fact that the latter perhaps placed more emphasis on the test of proportionality with regard to the sacrifice demanded of the State.

48. Mr. de SARAM said he agreed with Mr. Al-Baharna that the question had been dealt with by the Drafting Committee and that the word “necessary” should therefore be retained.

49. Mr. GÜNEY said he shared Mr. Tomuschat’s view that it would be impossible to adopt the word “possible”, since it imposed a higher degree of commitment which was not acceptable in the context. If there was to be any change, it should consist of the replacement of the word “necessary” by the word “appropriate”.

50. Mr. ROSENSTOCK said that he welcomed the Special Rapporteur’s explanations, as well as his stated intention to make it clear in the commentary that article 14 dealt with an obligation of due diligence or an obligation of conduct. He was, however, concerned that the word “necessary” could be read as meaning “possible”. He would therefore prefer it to be replaced by the word “appropriate” or the word “practicable”, which would leave no doubt as to the consistency of the text of the article with the commentary and of the text with the Special Rapporteur’s tenth report.

51. Mr. MAHIU said that, like Mr. Tomuschat, he considered that there was no difference between the words “necessary” and “appropriate”. He would not, however, object to the replacement of the former by the latter.

52. Mr. CALERO RODRIGUES, referring to the footnote, said that it was contradictory to speak of “measures taken . . . to prevent or minimize the harm caused”, since, if harm was caused, it could not be prevented. He therefore proposed that the word “caused” should be deleted.

⁸ Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972 (United Nations publication, Sales No. E.73.II.A.14 and corrigendum), part one, chap. I.

53. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to delete the word “caused” in the last line of the footnote.

It was so agreed.

54. The CHAIRMAN said that, in the light of the explanations given by the Special Rapporteur concerning the nature of the obligation laid down in article 14, he would take it, if he heard no objection, that the Commission agreed to retain the words “prevent or”.

It was so agreed.

55. The CHAIRMAN reminded the Commission that Mr. He had proposed that the footnote should be moved from the text of the draft articles to the commentary.

56. Mr. BOWETT (Chairman of the Drafting Committee) said that, if that were done, it would not assist the reader, as it would be difficult to find the content of the footnote in the relatively lengthy commentary.

57. Mr. HE withdrew his proposal.

58. The CHAIRMAN said that the Commission still had before it the proposal to replace the word “necessary” by the word “appropriate”.

The Commission decided to replace the word “necessary” by the word “appropriate” and took note of the objections of two members.

Article 14, as amended, was adopted.

ARTICLE 14 *bis* (Non-transference of risk)

59. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce article 14 *bis*, which read:

Article 14 bis [20 bis]. Non-transference of risk

In taking measures to prevent or minimize a risk of causing significant transboundary harm, States shall ensure that the risk is not simply transferred, directly or indirectly, from one area to another or transformed from one type of risk into another.

60. Mr. BOWETT (Chairman of the Drafting Committee) said that the number 20 *bis* which appeared between square brackets was the number originally designated for the article by the Special Rapporteur. The Drafting Committee had, however, felt that the article dealt with a general principle, non-transference of risk, that must be taken into account in the implementation of all the articles. It had therefore decided that it would be better to place it after article 14. Article 14 *bis* was inspired by the new trend in environmental law to design a comprehensive policy for protecting the environment. The Drafting Committee had taken note of article 195 of the United Nations Convention on the Law of the Sea and of article II, paragraph 2, of the Code of Conduct on Accidental Pollution of Transboundary Inland Waters,⁹ which also dealt with the issue.

61. The purpose of the expression “simply transferred” was to preclude actions that purported to prevent or to minimize the risk, but in effect merely externalized it by shifting it to a different place or changing it so as to produce a different risk which was not really a reduced risk. The Drafting Committee was aware that, in the context of the topic, the promotion of an activity, the place where it should be conducted and the use of measures to prevent or reduce the risk of its causing transboundary harm were, in general, matters that had to be determined through the process of finding an equitable balance between the interests of the parties concerned. Obviously, article 14 *bis* had to be understood in that context, but it was the view of the Drafting Committee that, throughout the process of finding an equitable balance of interests, the parties should take into account the general principle set forth in the article.

62. Mr. EIRIKSSON said that he wondered whether article 14 *bis* was really necessary. The consequences of such a provision were perhaps clearer in the instruments referred to by the Chairman of the Drafting Committee, whereas, in the draft under consideration, they might become too dependent on the reading of the word “simply”. Whether or not the risk was transferred from one area to another, if the risk of causing significant transboundary harm subsisted, it should not make any difference at all so far as the future convention was concerned.

63. Mr. BENNOUNA said that, in his view, it should be made clear, if not in the article itself, then at least in the commentary, that a risk of another type which arose out of the transformation of the initial risk continued to be a risk within the meaning of article 2.

64. Mr. BARBOZA (Special Rapporteur) said that the comments made by Mr. Eiriksson and Mr. Bennouna would be taken into account in the commentary.

Article 14 bis was adopted.

ARTICLE 15 (Notification and information)

65. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce article 15, which read:

Article 15. Notification and information

If the assessment referred to in article 12 indicates a risk of causing significant transboundary harm:

(a) **The State of origin shall notify without delay the States likely to be affected and shall transmit to them the available technical and other relevant information on which the assessment is based and an indication of a reasonable time within which a response is required;**

(b) **When necessary, such notification may be effected through a competent international organization;**

(c) **Where it subsequently comes to the knowledge of the State of origin that there are other States likely to be affected, it shall notify them without delay.**

66. Mr. BOWETT (Chairman of the Drafting Committee) said that article 15 addressed a situation where the assessment conducted by a State, in accordance with article 12, indicated that the activity planned did indeed have a risk of causing significant transboundary harm. Together with articles 16, 18 and 19, article 15 provided

⁹ E/ECE/1225-ECE/ENVWA/16 (United Nations publication, Sales No. E.90.II.E.28).

for a set of procedures that were essential in attempting to balance the interests of all the States concerned by giving them a reasonable opportunity to find a way to undertake the activity, subject to satisfactory and reasonable measures being taken to prevent or minimize transboundary harm. The core idea of article 15 was the duty of the State of origin to notify the States likely to be affected. Article 12 of the draft articles on the law of the non-navigational uses of watercourses¹⁰ dealt with a similar issue and the Drafting Committee had also taken note of article 3 of the Convention on Environmental Impact Assessment in a Transboundary Context, which also related to the same question.

67. The notification provided for in subparagraph (a) must be accompanied by technical and other relevant information on which the assessment was based. Subparagraph (a) assumed that not only raw data and technical information were included, but also the analysis of the information which had been used by the State of origin itself to determine the risk of transboundary harm. The notification should also include an indication by the State of origin of a reasonable time within which the States likely to be affected must respond and which should allow them enough time to review the assessment material and make their own determination of the possible transboundary consequences.

68. States were free to decide how they wished to inform the States that were likely to be affected. As a general rule, they would make direct contact through diplomatic channels. In the absence of diplomatic relations, the notification could be made through a third State or a competent international organization. As use of the latter was not as common as the other two, the Drafting Committee had felt that it would be useful to mention that possibility in subparagraph (b). The reference to international organizations had a further purpose, namely, to enable a State of origin which was unable by itself to determine the States that were likely to be affected to request the assistance of a competent international organization for the purpose. In doing so, the State of origin could properly claim that it had exercised due diligence. The word "competent" meant that the organization was technically competent to deal with the problem concerned and legally competent to act in the way described. Subparagraph (c) addressed the situation where the State of origin, despite all its efforts, was unable to identify all the States that might be affected prior to authorizing the activity and learnt later that other States might be affected. In such cases, the State of origin was under the obligation to notify such States without delay.

69. Mr. EIRIKSSON said that one of the general points he had made when expressing his support for the substance of the proposed draft articles was that he would have preferred them to be more direct and methodical. There might therefore be an opportunity to make the link between articles 15, 18 and 19 clearer by adding, before the words "is required", at the end of article 15, subparagraph (a), the words "including a request for consultations under article 18". He also wondered whether there should be an obligation on the

notifying State to indicate a reasonable time. Perhaps it would be preferable to replace the words "and an indication of a reasonable time" by the words "and may indicate a reasonable time". Lastly, the link between subparagraphs (b) and (c) and the remainder of the article was perhaps not very clear and he would therefore suggest that the article as a whole should be recast with an introductory clause followed by three separate subparagraphs corresponding to the three existing subparagraphs. As a further meeting of the Drafting Committee was apparently contemplated, those changes could perhaps be dealt with then.

70. Mr. ROSENSTOCK proposed that the word "other", in subparagraph (c), should be deleted to make it clearer that the obligation to notify without delay would apply even if no State had been notified on the first occasion.

71. Mr. BENNOUNA said that, as a matter of procedure, he found it unacceptable that the Drafting Committee should be reconvened, once it had completed its work, to consider the proposals of one member of the Commission.

72. Mr. VARGAS CARREÑO said that the arguments invoked by the Drafting Committee to justify the reference to a competent international organization in subparagraph (b) were valid in theory perhaps, but in practice the provision could give rise to difficulties and controversy as to which organization was competent. Was there not a risk of undermining the main purpose of the article, which was to ensure that the State of origin was always required to inform the States likely to be affected? Perhaps it should be made clear that subparagraph (b) would apply only in the absence of diplomatic relations.

73. Mr. GÜNEY said that he agreed with Mr. Bennouna concerning procedure. The Drafting Committee was open-ended and Mr. Eiriksson had been free to submit his proposals to it. Even if his proposals had merit, it would be difficult to consider them at the current stage. They could perhaps be considered on second reading.

74. Mr. PELLET said that he had no objection with regard to procedure. He also agreed with Mr. Vargas Carreño about substance. He still did not see the point of effecting notification through a "competent" international organization and in his view, article 15, subparagraph (b), which was obscure and ambiguous, could be deleted.

