

Document:-  
**A/CN.4/SR.2353**

**Summary record of the 2353rd meeting**

Topic:  
**Other topics**

Extract from the Yearbook of the International Law Commission:-  
**1994, vol. I**

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Group had made concessions in agreeing on the text. The revised draft statute, which had been considered very carefully, did not reflect the experience or methods of any one legal system but was an amalgam of various systems. Every member of the Working Group was undoubtedly dissatisfied with one or another of the draft's provisions, having regard to the particularities of his own legal system. However, very broad consensus had been reached on the basic structure and approach, and the consensus had grown greater with time. He wished to thank the Working Group's members for the work done so far and to salute their willingness to produce a text worthy of serious consideration by the General Assembly, where it would certainly receive the closest attention. Lastly, he thanked the secretariat for its very substantial assistance to the Working Group in its efforts.

3. The CHAIRMAN, noting that the Working Group hoped to conclude its work that afternoon, as originally envisaged, congratulated the members on their endeavours thus far.

4. Mr. ARANGIO-RUIZ drew attention to the new addendum to his sixth report on the topic of State responsibility (A/CN.4/461/Add.2), which had been distributed in English and French that morning, and expressed the hope that, as Special Rapporteur, he would be afforded an opportunity to introduce that document briefly at a forthcoming plenary meeting.

5. The CHAIRMAN, noting that the Commission had already held six meetings on the topic of State responsibility as originally planned, suggested that the Special Rapporteur's request should be accommodated at the next scheduled plenary meeting.

6. After a procedural discussion in which Mr. BENNOUNA, Mr. ARANGIO-RUIZ, Mr. EIRIKSSON, Mr. GÜNEY and Mr. ROSENSTOCK took part, the CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to the arrangement he had suggested.

*It was so agreed.*

*The meeting rose at 1 p.m.*

## 2353rd MEETING

*Tuesday, 21 June 1994, at 10.10 a.m.*

*Chairman:* Mr. Vladlen VERESHCHETIN

*Present:* Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. He, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Szekely, Mr. Thiam,

Mr. Tomuschat, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

### Tribute to the memory of Mr. César Sepúlveda Gutiérrez

1. The CHAIRMAN said that it was his sad duty to inform the members of the Commission of the death, on 11 June 1994, of Mr. Sepúlveda Gutiérrez, who had been a member of the Commission from 1987 to 1991. For many years, he had also been a professor of international law in his native land, Mexico. In that capacity and as author of a work entitled *Derecho Internacional*,<sup>1</sup> he had had a great formative influence on many students of international law from Mexico and other Latin-American countries.

*At the invitation of the Chairman, and in the presence of Mr. Miguel Marín-Bosch, Ambassador, Permanent Representative of Mexico to the United Nations Office at Geneva, the members of the Commission observed a minute of silence in tribute to the memory of Mr. César Sepúlveda Gutiérrez.*

2. Mr. SZEKELY said that, in view of the immense esteem in which Mr. Sepúlveda Gutiérrez had held the Commission, it was the most appropriate body in which to pay tribute to him and to express their gratitude and respect for him, that had been universally felt. In so doing, the Commission expressed the feelings of generations of students who, like himself, had attended the university courses given by Mr. Sepúlveda Gutiérrez or had read his writings. In the years to come, many more would continue to benefit from the contribution of that eminent jurist and great international lawyer.

3. Mr. BARBOZA expressed his condolences to the representative of Mexico, who was present at the meeting. With the death of Mr. Sepúlveda Gutiérrez, the Latin American countries had lost an extremely eminent figure in the world of international law.

4. The CHAIRMAN said that he would send a letter of condolences to Mrs. Sepúlveda Gutiérrez on behalf of the Commission and would also enclose a copy of the summary record of the meeting.

