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Summary record of the 2072nd meeting

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

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

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

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

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

The meeting rose at 1 p.m.

2072nd MEETING

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

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

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

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

[Agenda item 6]

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

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

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

Article 13 [12]. Period for reply to notification

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

It was so agreed.

Article 13 [12] was adopted.

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

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

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

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

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

11. Mr. EIRIKSSON said that the article would be clearer if, as in the article combining articles 13 and 14 which he had proposed, it read: "the notifying State shall provide the notified States, on request, with any additional data . . .", the words "shall co-operate with" being deleted.

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

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

It was so agreed.

Article 14 [12] was adopted.

ARTICLE 15 [13] (Reply to notification)

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

Article 15 [13]. Reply to notification

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

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

15. To take account of the comments made at the Commission's previous session and with a view to greater clarity, the Drafting Committee had decided to divide the article 13 submitted by the Special Rapporteur at that session[4] into two articles, now numbered 15 and 17. Former article 13 had regulated the three stages of the interaction between the notifying and notified States regarding planned measures. First, the notifying State made an assessment as to whether or not its planned measures would have appreciable adverse effects on the other watercourse States and communicated its findings to them. Secondly, if the notified State was not satisfied with that assessment or if there were discrepancies between the findings of the two States, they were required to negotiate with a view to reaching agreement. Thirdly, if the States concerned were unable to resolve their differences through consultation and negotiation, they would resort to the most expeditious procedure for the settlement of disputes binding on them or, in the absence of such binding procedure, to procedures provided for in the articles.

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

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

[4] *Ibid.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

It was so agreed.

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

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

It was so agreed.

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

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

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

Article 16 [14]. Absence of reply to notification

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

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

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

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

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

60. Mr. EIRIKSSON said that, first, he did not consider the phrase "under paragraph 2 of article 15" sufficiently precise. Secondly, the words "within the period provided for in article 13" seemed unnecessary, because the same words appeared in paragraph 2 of article 15, which was referred to in the same sentence. Thirdly, with regard to the words "proceed with the implementation of the planned measures", he pointed out that articles 12 and 14 spoke of implementing or permitting the implementation of planned measures and that article 19 used the words "immediately proceed to implementation". In order to avoid confusion, the same wording should be used throughout the draft.

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

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

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

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

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

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

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

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

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

[5] *Ibid.*

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

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

Article 16 [14] was adopted.

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

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

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

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

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

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

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

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

74. Paragraph 2 related to the conduct of consultations and negotiations. The language of that paragraph—which corresponded to that of paragraph 4 of the former article 13—had been taken from the award in the *Lake Lanoux* case. That explained the introduction of the word "interests", which had not previously been used in other draft articles. The Drafting Committee had thought it useful to include that word in article 17, qualifying it with the adjective "legitimate". The purpose of the article was to set in motion a process of consultations and negotiations between the States concerned with the aim of arriving at an equitable solution. Each State was asked to pay "reasonable regard" to the other State's interests. All the obligations provided for under paragraph 2 had been given sufficient flexibility to maintain a balance between the interests of both parties. Furthermore, the fact that the word "interests" was qualified by the adjective "legitimate" provided a useful safeguard. For in the context of a general convention, the word "interests" could have a very broad meaning and it would perhaps be best to limit it to "legitimate" interests.

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

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

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

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

[Agenda item 4]

[6] *Ibid.*

* Resumed from the 2070th meeting.

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

[8] *Ibid.*

EIGHTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

CONSIDERATION OF THE DRAFT ARTICLES[9] ON SECOND READING (*continued*)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The meeting rose at 1.20 p.m.

2073rd MEETING

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

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

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

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

[Agenda item 6]

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

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

1. Mr. EIRIKSSON said that, although he did not intend at the present stage to propose amendments to article 17, he wished to make a few comments on the text. First, the expression "the watercourse States concerned", in paragraph 1, was much too vague and he would have preferred "the notifying State and the State making the communication". In paragraph 2, it would have been preferable to replace the words "The consultations and negotiations provided for in paragraph 1" by "These consultations and negotiations", and, in paragraph 3, to replace the words "if so requested by the notified State at the time of making the communication under paragraph 2 of article 15" by "if the other State so requests at the time it makes the communication". Lastly, he wondered whether the members who had pressed for the retention in article 16 of the words "within the period provided for in article 13" might not be concerned that the same words did not appear in article 17.

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

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

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

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

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

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

It was so agreed.

Article 17 [13] was adopted.

ARTICLE 19 [15] (Measures of utmost urgency)

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

Article 19 [15]. Measures of utmost urgency

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

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

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

9. Article 15 submitted by the Special Rapporteur at the previous session[4] dealt with measures of extreme urgency which the State had to implement immediately, without waiting for the expiration of the period allowed to other States for reply and for study and evalua-

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

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

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

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