75. Mr. BARBOZA (Special Rapporteur) said that the purpose of article 15, subparagraph (b), was not to compensate for any absence of diplomatic relations between the State of origin and one or more States that were likely to be affected, but to respond to a concern expressed at the preceding session, namely, that an activity might carry a risk of causing harm to a considerable number of States not all of which the State of origin would be able to identify by its own means. Under the terms of subparagraph (b), it would be able in such a case to turn to a competent international organization for assistance in that connection. Subparagraph (b) would also make it possible to assess the diligence of the State of origin, for it could be argued that, if such a State had

¹⁰ See 2353rd meeting, para. 46.

had the possibility of calling on a competent international organization to notify the States likely to be affected, but had not done so, it had perhaps not employed due diligence. The idea expressed in subparagraph (b) should therefore be retained, at any rate in the commentary.

76. Mr. PELLET said that he was not indifferent to the Special Rapporteur's explanations, but, in his view, the intervention of an international organization was not linked to notification. A State could, of course, seek the help of an international organization, but it would do so more for the purpose of assessment, which was the subject of article 12. He did not see why a State would need help in making a notification.

77. Mr. MAHIU said that he shared Mr. Pellet's doubts. The provision might, moreover, be used by the State of origin to offload its procedural obligation to notify and inform on to an international organization.

78. As to Mr. Eiriksson's proposals, admittedly they were interesting, but the plenary must not be transformed into a drafting committee. It was a pity that his proposals had not been submitted to the Drafting Committee.

79. Mr. AL-BAHARNA said that his understanding of article 15, subparagraph (b), was the same as the Special Rapporteur's and he was opposed to deleting it or placing it elsewhere. Perhaps, for the sake of clarity, the words "at the request of the State of origin" could be added after the word "effected", and the word "through" could be replaced by the words "with the assistance of". At all events, the Special Rapporteur's explanations should appear in the commentary.

80. Mr. TOMUSCHAT said that, although subparagraph (b) was unnecessary, in his view, he would not object to its retention. He considered, however, that the replacement of the word "through" by the words "with the assistance of" would be awkward: he too did not see how a State could have need of the assistance of an international organization in making a notification.

81. Mr. CALERO RODRIGUES said he doubted that the existing wording of subparagraph (b) could be improved. If there was strong opposition to it, it could be deleted and the idea it reflected could be expressed in the commentary, as the Special Rapporteur had proposed.

82. Mr. YANKOV said that he favoured the retention of subparagraph (b) as worded because it defined one of the means the State of origin could use in making a notification. The differences of view concerning the subparagraph could be reflected in the commentary.

83. Mr. BENNOUNA, supported by Mr. KABATSI (Rapporteur), speaking as a member of the Commission, said that subparagraph (b) should be retained. The question had been debated at length and it might well be that a State did not know which States were likely to be affected by an activity and therefore turned to a competent international organization to identify and notify them.

84. Mr. RAZAFINDRALAMBO said that he too favoured the retention of subparagraph (b). The provision was important for the developing countries, which lacked technical resources. Recourse to an international

organization might also be necessary in the case of assessment and the ideal solution would perhaps be for a separate provision to be formulated, along the lines of the provision in the United Nations Convention on the Law of the Sea, on the assistance competent international organizations could provide in that connection. He also considered, like Mr. Tomuschat, that the replacement of the word "through" by the words "with the assistance of" would be awkward.

85. Mr. MAHIU said he agreed with Mr. Pellet that action by an international organization would be more justified when it came to risk assessment and the identification of the States likely to be affected. In that connection, he would not be opposed to a separate provision on assistance by international organizations.

86. Mr. FOMBA said that, although he had not expressed any objection to subparagraph (b) in the Drafting Committee, the discussion taking place raised doubts in his mind as to the relevance and utility of the provision. The State of origin could, of course, request an international organization to assist it in assessing the risk and in identifying the States likely to be affected, but, once those States had been identified, it was for the State of origin to notify them. Consequently, subparagraph (b) should not be retained, at least not as presently worded.

87. Mr. PELLET said that he agreed with Mr. Razafindralambo's analysis, but not with his conclusion. Developing States might need assistance, but it would not be for the purpose of notification. The retention of subparagraph (b) might even be dangerous, since it would suggest, *a contrario*, that international organizations could intervene solely for the purpose of notification—and that was probably the only area in which their assistance was unnecessary. He therefore proposed that subparagraph (b) should be deleted and that the following sentence should be added at the end of article 12: "For the purposes of such assessment, a State shall be entitled to seek the assistance of competent international organizations."

88. Mr. VARGAS CARREÑO said that the important thing was not to undermine the main objective of article 15, namely, that the States likely to be affected should be notified in time that the State of origin intended to undertake an activity that might cause them harm. If the notification could be made through an international organization, it was always possible that, once the harm had occurred, the affected States would say that they had not known that the activity was going to be undertaken and the State of origin would contend that it had notified its intention to undertake the activity in question in time to an international organization which it regarded as competent, but that that organization had carried out the notification in such a way that the affected States had not been informed in time. To avoid that situation, it would be preferable to delete subparagraph (b) or to word it in such a way as to explain the reasons for which an international organization might have to intervene. Also, as had been proposed, the intervention of international organizations could be dealt with in a separate article.

The meeting rose at 1.05 p.m.

2364th MEETING

Tuesday, 12 July 1994, at 3.10 p.m.

Chairman: Mr. Vladlen VERESHCHETIN

Present: Mr. Al-Baharna, Mr. Barboza, Mr. Benouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Jacovides, Mr. Kabatsi, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Yamada, Mr. Yankov.

International liability for injurious consequences arising out of acts not prohibited by international law (continued) (A/CN.4/457, sect. C, A/CN.4/459,¹ A/CN.4/L.494 and Corr.1, A/CN.4/L.503 and Add.1 and 2)

[Agenda item 6]

CONSIDERATION OF THE DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE AT THE FORTY-FIFTH AND FORTY-SIXTH SESSIONS (continued)

CHAPTER II (Prevention) (continued)

ARTICLE 15 (Notification and information) (concluded)

1. The CHAIRMAN said that two conflicting views appeared to have emerged with regard to subparagraph (b) of article 15. One view, held by Mr. Pellet (2363rd meeting) and others, was that it was not enough to confine the role of the international organizations to one of notification under article 15, subparagraph (b). Mr. Pellet had accordingly made a proposal to add to article 12 (Risk assessment) a proposal concerning the role that might be played by international organizations in risk assessment. The opposing view was that the reference to the role of international organizations in article 15, subparagraph (b) was superfluous or that the subparagraph should at least be reworded. In view of time constraints and of the expressed readiness of the Special Rapporteur to accept such a solution, he proposed that both views—concerning, first, the possible role of international organizations in the context of article 12, and secondly, that role in the context of article 15—should be reflected in the commentary, and that further consideration of the question of a reference to the role of international organizations in the text of the draft itself should be deferred until the second reading. On that understanding, subparagraph (b) of article 15 would be deleted.

It was so agreed.

2. The CHAIRMAN said that other suggestions had also been made regarding article 15, in particular by

Mr. Eiriksson. Clearly, some formal change would be needed, now that the article consisted only of subparagraphs (a) and (c). As he saw it, the chapeau of article 15 referred primarily, if not exclusively, to subparagraph (a). He thus proposed that the chapeau and subparagraph (a) should be merged to form a paragraph 1, while subparagraph (c) should become paragraph 2, thus addressing one of Mr. Eiriksson's concerns. No change in wording would be involved.

It was so agreed.

Article 15, as amended, was adopted.

3. Mr. EIRIKSSON said that, as he did not expect to be present at the second reading of the draft articles, and in view of the form in which article 15 had been adopted, he wished to state more clearly that his own preference would have been to retain subparagraph (a) unchanged up to the word "based", and to continue with the sentence: "The State of origin may indicate a reasonable time within which a response, including a request for consultations under article 18, is required."

ARTICLE 16 (Exchange of information)

4. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce article 16, which read:

Article 16. Exchange of information

While the activity is being carried out, the States concerned shall exchange in a timely manner all information relevant to minimizing any risk of causing significant transboundary harm.

5. Mr. BOWETT (Chairman of the Drafting Committee) said that article 16 dealt with steps to be taken after an activity had been undertaken. The purpose of all those steps was the same as in previous articles: to prevent or minimize the risk of causing significant transboundary harm.

6. Article 16 required the exchange of information between the State of origin and the States that were likely to be affected, after the activity involving risk had been undertaken. In the view of the Drafting Committee, preventing and minimizing the risk of transboundary harm on the basis of the concept of due diligence was not a once-and-for-all effort. It required continuing efforts, which meant that the requirement of due diligence did not terminate after granting authorization for the activity and undertaking the activity; it continued for as long as the activity continued.

7. The information that was required to be exchanged under article 16 was whatever information would be useful for the purpose of preventing risk of significant harm. Normally, such information came to the knowledge of the State of origin. However, when the State that was likely to be affected had any information which might be useful for the purposes of prevention, it should make it available to the State of origin.

8. The Committee had taken note of the fact that the duty to exchange information was fairly common in conventions designed to prevent or reduce environmental and transboundary harm. For example, article VI, paragraph 1 (b) (iii), of the Code of Conduct on Accidental

¹ Reproduced in *Yearbook* . . . 1994, vol. II (Part One).

Pollution of Transboundary Inland Waters,² and article 13 of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes contained such a duty.

9. Under article 16, such relevant information should be exchanged in a timely manner, which meant that when the State became aware of such information, it should inform the other States quickly so that there would be enough time for all the States concerned to consult on appropriate preventive measures.

10. The Commission would note that there was no requirement in the article as to how often such information should be exchanged. The original article as proposed by the Special Rapporteur³ had spoken of “periodic” exchanges of information. In the Drafting Committee’s view, it was unreasonable to impose a requirement as to frequency because the States concerned might not have any information to exchange. The requirement in article 16 came into operation only when States had information relevant to preventing or minimizing transboundary harm.