**State responsibility (continued)\* (A/CN.4/453 and Add.1-3,<sup>2</sup> A/CN.4/457, sect. D, A/CN.4/461 and Add.1-3,<sup>3</sup> A/CN.4/L.501)**

[Agenda item 3]

FIFTH AND SIXTH REPORTS OF THE SPECIAL RAPPORTEUR  
(concluded)\*

5. The CHAIRMAN recalled that the draft articles adopted by the Drafting Committee at the forty-fifth ses-

\* Resumed from the 2348th meeting.

<sup>1</sup> Mexico, Editorial Porrúa, 1981.

<sup>2</sup> *Yearbook* . . . 1993, vol. II (Part One).

<sup>3</sup> Reproduced in *Yearbook* . . . 1994, vol. II (Part One).

sion of the Commission including articles 11 and 12 were still pending before the Commission.<sup>4</sup> The Commission had not acted on those draft articles pending the submission of the commentaries thereto.<sup>5</sup> The Special Rapporteur, in chapter I, section D, of his sixth report (A/CN.4/461 and Add.1-3), had submitted his views on the pre-countermeasures dispute settlement provisions so far envisaged for the draft on State responsibility. Section D contained, *inter alia*, new proposals by the Special Rapporteur on articles 11 and 12 of part two of the draft.

6. Mr. ARANGIO-RUIZ (Special Rapporteur) said that, although chapter I, section D, seemed to be self-explanatory, he wished to refer to the main features of the revised proposals contained therein.

7. The revised text of article 11 differed on only one substantive point from the wording of that article as it had been adopted by the Drafting Committee.<sup>6</sup> The difference in the drafting consisted in a change at the beginning of paragraph 1 and the interpolation of an explanatory paragraph 2. Article 11, as adopted by the Drafting Committee at the forty-fifth session, began with the clause:

1. As long as the State which has committed an internationally wrongful act has not complied with its obligations under articles 6 to 10 *bis*, the injured State is entitled, subject to . . . , not to comply . . .

That meant that the entitlement of the injured State to resort to and maintain countermeasures would start from the moment when the wrongful act had been committed or perceived and would continue until that State had obtained complete cessation and full reparation from the wrongdoing State. Countermeasures—and not just provisional measures—would therefore be justified from the very moment when the existence of an internationally wrongful act was perceived by the injured State and up until the moment when the wrongdoing State had not only completely ceased the wrongful act, but also completely eliminated the physical or moral consequences of that act.

8. Two consequences would seem to derive from that entitlement conferred on the injured State and which, in his view, should be reconsidered.

9. The first consequence was that resort to countermeasures by an injured State would be legally possible as soon as that State believed, rightly or wrongly, that an unlawful act was being or had been committed. Countermeasures could legally be resorted to *ab initio*, regardless of any explanations, justifications or assurances the wrongdoing State could give or would be ready to give. In the simplest case, the wrongdoing State might explain, perhaps convincingly, that no wrongful act had been committed or was being committed. Another possibility was that the wrongdoing State would immediately accede to the injured State's demand for cessation

and/or reparation, but that it would need some time—perhaps a relatively short time—to achieve complete cessation or full reparation. Other possibilities could be interpolated from those two. For example, the wrongdoing State could show—perhaps very convincingly—the existence of circumstances that precluded wrongfulness.

10. It was in view of such possibilities, among others, that he considered the wording adopted by the Drafting Committee at the forty-fifth session of the Commission to be seriously deficient; and he, therefore, could not refrain from proposing that the Commission should revert to the concept of “adequate response”. However, considering that that wording had been part of his original proposal<sup>7</sup> which was not retained by the Drafting Committee, he had done his utmost to find a solution that would not involve a mere return to the original wording. His efforts, however, had been unsuccessful. He had felt obliged to reintroduce the words “adequate response”. However, he had thought of adding, in paragraph 2 of the revised text of article 11, what he assumed was a clear explanation of the expression “adequate response”. It would be for the Commission and the Drafting Committee to decide, at the appropriate time, whether to include that explanation as an integral part of article 11, as proposed in section D, and which he strongly recommended, or as a part of the commentary. Arguments could be put forward in favour of either solution. The essential question was whether, in substance and in form, that explanation attained the objective of reducing the vagueness of the concept of “adequate response” that had caused it to be rejected by the Drafting Committee at the preceding session. Apart from that issue, however, he did not suggest any other modification to article 11 as it had been adopted by the Drafting Committee at the preceding session. The essence of that text remained unchanged.