11. The CHAIRMAN, speaking as a member of the Commission, asked why article 16 referred only to “minimizing” any risk of causing significant transboundary harm. Was the omission of any reference to “preventing” such a risk intentional, or an oversight?

12. Mr. BOWETT (Chairman of the Drafting Committee) said that he personally could see no good reason for excluding a reference to “preventing” such a risk. The Special Rapporteur might perhaps recollect some reason why it had been deliberately excluded.

13. Mr. BARBOZA (Special Rapporteur) said that perhaps the assumption had been that it was not easy to completely prevent any risk of significant transboundary harm, where an activity already involved risk. The addition of a reference to “preventing” would be welcome.

14. Mr. ROSENSTOCK said that the activity referred to was one that involved risk; if that risk was prevented, the activity would cease to be one involving risk. The obligation in dealing with an activity involving risk, was to minimize that risk, not to minimize the harm caused. Article 16 did not cover activities in which no risk was involved. Logically, therefore, the provision should be left unchanged.

15. Mr. BARBOZA (Special Rapporteur) said that the obligation under article 16 was an obligation of information. If, as a result of new discoveries or technological advances, an activity were to cease to involve risk, there was no reason why States should not be obliged to inform other States of that fact. He thus continued to believe that it would be a good idea to insert a reference to “preventing”.

16. Mr. de SARAM said he endorsed the Special Rapporteur’s remarks. If, in the case of an ongoing activity,

a State obtained information which removed the risk involved, it would surely not be in accordance with the purpose of the articles for that State not to disclose the information.

17. Mr. CALERO RODRIGUES said that Mr. Rosenstock’s point might very well be correct. However, article 14 already contained a reference to measures “adopted to prevent or minimize the risk . . . of activities referred to in article 1”. He thus favoured the insertion of a reference to prevention.

18. Mr. TOMUSCHAT said that, in the modern world, not only neighbouring States, but also States in other regions, might be affected by an activity involving risk. Information on such activities should be sent to an international agency, which could act as a central depository, so that States which did not at first sight appear to be exposed to the risk could gain access to the information if they subsequently decided that they might have been affected. He thus favoured adding to article 16 a provision to the effect that information should also be provided to a competent international organization.

19. The CHAIRMAN asked whether, in view of the Commission’s decision merely to reflect in the commentary the role of international organizations in other cases, Mr. Tomuschat would be willing to adopt a similar course regarding those organizations in the context of article 16.

20. Mr. TOMUSCHAT said that he was not aware that the competent international organizations were referred to textually in any of the draft articles. In his view, it was not appropriate merely to relegate a reference to them to the commentaries. The assumption underlying all the articles as currently drafted was that such activities affected States only in their mutual and bilateral relations. However, account must also be taken of new developments in a more structured world which did not consist simply of a network of bilateral relationships, and in which some hierarchical institutions existed. Against that background, it would be an oversight not to mention the international organizations somewhere in the text. Perhaps, if there was agreement on the need for such a reference, the task of finding an appropriate wording could be assigned to a working group.

21. The CHAIRMAN pointed out that, if Mr. Tomuschat’s concern was to be addressed, the entire set of draft articles would probably have to be reviewed, something that would indeed be hard to accomplish in plenary. His suggestion that Mr. Tomuschat’s concerns should be reflected in the commentary had been intended as a means of drawing attention to the fact that the question of incorporating the role of the international organizations into the text of the draft articles would need to be addressed at a later stage. Now that it had been agreed to insert a reference to such organizations in the commentary in the cases of articles 12 and 15, it would be invidious to insist on inserting a reference thereto in the text of article 16 alone.

22. Mr. BARBOZA (Special Rapporteur) said that he would hesitate before including any reference to the international organizations in the draft articles. The Commission had several times contemplated doing so,

² E/ECE/1225-ECE/ENVWA/16 (United Nations publication, Sales No. E.90.II.E.28).

³ *Yearbook . . . 1993*, vol. II (Part One), document A/CN.4/450, chap. I, sect. B.

and had concluded that it would be best not to refer to them explicitly. The international organizations would not be parties to the articles, so it was not possible to impose obligations on them. He himself had proposed including a reference to them in article 15, but merely as a means of measuring the degree of the due diligence exercised by a State in its duty of notification. The extent of any subsequent involvement of those organizations would depend on their readiness to cooperate.

23. Mr. BENNOUNA said he was unable to agree with the Special Rapporteur. Mr. Tomuschat had raised a very important question. The Commission had decided to delete subparagraph (b) of article 15, which had provided a means of notification in cases in which it was not known what States might be affected. Chernobyl offered a prime example in that regard. As things stood, it was now up to the State of origin to decide what States were likely to be affected. Yet international organizations existed whose specific task was to deal with transboundary pollution and protection of the environment. To ignore them in a set of draft articles the central concern of which, however generally expressed, was prevention of pollution and protection of the environment, would be a mistake.

24. Mr. MAHIU said that it seemed necessary to insert the word "preventing", in view of the remark made by Mr. Calero Rodrigues regarding article 14. Furthermore, chapter II as a whole was entitled "Prevention" and the idea of prevention was thus implicit throughout the chapter; no harm could thus come of mentioning it explicitly.

25. There seemed to be agreement that the international organizations had a role to play, but insufficient consideration had been given to ways and means of involving them, and to the implications of such involvement. The Special Rapporteur should perhaps be asked to give further thought to the advantages and drawbacks of including a reference to those organizations, and either to draft an additional article for consideration at the next session, or, should he conclude that it was better to omit any explicit reference, to explain the reasons for reaching that conclusion.

26. Mr. PELLET thought that the Special Rapporteur might have begged the question in asserting that international organizations would not be parties to a future convention on the subject. It might in fact be necessary, not only to refer to the international organizations in the draft articles, but also to open the convention for signature by those organizations. He agreed with Mr. Mahiou that the question was one to which the Special Rapporteur should be asked to give further thought before the next session.

27. As to the matter raised by Mr. Tomuschat, the Special Rapporteur was wrong to speak in terms of imposing obligations on the international organizations. The task was to establish what were the rights of States, and what their attitude should be, when faced with a risk associated with a non-prohibited activity. Mr. Tomuschat was right to say that the possibility of States having recourse to international organizations, and the role of those organizations, could not be totally disregarded. Since the Commission was behind in its schedule of

work, he wished to make a procedural proposal that discussion of the question should be suspended and resumed at the end of the next plenary meeting if time permitted. At that point, it might prove possible to formulate an additional article, with some such wording as: "These provisions shall be without prejudice to the role of the international organizations in their implementation and to the right of the States concerned to have recourse to their assistance." A draft article along those lines could serve as a basis for further study by the Special Rapporteur and there would then be a mention made in the report of the Commission to the effect that the Commission had not yet fully considered the issue.

28. Mr. BARBOZA (Special Rapporteur) said it was gratifying that the Commission had at last taken cognizance of a problem he had drawn to its attention three times and on which he had hitherto received no guidance whatever. It was against that background that he had concluded that it was not possible to impose obligations on international organizations unless they were parties to the draft articles, and also that they were not supposed to be parties thereto. To the best of his knowledge, not one convention on responsibility or liability contained a provision on international organizations. The Commission was thus venturing into a previously unexplored territory. He welcomed any suggestions for further reflection on the point at the next session. Perhaps there was no need to draft an additional article and it would be sufficient to state in the report of the Commission that the Special Rapporteur would give further consideration to the matter in his next report.

29. The CHAIRMAN asked whether he could take it that the Commission was prepared not to introduce amendments as to the role of the international organizations in the text of the draft articles at the current stage, without prejudice as to the role of those organizations, which would be the subject of further study in the Commission and would possibly be reflected in the articles themselves at some future stage. In the meantime, the fact that the Commission had not touched on that question would be reflected in its report to the General Assembly.

30. Mr. TOMUSCHAT said he supported Mr. Pellet's suggestion that an additional draft article should be discussed at the next plenary meeting, if time permitted once consideration of the existing draft had been completed. In that way, a glaring lacuna in the draft might be filled.

31. The CHAIRMAN asked whether, on that understanding, the Commission wished to adopt article 16, as amended to include a reference to "preventing or minimizing any risk...".

32. Mr. EIRIKSSON said that the proposed amendment should reproduce the language used in the other relevant articles, and should refer to "preventing or minimizing the risk...", since the words "any risk" gave rise to confusion in the other languages, and had been interpreted as meaning "all risk".

33. Mr. HE said that, at the previous session, many members had been in favour of incorporating in chapter I (General provisions) a general provision which would

take account of the situation of the developing countries, and, in chapter II (Prevention) a specific provision on that same matter. Accordingly, he proposed that a phrase should be added at the end of article 16, reading: "taking into particular account the facilitation of diffusion and transfer of technologies, including new and innovative technologies, by developed States to developing States."

34. Mr. ROSENSTOCK said that such a provision had already caused difficulties with regard to the United Nations Convention on the Law of the Sea and the same was likely to happen with the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law. The incorporation of such a formulation might well prevent some States from accepting the draft.

35. The CHAIRMAN said that the wording suggested by Mr. He might be more appropriately placed in a different part of the draft. Perhaps consideration of the proposal could be deferred until the Commission had adopted article 16.

36. Mr. HE said that article 16 seemed to be the most appropriate place for the specific provision he was proposing.

37. Mr. PELLET said that he endorsed the substance of Mr. He's proposal and, moreover, did not share Mr. Rosenstock's concern with regard to its potentially adverse effect on acceptance of the draft by States. Nevertheless, the proposed wording had nothing to do with prevention and therefore did not belong in article 16.

38. Mr. MAHIOU said that he naturally endorsed the idea of taking account of the special situation of the developing countries. The Special Rapporteur had already mentioned the possibility of a general provision to that effect.

39. Mr. BARBOZA (Special Rapporteur) said that, while he agreed with the substance of Mr. He's proposal, he would prefer a general provision which might be incorporated in the chapter on principles. A more specific provision might disturb the balance of the draft and would, furthermore, undoubtedly require changes in several other articles besides the one to which the provision would be added.

40. The CHAIRMAN said that, while there seemed to be a general consensus regarding the substance of Mr. He's proposal, reservations had been expressed about incorporating it in article 16. Perhaps the Commission could consider the matter at the next stage of its work on the topic.

41. Mr. HE said that even if a general provision was elaborated, he still saw the need for a specific provision in chapter II.

42. The CHAIRMAN said that, having noted Mr. He's proposal and if he heard no further objections, he would take it that the Commission agreed to adopt article 16 as it stood.

It was so agreed.

Article 16 was adopted.

ARTICLE 16 *bis* (Information to the public)

43. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce article 16 *bis*, which read:

Article 16 bis. Information to the public

States shall, whenever possible and by such means as are appropriate, provide their own public likely to be affected with information relating to the risk and harm that might result from an activity subject to authorization in order to ascertain their views.

44. Mr. BOWETT (Chairman of the Drafting Committee) said that article 16 *bis* had originally been proposed by the Special Rapporteur as paragraph (d) of article 15.⁴ In the view of the Drafting Committee, that paragraph dealt with an issue different from the rest of article 15 and should therefore stand as a separate article.

45. Article 16 *bis* required that States, whenever possible and by such means as they deemed appropriate, should provide their own public with information relating to the risk and harm that might result from an activity subject to authorization in order to ascertain their views. The article was inspired by new trends in international law in general, and environmental law in particular, which sought to involve in the State's decision-making processes those people whose lives, health and property might be affected, by providing them with a chance to present their views to those responsible for making the ultimate decisions. A number of States allowed in their domestic law for hearings before administrative tribunals, so that the public might express its views on a particular project the authorities were considering. At least three recent legal instruments dealing with environmental law had also provided for that option. The Drafting Committee had taken note, in particular, of article 6, paragraph 3, of the Convention on Environmental Impact Assessment in a Transboundary Context; article VII, paragraph 2, of the Code of Conduct on Accidental Pollution of Transboundary Inland Waters;⁵ and article 16 of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes.

46. The obligation contained in article 16 *bis* was circumscribed by the phrase "whenever possible and by such means as are appropriate". The phrase was intended to take into account possible constitutional and other domestic law limitations where such a right to hearings might not be granted. The choice of means by which information could be provided to the public was also left to the States. Therefore, the requirements of article 16 *bis* were conditioned by the provisions of domestic law.

47. The article limited the obligations of each State to providing such information to its own public. The phrase "States shall . . . provide their own public" avoided obligating the State to provide information to the public of another State. Thus, the State that might be affected must, after receiving notification and information from the State of origin, inform its own public before respond-

⁴ Ibid.

⁵ See footnote 2 above.

ing to the notification, when possible and by whatever means were appropriate.

48. Mr. PELLET said that he had two reservations about article 16 *bis*. First, in the French version, States were required to inform *leurs propres populations* with regard to possible risk and harm. As he recalled, in international legal instruments, the French word *population* was generally used in the singular. In the matter currently under consideration, the Commission should be codifying the law rather than developing it and, accordingly, should base itself on precedents, more particularly the instruments just cited by Mr. Bowett.

49. Secondly, he had serious doubts about the phrase "in order to ascertain their views", a formulation which gave the impression that the sole objective of providing information to the public was to determine its views on the matter in question. It was counterproductive to link providing information with consultation. Article 16 *bis* placed States under a twofold obligation: to inform the public of possible risk and harm, and also to ascertain the view of the public in response to that information. The wording of the article should reflect those dual objectives.

50. Mr. BARBOZA (Special Rapporteur) said that the Drafting Committee had based its work on precedents in the field, but had not necessarily used the exact language of the relevant instruments which, generally speaking, referred to "the public".

51. In elaborating article 16 *bis*, the Committee had endeavoured to find a compromise solution which, on the one hand, would give due consideration to contemporary trends towards informing the public and allowing them to participate, in whatever fashion was appropriate, in decision-making, and on the other hand, would temper the obligation of States to provide public information, as reflected in the phrase "whenever possible and by such means as are appropriate". The phrase "in order to ascertain their views" implied that Governments were under an obligation to take into account the reaction of the public, but not necessarily to involve the public actively in the decision-making process. Thus, the article sought to take into account the various constitutional systems of States.

52. Mr. BENNOUNA said it was important that the public should be informed of the risk inherent in a particular activity and about the details of the activity itself. He suggested, therefore, that the words "information relating to the risk and harm that might result from an activity subject to authorization" should be replaced by "information relating to the activity subject to authorization, the risk of that activity and the harm that might result from it".

53. Deletion of the phrase "in order to ascertain their views" might make article 16 *bis* more suited to the range of political systems under which States operated, but he did not feel strongly about the matter.

54. Mr. BOWETT (Chairman of the Drafting Committee) said that the term "public" was used in paragraph 8 of article 3 of the Convention on Environmental Impact Assessment in a Transboundary Context. The idea

behind article 16 *bis* was that it was for each State, both the State of origin and the notified State, to inform its own public of any risk and harm that might result from the activity in question. The Drafting Committee had wished to ensure that the public was informed and that its views were heard, something which was reflected in the article by the words "in order to ascertain their views".

55. Mr. EIRIKSSON said that the words "activity subject to authorization" should be replaced by "activity referred to in article 1" in order to make it clear that the article was directed towards both the State of origin and the notified State.

56. Mr. PELLET said that he had no objection to the proposals made by Mr. Bennouna and Mr. Eiriksson.

57. In view of the Special Rapporteur's comments, he was satisfied that the phrase "their own public" was in fact based on the appropriate precedents, but none the less wished to be sure that the French translation of the phrase was accurate.

58. He continued to have reservations about the phrase "in order to ascertain their views", which weakened the first obligation set forth in the article, namely, the obligation of States to provide information. In response to article 16 *bis*, a State might decide not to inform the public precisely because it did not wish to consult with the public.

59. The two obligations, to inform and to consult, should be addressed separately in the article and to that end he proposed that the words "in order to ascertain their views" should be replaced by "and, whenever possible, States shall ascertain the views of their population".

60. Mr. MAHIOU said that, in his view, article 16 *bis* should present consultation as an obligation, but a compromise along the lines suggested by Mr. Pellet would give States the option of consulting, rather than compelling them to do so. He accordingly suggested that the words "in order to ascertain their views" should be replaced by "and shall, as appropriate, ascertain their views".

61. Mr. CALERO RODRIGUES said that it was the Commission's duty to reflect developments in international law. The practice of consulting the public existed in some countries and did not exist in others. The Commission should therefore take a stand on the matter and then let States decide if they wished to accept the obligation or not.

62. Mr. BARBOZA (Special Rapporteur) said that using the phrase "as appropriate" a second time, as suggested by Mr. Mahiou, would weaken the obligation on the State to consult the public. Furthermore, the phrase "whenever possible and by such means as are appropriate" which already appeared in the first line of the draft article was intended to apply to both obligations, that of informing and that of consulting.

63. Mr. EIRIKSSON said that a phrase along the lines of "and, where appropriate, ascertain their views" would not weaken the obligation to consult and was also

a good way of meeting Mr. Pellet's criticisms of the article.

64. Mr. TOMUSCHAT said that article 16 *bis* should remain as it stood. Mr. Pellet was, in that instance, being too prudent. There was no need to use the phrase "as appropriate" a second time.

65. Mr. MAHIU said that he could accept the proposed change.

66. Mr. PELLET, in response to Mr. Calero Rodrigues, said that Mr. Calero Rodrigues had not properly understood his objection. He did not in fact want States to be "too happy" with the text and was willing to go further than the Drafting Committee. He was certainly not being too cautious. In any event, he could accept Mr. Eiriksson's proposal.

67. Mr. de SARAM said that it would be preferable for the article to remain unchanged, since it represented a compromise reached in the Drafting Committee. Actually, he was prepared to go even further and add at the end of the article "and take those views into account in any decisions".

68. Mr. BARBOZA (Special Rapporteur) said that he did not share Mr. Pellet's fears. If the obligation to inform was separated from the obligation to ascertain the public's views, States would find it easier to comply with the provision.

69. Mr. BOWETT (Chairman of the Drafting Committee) said that Mr. Eiriksson had made an important point. The proposed phrase "referred to in article 1" made it clear that the provision applied to all States and not just to the State of origin. He could also accept the substitution of "and" for "in order to".

70. Mr. BENNOUNA said that he wished to remind the Commission of his earlier proposal. He would now like to suggest the following wording: "information relating to an activity referred to in article 1, the risk involved and the harm which might result and ascertain their views".

71. Mr. BOWETT (Chairman of the Drafting Committee) said the Committee had assumed that it would be difficult to provide information about risk without describing the activity creating the risk. Perhaps the point could be made clear in the commentary.

72. Mr. BENNOUNA said that many details might be implicit in the Drafting Committee's text but it was better to spell them out.

73. Mr. EIRIKSSON suggested the formulation: "affected by an activity referred to in article 1 with information relating to that activity, the risk involved and the harm which might result and ascertain their views".

74. Mr. AL-BAHARNA said that he had difficulty with the phrase "ascertain their views". It was not clear how that was to be done and he could not understand why the Commission wanted to open that particular door. The phrase should be deleted and the point explained in the commentary.

75. The CHAIRMAN said that there now appeared to be two separate proposals, one from Mr. Al-Baharna and the other from Mr. Eiriksson and Mr. Bennouna. He suggested that the Commission should continue its consideration of those proposals after they had been produced in writing during the break.

76. Mr. de SARAM said that there was a third possibility, which was to retain the existing text.

The meeting was suspended at 4.40 p.m. and resumed at 5.10 p.m.