11. He then turned to the revised text of article 12, as contained in section D, which he would take up paragraph by paragraph.

12. With regard to paragraph 1 (*a*), it could be seen that the text he proposed was a drastically softened version of the prior-recourse-to-dispute-settlement requirement which had appeared in the draft article he proposed at the forty-fourth session.<sup>8</sup> Many—although not all—members of the Commission had expressed misgivings with regard to the severe terms in which that requirement had been worded, notwithstanding the fact that the majority of the members of the Commission and the Drafting Committee had favoured the requirement in principle; its effect had been to require the injured State to have exhausted all dispute settlement means available under general international law, the Charter of the United Nations or any other instrument. That had been asking too much. That was why the new proposal, in chapter I, section D, of the sixth report, left out all the controversial elements and referred in a neutral manner to compliance with the existing dispute settlement obligations of the injured State.

<sup>4</sup> For the text of articles 11 to 14, concerning countermeasures, adopted by the Drafting Committee, see *Yearbook . . . 1993*, vol. I, 2318th meeting, para. 3.

<sup>5</sup> *Yearbook . . . 1993*, vol. II (Part Two), p. 35, document A/48/10, para. 204.

<sup>6</sup> See footnote 4 above.

<sup>7</sup> *Yearbook . . . 1992*, vol. II (Part Two), p. 25, footnote 56.

<sup>8</sup> *Ibid.*, p. 27, footnote 61.

13. The wording chosen to express that condition introduced a major element of flexibility into article 12. The solution to the question whether attempts at peaceful settlement of disputes should or should not precede the adoption of countermeasures, would depend, in each specific case, on how strict the existing dispute settlement obligations were determined to be. Such a determination would remain, at least initially, within the traditionally unilateral discretion of each State and, above all, of the injured State.

14. The flexibility of that provision to existing settlement obligations—those existing at the relevant time between the injured State and the State committing the internationally wrongful act—also left more room for further developments with regard to the interaction between the regime of countermeasures and the law concerning dispute settlement. States would be encouraged, more than they would be by a text which ignored that element, to pay some attention to that interaction when they worked out and negotiated, at some time in the future, their commitments in the area of dispute settlement.

15. A further feature of the text of paragraph 1 (a) was the mention of negotiation, in addition to third-party procedures, thus meeting the wish of a number of members, both of the Commission and of the Drafting Committee, to see negotiation expressly included among the means of settlement to be resorted to with priority.

16. Paragraph 1 (b) merely reintroduced the prior communication requirement. He believed that that requirement had been omitted inadvertently from the draft adopted by the Drafting Committee at the forty-fifth session.

17. Paragraph 2 contained another substantial softening of both the prior-settlement-means requirement and of the prior communication requirement. That was even more important when assessing the degree of flexibility of the proposed revised draft article. Paragraph 2 exempted the injured State from both requirements whenever (a) it confined itself, for the time being, to provisional measures of protection; or (b) the wrongdoing State did not cooperate in good faith in the settlement procedures proposed by the injured State in conformity with paragraph 1 (a).

18. Considering the broad scope of the concept of provisional measures of protection and considering that, of course, such measures were not subject to the prior communication requirement, the proposed draft article would leave ample room for the injured State to choose the means of unilateral reaction to be employed. But at the same time, bearing in mind the difficulty of stretching the concept of provisional measures beyond reasonable limits, some protection would be provided to the wrongdoing State. That latter consideration should at least reduce the weight of the argument that the broad scope of the concept of interim measures of protection would make the requirements of paragraph 1 (a) and (b) of article 12 illusory. As he had noted in section D, slight progress was better than no progress at all.