77. The CHAIRMAN drew the Commission's attention to the three alternatives which had been circulated in writing: (a) to retain the article as it was; (b) to delete the words "in order to ascertain their views"—proposal by Mr. Al-Baharna; and (c) "States shall, whenever possible and by such means as are appropriate, provide their own public likely to be affected by an activity referred to in article 1 with information relating to that activity, the risk involved and the harm which might result and ascertain their views."—proposal by Mr. Eiriksson and Mr. Bennouna. He suggested that the Commission should first consider the third alternative.

78. Mr. CALERO RODRIGUES said that the substitution of "and" for "in order to" had the effect of imposing two obligations on States: to provide the public with information and to ascertain the public's views. States would not have to comply with both obligations, but he had thought that the whole point of providing the information was precisely to ascertain the public's views in the matter. The linkage provided by "in order to" should be retained. Failing that, he would prefer deletion of the words "in order to ascertain their views", as suggested by Mr. Al-Baharna. In other respects, the third alternative was only a slight improvement over the original text, but he would not obstruct a majority decision to adopt it. It was a pity that the Commission was spending so much time on what were merely drafting changes.

79. Mr. PELLET said that the obligations were weak because of the qualification "whenever possible and by such means as are appropriate". As he had said, he would have preferred to go further. In the English version the phrase "by such means as are appropriate" applied to both of the obligations, but in the French version to only one of them. The French should be brought into line with the English. He could accept the third alternative, subject to the point he had made earlier about the phrase *leurs propres populations* in the French text.

80. Mr. TOMUSCHAT said that the third alternative was an improvement. It was important to have information about the activity so that people could express their views about it and not just about the risk and possible harm.

81. Mr. de SARAM said that he still preferred the compromise solution achieved by the Drafting Committee, but would accept the third alternative. He could not agree to the deletion proposed by Mr. Al-Baharna.

82. Mr. PELLET said that he understood Mr. de Saram's point of view, but the Commission was not bound by the Drafting Committee's decisions.

83. The CHAIRMAN said it appeared that a majority of the members of the Commission were opposed to the first and second alternatives and he suggested that the Commission should adopt the third alternative.

It was so agreed.

Article 16 bis, as amended, was adopted.

ARTICLE 17 (National security and industrial secrets)

84. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce article 17, which read:

Article 17. National security and industrial secrets

Data and information vital to the national security of the State of origin or to the protection of industrial secrets may be withheld, but the State of origin shall cooperate in good faith with the other States concerned in providing as much information as can be provided under the circumstances.

85. Mr. BOWETT (Chairman of the Drafting Committee) said that the article had been proposed by the Special Rapporteur in his ninth report.⁶ It had been generally supported during the discussion in the Commission. The Drafting Committee had introduced only minor editing changes to the Special Rapporteur's original text.

86. Article 17 was intended to create a narrow exception to the obligation of States to provide information in accordance with articles 15, 16 and 16 *bis*. It was obvious that States could not be obliged to disclose information that was vital to their national security or was considered part of their industrial secrets. That type of clause was not unusual in treaties which required exchange of information. In fact, article 31 of the draft articles on the law of the non-navigational uses of international watercourses⁷ also provided for such an exception to the requirement of disclosure of information.

87. He wished to emphasize that the article protected industrial secrets in addition to national security. It was highly probable that some of the activities might involve the use of sophisticated technology including certain types of information protected even under domestic law. That type of safeguard clause was not unusual in legal instruments dealing with the prevention of potential harm from industrial activities. The Drafting Committee had taken note of some other conventions such as, for example, article 8 of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, and article 2, paragraph 8, of the Convention on Environmental Impact Assessment in a Transboundary Context, which provided for similar protection of industrial and commercial secrecy.

88. Article 17 also recognized the need for a balance between the legitimate interests of the State of origin and of the States likely to be affected. It therefore required the State of origin which decided that it must withhold

information on the grounds of security or industrial secrecy to cooperate in good faith with the other States in providing as much information as could be provided under the circumstances. The words "as much information as can be provided" were intended to cover a general description of the risk and the type and the extent of harm to which a State might be exposed. The words "under the circumstances" referred to the reasons invoked for withholding information.

89. Mr. EIRIKSSON said that, since the tenor of article 17 was similar to that of article 31 of the draft articles on the law of the non-navigational issues of international watercourses, he would have thought that the same wording could have been used in both instances. The question could, however, perhaps be reconsidered, with a view to harmonizing the wording of the two articles, on the second reading of the draft articles now before the Commission. He did not, however, insist on an immediate amendment.

90. The CHAIRMAN said that if he heard no objections, he would take it that the Commission agreed to adopt article 17.

It was so agreed.

Article 17 was adopted.

ARTICLE 18 (Consultations on preventive measures)

91. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce article 18, which read:

Article 18. Consultations on preventive measures

1. The States concerned shall enter into consultations, at the request of any of them and without delay, with a view to achieving acceptable solutions regarding measures to be adopted in order to prevent or minimize the risk of causing significant transboundary harm and cooperate in the implementation of these measures.

2. States shall seek solutions based on an equitable balance of interests in the light of article 20.

3. If the consultations referred to in paragraph 1 fail to produce an agreed solution the State of origin shall nevertheless take into account the interests of States likely to be affected and may proceed with the activity at its own risk, without prejudice to the right of any State withholding its agreement to pursue its rights under these articles or any other treaty.

92. Mr. BOWETT (Chairman of the Drafting Committee) said that article 18, which had also been proposed by the Special Rapporteur in his ninth report,⁸ dealt with the question of consultation between the States concerned on measures that should be taken to prevent the risk of causing significant transboundary harm. The article contemplated activities that were not prohibited by international law and that, normally, were important to the economic development of the State of origin. It would, however, be unfair to other States to allow such activities without consulting them and without taking adequate preventive measures. A balance therefore had to be struck between those two equally important sets of interests. Accordingly, the article did not provide either for a mere formality which the State of origin had to go

⁶ See footnote 3 above.

⁷ See 2353rd meeting, para. 46.

⁸ See footnote 3 above.

through, without any real intention of reaching a solution acceptable to the other States, or for a right of veto for the States likely to be affected. Instead, it relied on the manner in which, and the purpose for which, the parties entered into consultations. Thus, they must enter into consultations in good faith and must take account of each other's legitimate interests; they must also consult each other with a view to arriving at an acceptable solution with regard to the measures to be adopted in order to prevent or minimize the risk of significant transboundary harm.

93. Under paragraph 1 of the article, the parties must enter into consultations, without delay, at the request of any one of them, in other words, at the request of the State of origin or of any of the States likely to be affected. The purpose of consultations was (a) to enable the parties to find acceptable solutions regarding measures to be adopted in order to prevent or minimize the risk of significant transboundary harm, and (b) to cooperate in the implementation of such measures. The words "acceptable solutions", which referred to the adoption of preventive measures, meant such measures as were accepted by the parties. Generally, the consent of the parties to measures of prevention would be expressed by way of some form of agreement. The preventive measures should obviously be measures that might avoid any risk of causing significant transboundary harm or, if that were not possible, that would minimize the risk of such harm.

94. The article could be invoked whenever a question arose as to the need to take preventive measures. Such questions might, of course, arise by virtue of article 15, because a notification to other States had been made by the State of origin that an activity it intended to undertake could carry a risk of causing significant transboundary harm, or in the course of exchange of information under article 16, or again, in the context of article 19, which dealt with the rights of the State likely to be affected. The Drafting Committee considered that article 18 had a broad scope of application in as much as it would apply to all issues relating to preventive measures. For instance, if there were ambiguities in communications made by the parties with respect to a notification under article 15 or to exchange of information under article 16, a request for consultations could be made simply to clarify those ambiguities. Under the last part of paragraph 1, the parties were required to cooperate in the implementation of the preventive measures on which they had agreed.

95. Paragraph 2 provided guidance for States in their consultations with each other on preventive measures. Article 20, to which paragraph 2 referred, contained a non-exhaustive list of factors the parties should take into account in balancing their interests in the course of consultations. The parties were not precluded either by paragraph 2 of article 18 or by article 20 from taking account of other factors which they regarded as relevant in achieving an equitable balance of interests.

96. Paragraph 3 dealt with the possibility that, despite every effort by the parties, they could not reach agreement on acceptable preventive measures. It was the view of the Drafting Committee that the State of origin should

then be permitted to go ahead with the activity. The absence of such an alternative would, in effect, create a right of veto for the States likely to be affected. To maintain a balance between the interests of the parties, however, the State of origin, although permitted to go ahead with the activity, was still obliged to take account of the interests of the States likely to be affected. In addition, the State of origin conducted the activity "at its own risk", an expression also used in article 13. The explanations he had given with regard to the latter article applied equally to paragraph 3 of article 18.

97. The last part of paragraph 3 protected the interests of the States likely to be affected by allowing them to pursue any rights they might have under the articles or under any other treaty in force between the States concerned. The Commission had not, of course, yet discussed the question whether there should be any dispute settlement procedures under the draft articles to which such disputes might be referred. The Drafting Committee had decided not to prejudge that issue. The words "any other treaty" were intended to take account of situations in which the parties might be bound by some other treaty to settle that type of dispute through a particular procedure.

98. The CHAIRMAN invited the Commission to consider the article paragraph by paragraph.

Paragraph 1

99. Mr. de SARAM said he wondered why the words "in good faith" appeared in article 17 but not in article 18. For the sake of consistency, they should perhaps be inserted after the word "consultations", in paragraph 1, or, alternatively, should be deleted from article 17. Further, the sense of the last part of the paragraph would be improved if a comma were added after the words "transboundary harm".

100. Mr. GÜNEY said that the Drafting Committee had decided against including the words "in good faith" after the word "consultation", since it went without saying that States were required to negotiate and consult in good faith. It was therefore unnecessary to repeat them after each and every reference to consultation and negotiation. He would not, however, oppose incorporating them in the paragraph if that was the Commission's wish.

101. Mr. KABATSI said he too considered that it was unnecessary to add the words "in good faith", since it was presumed that States would negotiate and consult in good faith. The paragraph should therefore remain as drafted, in his view, and the words "in good faith" could even be deleted from article 17.