19. Paragraph 3 was in conformity with the corresponding paragraph of the article adopted by the Drafting Committee.

20. He had no doubt that, if the revised wording of articles 11 and 12 were referred to the Drafting Committee, as he hoped they would be, the Committee would, as usual, be able to improve upon it. His concern was to ensure that, in its task of codifying and developing the law of unilateral countermeasures, the Commission should attain three essential objectives: (a) to strike a balance between the position and interests of any prospective injured State and any prospective wrongdoing State; (b) to strike a balance between unilateral measures on one side and available dispute settlement means on the other side, for the sake of justice and equality in relations between States, which were equal under the law, but frequently very unequal as to their economic and political power; and (c) to strike a balance between mere codification and progressive development in the regime of both unilateral measures and dispute settlement means.

21. He hoped it would be seen that the proposed revised draft articles did not curtail in any measure the right of injured States to protect themselves against breaches of international law and that, furthermore, they left the door open to any useful innovations that States might be willing to adopt in the future with regard to the relationship between the right of unilateral reaction on one side and dispute settlement obligations on the other side.

22. Mr. YANKOV asked the Special Rapporteur and the Chairman of the Drafting Committee to explain how the Drafting Committee intended to proceed with regard to the Special Rapporteur's additional proposals on questions that the Committee had already considered. Would there be a global reconsideration or only a consideration of the amendments proposed?

23. Mr. VILLAGRÁN KRAMER said that he welcomed the opportunity that had been afforded to the Special Rapporteur to express his views on articles 11 and 12. However, he wished to point out that, ever since the preceding session, in the course of which Mr. Mikulka, in his capacity as Chairman of the Drafting Committee, had submitted the text of the articles adopted by the Committee, the Commission had been waiting to take up consideration of those articles. The Special Rapporteur was certainly entitled to submit observations and to request the Drafting Committee to "reconsider" provisions it had already adopted, but other members of the Commission were entitled to request that they should be considered in plenary. Referring them to the Drafting Committee was likely to delay the completion of the consideration of substantive questions on first reading by one or two years.

24. He also wished to protest at the use, in the Spanish version of chapter I, section D, of the word *descuido* with respect to the work of the Drafting Committee. He did not think that the Drafting Committee had shown any signs of negligence in its consideration of the articles and he asked for that passage to be corrected.

25. Mr. TOMUSCHAT said that he would like to know what practice, if any, the Commission followed where articles already adopted by the Drafting Committee were referred back to that Committee. He asked that question purely for information purposes, since it was for the Commission to decide on whatever procedure it thought best.

26. Mrs. DAUCHY (Secretary to the Commission) said, in general and provisionally, that the situation had already arisen in which articles submitted to the Commission in plenary by the Drafting Committee had been referred back to the latter after a general debate to enable the Committee to reconsider them in the light of that debate. The secretariat would endeavour to find specific instances.

27. Mr. BOWETT (Chairman of the Drafting Committee) said that he too was not entirely in agreement with the proposals made by the Special Rapporteur at the preceding session. His reservations particularly concerned the notion of an "adequate response", the requirement of prior exhaustion of all available settlement means and the prior communication requirement. Notwithstanding the difficulties to which the text gave rise, however, the Drafting Committee had done remarkable work on finding a compromise solution. Since then, the Special Rapporteur had continued to give much thought to the question and he was now submitting an important proposal which might lead to a solution still better than that proposed by the Drafting Committee. The task of the Drafting Committee was, after all, to facilitate the work of the Commission by submitting to it the best possible drafts, a task which took precedence over procedural issues. It would thus be best for the Drafting Committee simultaneously to reconsider the draft articles it had adopted at the preceding session and the new proposals of the Special Rapporteur. However, the consideration of other topics must not suffer as a result and the Drafting Committee should therefore devote no more than two meetings to the reconsideration of draft articles 11 and 12.