102. Mr. BARBOZA (Special Rapporteur) said that he was not in favour of adding "in good faith" every time a reference was made to consultation or negotiation. It was virtually axiomatic that all obligations under international law must be performed in good faith. The specific reference to good faith in article 17 had been included simply to underline the particular importance of an honest attitude on the part of the State that wished to withhold secret information.

103. Mr. BENNOUNA said that he tended to agree with the Special Rapporteur. The inclusion of the words "in good faith" in article 17 was understandable in view of the special situation with respect to national security. In any event, the requirement to act in good faith was a rule of international law.

104. The CHAIRMAN said that, in the light of the discussion, he took it that the Commission agreed to adopt paragraph 1 as it stood.

It was so agreed.

Paragraph 1 was adopted.

Paragraph 2

105. Mr. MAHIOU said that he would like to know why the expression "in the light of article 20" had been used. Article 20 in fact contained a list of factors and circumstances to be taken into account by States but, as was apparent from the word "including" in its opening clause, other factors and circumstances might well be added to that list. In the circumstances, he would have thought that some more direct reference, such as "in accordance with article 20", would have been preferable.

106. Mr. EIRIKSSON suggested that the words "in the light of article 20" should be replaced by the words "as referred to in article 20", which was the expression used in the draft articles on the law of the non-navigational uses of international watercourses.

107. Mr. CALERO RODRIGUES said he would point out that article 20 did not contain a definition of a balance of interests but simply listed factors and circumstances to be taken into account in establishing that balance. The words "in the light of article 20" were therefore entirely appropriate, since they referred to those factors. Naturally, there were other ways of saying the same thing, but if the Commission insisted on every tiny change it would never finish its work and, moreover, the text would not be improved.

108. Mr. YANKOV, agreeing with Mr. Calero Rodrigues, said that the words "in the light of" were perfectly adequate, particularly since article 20 did not contain an exhaustive list of factors and circumstances to be taken into account by States. The words "in accordance with" would be too rigid, and would require a definition or an exhaustive list of factors and circumstances to be set forth in article 20. Since that was not the case, paragraph 2 should remain in its present form.

109. Mr. TOMUSCHAT, agreeing with Mr. Calero Rodrigues and Mr. Yankov, said that he did not favour any change. The wording was entirely in keeping with the intention of the paragraph. The expression "in the light of" referred in a general way to article 20, which was precisely what was required.

110. Mr. AL-BAHARNA said that it might be clearer if the words "in the light of article 20" were replaced by the words "in the light of the factors and circumstances referred to in article 20".

111. Mr. MAHIOU said that he was satisfied with the explanations given in response to his question and was prepared to accept the wording of the paragraph as it stood.

112. Mr. GÜNEY said that Mr. Al-Baharna's suggestion would limit the scope of the provision. It would be preferable therefore either to leave paragraph 2 as drafted or, as Mr. Mahiou had originally suggested, to replace the words "in the light of article 20" by the words "in accordance with article 20".

113. The CHAIRMAN said he understood that Mr. Al-Baharna did not insist on his suggestion. He therefore took it that the Commission agreed to adopt paragraph 2 as drafted.

It was so agreed.

Paragraph 2 was adopted.

Paragraph 3

114. Mr. PELLET said that he objected to the last part of the paragraph, reading: "without prejudice to the right of any State withholding its agreement to pursue its rights under these articles or any other treaty". International law consisted not only of treaties but also of customary rules of law, particularly in the matter of prevention, as was apparent from the *Chorzów Factory* case (Merits).⁹ He therefore suggested that the words "or any other treaty" should be replaced by the words "or under any other relevant rules of international law".

115. The CHAIRMAN said that, since it was late, the Commission would continue its consideration of article 18, paragraph 3, at the next meeting.

The meeting rose at 6.05 p.m.

⁹ *Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17.*

2365th MEETING

Wednesday, 13 July 1994, at 10.10 a.m.

Chairman: Mr. Vladlen VERESHCHETIN

Present: Mr. Al-Baharna, Mr. Barboza, Mr. Ben-nouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Jacovides, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Yamada, Mr. Yankov.

International liability for injurious consequences arising out of acts not prohibited by international law (continued) (A/CN.4/457, sect. C, A/CN.4/459,¹ A/CN.4/L.494 and Corr.1, A/CN.4/L.503 and Add.1 and 2)

[Agenda item 6]

CONSIDERATION OF THE DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE AT THE FORTY-FIFTH AND FORTY-SIXTH SESSIONS (continued)

CHAPTER II (Prevention) (concluded)

ARTICLE 18 (Consultations on preventive measures) (concluded)

Paragraph 3 (concluded)

1. The CHAIRMAN reminded the Commission that Mr. Pellet had proposed (2364th meeting) that the words “or any other treaty”, at the end of the paragraph, should be replaced by the words “or any other relevant rule of international law”. He understood that Mr. de Saram had another proposal to the same effect.

2. Mr. de SARAM said that, since States which withheld their agreement could also have rights under private law, general principles of law and even equity, it would be better to adopt wording that was as general as possible. He therefore proposed that the end of the paragraph should read “to pursue such rights as it may have under these articles or otherwise”.

It was so agreed.

3. Mr. TOMUSCHAT said that the expression “at its own risk” was unfortunate, as it seemed to refer to the concept of strict liability. If, however, the States likely to be affected and the State of origin did not come to an agreement, the only obligation on the State of origin was to take all necessary measures to prevent or minimize the risk of harm. It certainly could not be held strictly liable for harm, as the expression “at its own risk” seemed to suggest. Consequently, if those words could be interpreted as making the State of origin liable for any harm caused, they should be deleted.

4. Mr. BOWETT (Chairman of the Drafting Committee) said that the Drafting Committee had not thought that the expression “at its own risk” implied the strict liability of the State of origin. They did not prejudge the question of liability, which would be covered in a later article.

5. The CHAIRMAN said that he would refer members to the explanations given by the Chairman of the Drafting Committee when introducing article 13,² at the end of which the expression “at its own risk” also appeared.

6. Mr. ROSENSTOCK said that, if the words “at its own risk” were deleted—as they should be, in his view—it would be preferable also to delete the words that went before: “and may proceed with the activity”.

They stated the obvious and their inclusion could suggest that the State of origin required the authorization to proceed with the activity it would be given under the draft articles. That, however, was not so.

7. Mr. PELLET said that the introduction of the words “at its own risk” was a curious and unnecessary innovation. They did indeed state the obvious, for under international law, too, a State always acted at its own risk. Their inclusion in article 18, paragraph 3, could be wrongly interpreted and it would therefore be preferable to delete them. That remark also applied to article 13. He would not oppose the longer deletion proposed by Mr. Rosenstock, although it did not seem to be strictly necessary.

8. Mr. BOWETT (Chairman of the Drafting Committee), supported by Mr. KABATSI (Rapporteur), speaking as a member of the Commission, Mr. CALERO RODRIGUES and Mr. RAZAFINDRALAMBO, said that the words “at its own risk” were essential for the clarity of article 18, paragraph 3. In the event that there was no agreement between the State of origin and the States likely to be affected, the State of origin must know exactly what it could do and what the consequences of proceeding with the activity in the event of harm would be. It was essential to clarify that question so that the States which would apply the draft articles would not have to proceed by logical inference.

9. Mr. MAHIU said that Mr. Rosenstock’s proposed longer deletion would divest the paragraph of its meaning and there would inevitably be problems of interpretation. While he would not oppose the deletion of the words “at its own risk”, he considered that it would be preferable, for the sake of clarity, to leave the paragraph as it stood.

10. Mr. ROBINSON, supported by Mr. HE, said that from the standpoint of internal consistency and of the actual meaning of the paragraph, it would be difficult to delete the words “and may proceed with the activity”, as proposed by Mr. Rosenstock. Also, while the words “at its own risk”, did not, in his view, have the effect that those who wanted to delete them feared, their deletion would not in any way detract from the provision, since they merely confirmed that the State of origin remained subject to the obligations imposed on it under general international law.

11. Mr. ROSENSTOCK said that he would not insist on the deletion of the words “and may proceed with the activity at its own risk”, but, at the very least, the words “at its own risk” should, at the current stage, be deleted.

12. Mr. PELLET said that the introduction in a roundabout way of the expression “at its own risk”, which seemed harmless, but was not defined anywhere in the draft articles, drew attention to an obscure and complex concept which little by little, and almost by stealth, transformed activities that were not prohibited into activities that were prohibited. Consequently, it would be better by far to delete the expression and to define the “risks” assumed by the State of origin in the provisions relating to its liability.

¹ Reproduced in *Yearbook . . . 1994*, vol. 11 (Part One).

² See 2362nd meeting, para. 89.

13. Mr. TOMUSCHAT said he too considered that the words "at its own risk" inevitably had the connotation of strict liability regardless of any explanations to the contrary given in the commentary. Where consultations had been held and the State of origin had accordingly been notified of the dangers inherent in the activity contemplated, the criterion used to assess its diligence would, of course, be stricter, but its liability would not be transformed into strict liability on that account. Furthermore, he feared that, if the words in question were retained, the States likely to be affected could have an interest in not coming to an agreement with the State of origin so as to be in a better position with respect to the latter's liability.

14. Mr. FOMBA said that the expression "at its own risk" stated the obvious and would therefore inevitably give rise to difficulties of interpretation, particularly since it was not defined anywhere in the draft articles. The consequences of proceeding with the activity in terms of liability would have to be stipulated in subsequent provisions and the expression should be deleted.

15. Mr. BARBOZA (Special Rapporteur) said that none of the arguments put forward in favour of the deletion of the expression "at its own risk" were convincing to him. The purpose of the expression was to preserve a balance, although it must not be possible to delay the activity—and that was why no right of veto was conferred on the States likely to be affected—the State of origin, which had been duly notified during consultations of the consequences the activity could have, had to take full responsibility for the consequences if it proceeded with the activity. That was the meaning of the expression "at its own risk". As to the concern expressed about possible strict liability, it was quite clear that all the obligations of prevention were obligations of due diligence and that there could be no strict liability inasmuch as the State itself was liable for its own negligence if it did not take all the necessary measures to prevent or minimize the risk of harm. The Drafting Committee had spent considerable time on the provision and had used the expression in question only after due consideration. In his view, and in the view of many members of the Drafting Committee and the Commission, its deletion would be unacceptable. He therefore proposed that a vote should be taken on the question by show of hands.