28. Mr. Sreenivasa RAO said that, like some other members of the Commission, albeit a minority, he had always considered that, in the absence of commonly accepted mechanisms and institutions to determine whether there was an internationally wrongful act and what reactions were reasonable, appropriate and legitimate, and having regard to the political and economic inequalities between States, the most perfect regime that the Commission might come up with would still be in danger of creating more abuses than anything else and of doing little to further the rule of law in the international community. If the Commission was nevertheless obliged to come to grips with the establishment of such a regime, it should place emphasis on the means of limiting the possibility of abuse and on specifying more clearly the types of reaction to which the injured State would have the right to recourse. In view of those reservations regarding the substance of the question of countermeasures, the Special Rapporteur's new proposals concerning articles 11 and 12 contained one positive and one negative element. The first concerned the re-emergence in article 11 of the notion of "adequate response", which was deemed necessary by those who regarded unilateral

determination and the immediate adoption of countermeasures as unacceptable. In article 12, on the other hand, there was a weakening of the element of limitation and, as a corollary, a broadening of the injured State's latitude to take countermeasures. The obligation to have exhausted all available settlement means had constituted a minimum, the suppression of which posed problems, particularly in view of the fact that the Drafting Committee appeared in general to favour a broadening of the injured State's room for manoeuvre at the expense of that of the wrongdoing State. Consequently, it was to be feared that, once the Drafting Committee had before it the Special Rapporteur's new proposals, it would once again reject the notion of "adequate response" that had been reintroduced into article 11, while eagerly accepting the softening of article 12, thereby widening the gap that divided those members of the Commission who were in favour of elaborating a regime under which the measures taken unilaterally by powerful and other States would have a legal basis and those who considered that the Commission should not embark upon such a course. He hoped that the Drafting Committee would at least avoid dissociating the two elements of the Special Rapporteur's proposal and would treat it as a whole.

29. Mr. BARBOZA urged the Commission not to return in plenary to questions that were notoriously controversial. In his view, the Special Rapporteur's proposals should have been submitted directly to the Drafting Committee, a body in which all members of the Commission had an opportunity to make their views heard. He therefore supported the proposal of the Chairman of the Drafting Committee.

30. Mr. TOMUSCHAT said that he too agreed with the Chairman of the Drafting Committee and stressed the need not to devote more than two meetings of the Drafting Committee to that question.

31. Mr. VILLAGRÁN KRAMER said that he was no longer opposed to the submission to the Drafting Committee of the Special Rapporteur's proposals concerning articles 11 and 12, if reconsideration of those articles was to take up no more than two meetings. Articles 11 to 14 certainly dealt with the regime of countermeasures, but part three of the draft, which established a relationship between countermeasures and dispute settlement systems, was the most important part.

32. Mr. AL-KHASAWNEH, supported by Mr. KABATSI, said that the Special Rapporteur's proposals might in fact offer a better solution than the one found at the Commission's preceding session. He thus favoured referral back to the Drafting Committee. While he hoped that the Drafting Committee would be able to complete its consideration of the proposals in two meetings, he would prefer it to take as much time as was necessary.

33. Mr. de SARAM said that he had no particular objection to the proposal made by the Chairman of the Drafting Committee, although he would have preferred more flexibility with regard to the time to be devoted to the question. Nevertheless, in his view, it must be clearly indicated that the question of countermeasures was of considerable importance for the topic of State responsibility as a whole. It would be unduly optimistic to

think that there would be full consensus in the Drafting Committee. Consequently, it was important that the views of those who had been unable to join the consensus should be reflected when the Chairman of the Drafting Committee reported to the Commission in plenary. Basically, one very important element was the relationship between the injured State and the wrongdoing State before the right to resort to countermeasures was applied. It would also be useful if, when considering the Special Rapporteur's proposals, the Drafting Committee had before it the text of the Understanding on Rules and Procedures Governing the Settlement of Disputes, adopted during the Uruguay Round of Multilateral Trade Negotiations.<sup>9</sup> One problem that continued to face the Drafting Committee was that not all its members seemed to be equally aware of the difficulties, and that it led to much futile haggling.