It was so agreed.

A vote was taken by show of hands on the retention of the expression "at its own risk" in article 18, paragraph 3. There were 14 votes in favour of the retention of the expression and 6 against.

Paragraph 3 was adopted.

16. The CHAIRMAN said it had been agreed, in informal consultations, that the commentary of the Special Rapporteur would state that "several" members had been in favour of the deletion of the words "at its own risk" and that the other members had been in favour of their retention.

17. Mr. PELLET said that he was not satisfied with that solution: a formal vote should have been taken as

the opposition to the retention of the expression in question had been significant. He reserved the right to ask for a vote in that kind of situation in future.

Article 18 was adopted.

ARTICLE 19 (Rights of the State likely to be affected)

18. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce article 19, which read:

Article 19. Rights of the State likely to be affected

1. When no notification has been given of an activity conducted in the territory or otherwise under the jurisdiction or control of a State, any other State which has serious reason to believe that the activity has created a risk of causing it significant harm may request consultations under article 18.

2. The request shall be accompanied by a technical assessment setting forth the reasons for such belief. If the activity is found to be one of those referred to in article 1, the State of origin may be requested to pay an equitable share of the cost of the assessment.

19. Mr. BOWETT (Chairman of the Drafting Committee) said that article 19 addressed the situation in which a State became aware that an activity planned in another State, either by the State itself or by a private entity, carried a risk of causing it significant harm, but had received no notification of that activity in accordance with article 15 (Notification and information). A similar provision appeared in article 18 of the draft articles on the law of the non-navigational uses of international watercourses.³ The Drafting Committee had also taken note of article 3, paragraph 7, of the Convention on Environmental Impact Assessment in a Transboundary Context, which contemplated a procedure by which a State likely to be affected could itself initiate consultations with the State of origin.

20. With regard to paragraph 1 of the article, he drew attention in particular to the words "has serious reason to believe". Since the activities covered by the draft articles were not prohibited by international law, the Committee had felt that the State which requested consultations should have sufficient reason for doing so and should not act on mere suspicion or conjecture.

21. Once consultations had begun, the parties would either agree that the activity was one of those covered by article 1 and the State of origin should therefore take preventive measures or the parties would not agree and the State of origin would continue to believe that the activity was not within the scope of the articles. In the former case, the parties must conduct their consultations in accordance with article 18 and find acceptable solutions based on an equitable balance of interests. In the latter case, namely, where they disagreed on the nature of the activity, no further step was anticipated in the paragraph. Originally, some members of the Drafting Committee had proposed that a sentence should be included to the effect that, in the event of disagreement, the parties should have recourse to a dispute settlement procedure as provided for in an article X to be adopted in the future or that a technical body should be established

³ See 2353rd meeting, para. 46.

for the purpose of conciliation. Some members had, however, been unwilling to accept an article that made reference to another article whose content was still unknown. For that reason, the article did not provide for the possibility of a dispute between the parties. It would probably be necessary to review the matter at a later stage.

22. In paragraph 2, the first sentence attempted to maintain a fair balance between the interests of the State of origin, which had been required to enter into consultations, and the interests of the State that believed it had been affected or was likely to be affected by requiring the latter to provide justification for such a belief, supported by technical documents. The second sentence dealt with financial consequences: if it was proved that the activity in question came within the scope of article 1, the State of origin could be requested to pay an equitable share of the cost of the technical assessment. The Drafting Committee had considered that such a sharing of costs was reasonable since, first, the State of origin would already have had to make an assessment in accordance with article 12 (Risk assessment); secondly, it would be unfair to expect that the cost of the assessment should be borne by the State that was likely to be injured by an activity in another State; and, thirdly, if the State of origin was not obliged to share the cost of the assessment undertaken by the State likely to be affected, that might serve to encourage the State of origin not to make the assessment provided for in article 12 or not to effect the notification provided for in article 15, leaving all such costly assessments to be carried out by the States likely to be affected.

23. The Committee had, however, considered that the State of origin which failed to effect the notification might have acted in good faith because, for example, it believed that the activity posed no risk of causing significant transboundary harm. That was the reason why paragraph 2 stated that the State of origin "may be requested to pay an equitable share of the cost of the assessment". That meant that if, following discussion, it appeared that the assessment did not reveal a risk of significant harm, the matter was at an end and the question of sharing the cost did not arise. If, on the other hand, such a risk was revealed, then it was reasonable that the State of origin should be requested to contribute an equitable share of the cost of the assessment, namely, that part of the cost resulting directly from the failure of the State of origin to notify its activity and to provide the necessary technical information.

24. The CHAIRMAN invited the members of the Commission to consider article 19 paragraph by paragraph.

Paragraph 1

25. Mr. AL-BAHARNA said that, if the Chairman of the Drafting Committee had no objection, he would suggest that the words "causing significant harm to it" should be replaced by the words "causing it significant harm".

It was so agreed.

26. Mr. PELLET said that there was a contradiction between the title of the article, "Rights of the State likely to be affected", and the words "may request". Obviously, what the Drafting Committee had wanted to say was that the State likely to be affected had the right to ensure that the State of origin was a party to the consultations. The words "may request" did not convey an idea of obligation and the sentence should perhaps be rephrased.

27. Mr. EIRIKSSON said that the paragraph should perhaps be read in the light of article 18. The State likely to be affected was, of course, one of the "States concerned" which had the right to request consultations in accordance with article 18, paragraph 1.

28. Mr. MAHIOU said that Mr. Pellet's concern could perhaps be met if the words "may request" were replaced by the words "may have".

29. The CHAIRMAN asked the Special Rapporteur if he could provide a further explanation.

30. Mr. BARBOZA (Special Rapporteur) said that, if the State of origin did not agree to the consultations requested, it was in breach of its obligation to act with due diligence under the draft articles. The State of origin must agree to consultations; that was why the word "Rights" had been included in the title of article 19.

31. Mr. Mahiou's proposed amendment was perfectly acceptable to him, however.

32. Mr. PAMBOU-TCHIVOUNDA suggested that, to make the situation even plainer, the word "request" could be replaced by the word "require".

33. The CHAIRMAN asked whether the members of the Commission would be prepared to agree to the replacement of the words "may request" by the words "may require", which would be translated into French by the words *peut exiger*.

34. Mr. ROBINSON asked whether the reference to "consultations under article 18" referred to all the paragraphs of article 18 or only to paragraph 1.

35. Mr. BARBOZA (Special Rapporteur) confirmed that it referred to the whole of article 18.

36. Mr. GÜNEY, noting that the proposed change affected substance, said that he would prefer the French version to remain as drafted and as adopted by the Drafting Committee.

37. Mr. CALERO RODRIGUES said he wished to place on record that, in his view, the proposed change was not the right solution.

38. Mr. PELLET said that he would be inclined to retain the word *demande* in the French version if, in the English version, the word "require" replaced the word "request", since the English text would, if necessary, help to dispel any ambiguity in the French text and, also, article 18, to which paragraph 1 made reference, was sufficiently precise.

39. The CHAIRMAN invited the members of the Commission to take a decision on the text, in English

and French, of article 19, paragraph 1. He suggested that the French text should remain as proposed by the Drafting Committee and that the English text should be reworded to read:

“1. When no notification has been given of an activity conducted in the territory or otherwise under the jurisdiction or control of a State, any other State which has serious reason to believe that the activity has created a risk of causing it significant harm may require consultations under article 18”.

It was so agreed.

Paragraph 1 was adopted.

Paragraph 2

40. The CHAIRMAN asked the Chairman of the Drafting Committee whether he considered, in view of the change introduced in paragraph 1, that there should be a consequential amendment to the first sentence of paragraph 2.

41. Mr. BOWETT (Chairman of the Drafting Committee) confirmed that the first sentence of paragraph 2 should be reworded to read: “The State requiring consultations shall provide a technical assessment . . .”.

42. The CHAIRMAN said that, if he heard no objection, he would take it that the members of the Commission agreed to the rewording of the first sentence of paragraph 2 as proposed by the Chairman of the Drafting Committee.

It was so agreed.

43. Mr. PELLET said he again regretted to note that the second sentence was couched in very weak terms. The words “may be requested” had no meaning in law and their effect was to divest the article of any interest or substance. He would, however, be prepared to agree to a compromise solution along the lines of that adopted for paragraph 1.

44. Mr. ROSENSTOCK said he felt bound to point out, since the Chairman of the Drafting Committee had said that in substance the article restated the terms of article 18 of the draft articles on the law of the non-navigational uses of international watercourses, that the second sentence of paragraph 2 on the sharing of the cost of assessment did not appear in article 18.

45. Paragraph 2 was unnecessary, in his view, as it was concerned with a matter of detail. In any event, if the paragraph was deleted, it would suffice to leave it to the common sense of States; if one of them was in violation of the obligations imposed on it under article 18, paragraph 1, the matter would come within the scope of the law on State responsibility. If other members of the Commission considered that paragraph 2 should be retained, however, he would not insist.

46. Mr. BOWETT (Chairman of the Drafting Committee) said that it would be a great pity to delete a paragraph which, even if it did not import strict legal obligations, did provide extremely helpful guidelines for any State that requested consultations and did indicate a

reasonable basis for asking the other State to pay some part of the cost of assessment. To delete the provision on the ground that it would suffice to rely on the law of State responsibility would be depriving States of valuable guidance.

47. Also, it would be going too far to replace the word “request”, in that paragraph, by the word “require” and it would, moreover, cause endless difficulties for those members of the Commission who already had some hesitation in accepting such a concept.

48. Mr. TOMUSCHAT said that an extremely simple solution would be to reword the second sentence of paragraph 2 to read: “If the activity is found to be one of those referred to in article 1, it [the State requiring consultation] may claim from the State of origin an equitable share of the cost of the assessment”.

49. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt paragraph 2 of article 19, as amended by the Chairman of the Drafting Committee, and Mr. Tomuschat.

It was so agreed.

Paragraph 2, as amended, was adopted.

Article 19, as a whole, as amended, was adopted.

50. Mr. EIRIKSSON said that he had two comments to make on article 19 which he would like to be recorded. In the first place, there could be cases in which there was a notification, but it was not addressed to a particular State, whereas paragraph 1 of the article stated simply: “When no notification has been given . . .”. Secondly, the article dealt with cases where an activity which had already been undertaken created a risk, but not with those where an activity was planned.

51. He would therefore have proposed, had the Commission had more time, that article 19, paragraph 1, should be reworded to read:

“1. A State may require consultations in the manner indicated in article 18 if it has serious reason to believe that an activity referred to in article 1 which is likely to affect it is being planned or conducted in the territory or otherwise under the jurisdiction or the control of another State and no assessment under article 12 has taken place or, if it has taken place, it has not led to it being notified under article 15.”

52. In that case, the first part of the second sentence of paragraph 2 would have to be amended to read: “If the activity is found to be one which should have led to that State being notified under article 15, . . .”.

ARTICLE 13 (Pre-existing activities) (*concluded*)*

53. Mr. BOWETT (Chairman of the Drafting Committee) said that the informal working group appointed to consider article 13 proposed that it should be amended in

* Resumed from the 2363rd meeting.

the following manner. The words “after becoming bound by” should be replaced by the words “having assumed the obligations contained in” and the word “already” should be added before the word “being”. The purpose of the first of those amendments was to provide States with the opportunity of embodying the obligations in question in a bilateral or multilateral instrument which was quite separate from the future convention. The purpose of the second amendment was simply to highlight the fact that the activity existed before the obligation arose.

54. Mr. ROSENSTOCK said that the clarification introduced by the new wording, showing that the article was not *de lege lata*, was a step in the right direction and it would suffice if the explanations given by Mr. Bowett were reflected in the commentary. The problem of the last sentence of the article had still not been settled, however.

55. Mr. EIRIKSSON said that the obligation to require an authorization was implicit, whereas it should have been expressed more directly in the article. He would have preferred the following wording: “States shall also require authorization for the continuation of activities referred to in article 1 which are being carried out upon their having assumed the obligations contained in these articles”.

56. Mr. PELLET said that his opposition to the expression “at its own risk” was as strong in the case of the last sentence of article 13 as it was in the case of article 18.

57. Mr. de SARAM said that he favoured the deletion of the last sentence of article 13, which, in his view, touched on the difficult question of liability for harm. The differences of view with regard to the deletion or retention of the expression “at its own risk” derived from the differences of view with regard to such liability. It would be better to do away with the problem by deleting the last sentence of the article.

58. Mr. TOMUSCHAT said that, like Mr. Pellet, he was firmly opposed to the expression “at its own risk”. The words “pending such compliance” were also not very clear. The article actually laid down a number of requirements: that the State of origin should inform the operator that it must seek an authorization; that the operator must seek the authorization; and that the State must grant the authorization. To which requirement did those words refer?

59. Mr. BOWETT (Chairman of the Drafting Committee) said that it could take time to process a request for authorization and, during that time, it was necessary to know what was happening with the activity.

60. Mr. EIRIKSSON said that the problem raised by Mr. Tomuschat could be solved by the following wording: “States which permit the continuation of the activity pending the obtaining of such authorization do so at their own risk”.

61. Mr. TOMUSCHAT said that some of the ambiguity of the last sentence of the article would be dispelled if the words “Pending such compliance, the State may

permit ...” were replaced by the words “Pending authorization, the State may permit ...”.

62. Mr. ROSENSTOCK said that Mr. Tomuschat’s proposal could give rise to a problem if the authorization were refused once the assessment had been completed. That problem could be dealt with in the commentary, but the position should be made quite clear.

63. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt article 13, as amended by the Chairman of the Drafting Committee and Mr. Tomuschat, on the understanding that the commentary would reflect the concerns and objections of those members who were opposed to the expression “at its own risk”.

It was so agreed.

Article 13, as amended, was adopted.

ARTICLE 11 (Prior authorization) (*concluded*)**

64. Mr. BARBOZA (Special Rapporteur) said that, following consultations on article 11, it was proposed that the second sentence should be reworded to read: “Such authorization shall also be required in case a major change is planned which may transform an activity into one referred to in article 1”.

It was so agreed.

Article 11, as amended, was adopted.

65. Mr. EIRIKSSON said he trusted that the original wording of the second sentence would appear in the commentary as the obligation with respect to prior authorization also applied in the case to which it made reference.

ARTICLE 20 (Factors involved in a balance of interests)

66. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce article 20, which read:

Article 20. Factors involved in a balance of interests

In order to achieve an equitable balance of interests as referred to in paragraph 2 of article 18, the States concerned shall take into account all relevant factors and circumstances, including:

(a) **the degree of risk of significant transboundary harm and the availability of means of preventing or minimizing such risk or of repairing the harm;**

(b) **the importance of the activity, taking into account its overall advantages of a social, economic and technical character for the State of origin in relation to the potential harm for the States likely to be affected;**

(c) **the risk of adverse effects of the activity on the environment and the availability of means of preventing or minimizing such risk or restoring the environment;**

(d) **the economic viability of the activity in relation to the costs of prevention demanded by the States likely to be affected and to the possibility of carrying out the activity elsewhere or by other means or replacing it with an alternative activity;**

(e) **the degree to which the States likely to be affected are prepared to contribute to the costs of prevention;**

** Resumed from the 2362nd meeting.

(f) the standards of protection which the States likely to be affected apply to the same or comparable activities and the standards applied in comparable regional or international practice.

67. Mr. BOWETT (Chairman of the Drafting Committee) said that the purpose of the article was to provide some guidance for States in their consultations with regard to an equitable balance of interests, in which respect many facts had to be established and all the relevant factors and circumstances had to be weighed. In view of the diversity of activities and situations, the article set forth a non-exhaustive list of those factors and circumstances and no priority or weight was assigned to them. In general, the factors and circumstances indicated would allow the parties to compare the costs and benefits in each particular case.

68. Subparagraph (a) compared the degree of risk and the availability of means of preventing or minimizing such risk and of repairing the harm. The degree of risk could be high, but there might be measures that could prevent that risk or good possibilities for repairing the harm. The comparisons there were both quantitative and qualitative.

69. Subparagraph (b) compared the importance of the activity, in terms of its social, economic and technical advantages for the State of origin, and the potential harm to the States likely to be affected.

70. Subparagraph (c) made the same comparison as subparagraph (a), but as it applied to the environment. The concept of transboundary harm as used in subparagraph (a) could, of course, be interpreted as applying to the environment, but the Drafting Committee had wished to make a distinction, for the purposes of the article, between harm to some part of the environment which could be translated into value deprivation to individuals and could be assessable by standard economic and monetary means, on the one hand, and harm to the environment that was not susceptible to such measurement, on the other. The former was covered by subparagraph (a) and the latter by subparagraph (c).

71. Subparagraph (d) compared the economic viability of the activity with the costs of prevention demanded by the States likely to be affected. Such costs should not be so high as to make the activity economically non-viable. Economic viability was also assessed in terms of the possibility of conducting the activity elsewhere or by other means or by replacing it with an alternative activity. The words "conducting [the activity] by other means" referred to situations in which, for example, one type of chemical substance, which might be the source of transboundary harm, could be replaced by another chemical substance or where mechanical equipment in the plant or factory could be replaced by different equipment. The words "replacing [the activity] with an alternative activity" were intended to take account of the possibility of securing the same or comparable results by another activity with no risk, or much lower risk, of significant transboundary harm.

72. Subparagraph (e) provided that one of the elements which determined the choice of preventive measures was the willingness of the States likely to be affected to contribute to the cost of prevention. If such States were

prepared to contribute to the expense of preventive measures, it might be reasonable to expect, all other things being equal, that the State of origin could take more costly, but also more effective, preventive measures.

73. Subparagraph (f) compared the standards of prevention demanded of the State of origin with those applied to the same or comparable activity in the State likely to be affected. The rationale was that, in general, it might be unreasonable to demand that the State of origin should comply with a much higher standard of prevention than that applied by the States likely to be affected. That factor was not, however, in itself conclusive. If the State of origin was highly developed and applied domestically established environmental law regulations, it might have to apply its own standards of prevention, even if they were substantially higher than those applied by a State likely to be affected, in a developing country where there might be few if any regulations on prevention. States should also take into account the standards of prevention applied to the same or comparable activities in other regions or the international standards of prevention adopted for similar activities. That was particularly relevant when the States concerned did not have any standard of prevention for such activities or they intended to improve their existing standards.

74. Mr. EIRIKSSON said he noted that subparagraph (c) spoke of "adverse effects", whereas, throughout the rest of the draft articles, the word used was "harm". He therefore proposed that, for the sake of consistency, the beginning of subparagraph (c) should be reworded to read: "The risk of harm to the environment ...". He further proposed that the concept of equitable balance, referred to at the beginning of the article, should be repeated in the title, which would then become "Factors involved in an equitable balance of interests".

75. Mr. ROSENSTOCK said that, to be completely consistent, the word "significant" should be added to the word "harm".

76. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt article 20, as amended by Mr. Eiriksson and Mr. Rosenstock.

It was so agreed.

Article 20, as amended, was adopted.

The meeting rose at 1.05 p.m.

2366th MEETING

Wednesday, 13 July 1994, at 3.10 p.m.

Chairman: Mr. Vladlen VERESHCHETIN

Present: Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bowett, Mr. Calero Rodrigues, Mr. de