34. Mr. SZEKELY and Mr. RAZAFINDRALAMBO said that they supported the proposal made by the Chairman of the Drafting Committee.

35. Mr. TOMUSCHAT asked when the commentaries to articles 11 and 12 would be submitted to the Commission. His main concern was that the Commission should be able to complete its consideration of the draft articles on State responsibility before the end of its members' current term of office, which expired in 1996. He wondered whether there might not be a case for drawing up a timetable of work to that end.

36. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he had naturally never intended to offend the Drafting Committee or any of its members. What he had meant by the word "oversight" was simply that the Drafting Committee had been so preoccupied by the key question whether and to what extent dispute settlement means should be resorted to prior to countermeasures that it had not discussed the question of prior communication.

37. With regard to the next step to be taken, the majority of those members of the Commission who had expressed their views seemed to agree with the proposal made by the Chairman of the Drafting Committee.

38. In respect of the commentaries to articles 11 to 14, those relating to articles 13 and 14 were ready, as was that relating to article 11, which would have to be amended to conform to whatever decision was made with regard to the concept of "adequate response". The commentary to article 12 was being drafted, but there was no danger that the Commission would have to postpone the consideration and adoption of that article until its next session. There was also no reason to believe that the Commission would not be able to complete its first reading of the draft articles on State responsibility by the 1996 deadline.

39. It was to be hoped, then, that the members of the Commission were all determined that the first reading should proceed under the best possible conditions and,

consequently, the possibility of making further improvements should not be ruled out merely on the grounds that it was not feasible for the Drafting Committee to hold another meeting. The Drafting Committee would surely be able to demonstrate the ingenuity and good will needed to find an appropriate solution. Contributions in that respect from the members of the Commission who were not members of the Drafting Committee but who were interested in articles 11 and 12 would be welcome.

40. Mr. VILLAGRÁN KRAMER said that the secretariat should correct the Spanish version of chapter I, section D, so that it did not imply that the Drafting Committee had been negligent. The Committee had devoted 26 meetings to the consideration of articles 11 to 14 and none of the members had the feeling that they had been negligent.

41. The CHAIRMAN said that the secretariat would make the necessary changes and that, for his part, the Special Rapporteur might wish to find another term in English for "oversight". He confirmed that there had been no negligence on the part of the Drafting Committee and that it had in fact devoted 26 meetings to consideration of the question.

42. He agreed that the first reading of the draft articles absolutely had to be completed by the forty-seventh session in 1996 at the latest. The Special Rapporteur's request that his new proposals should be referred to the Drafting Committee for consideration had been endorsed by many members of the Commission and by the Chairman of the Drafting Committee, on the understanding that there would be no consequent delay in the normal work of the session. The Chairman of the Drafting Committee wished to limit consideration of the matter to two meetings, while other members of the Commission were in favour of a more flexible approach. He himself was convinced that the Drafting Committee was in the best position to decide. He proposed that the Commission should request the Drafting Committee to consider the possibility of amending articles 11 and 12 in the light of the new proposals by the Special Rapporteur, it being understood that, if amendment proved impossible, the Commission would take up in plenary the consideration of those articles on the basis of the text adopted at the preceding session by the Drafting Committee.

*It was so decided.*

**The law of the non-navigational uses of international watercourses (continued)\*\* (A/CN.4/457, sect. E, A/CN.4/462,<sup>10</sup> 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

43. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the report of the Draft-

<sup>9</sup> Annexed to the Marrakesh Agreement Establishing the World Trade Organization (GATT, *The Results of the Uruguay Round of Multilateral Trade Negotiations: the Legal Texts* (Sales No. Gatt/1994-4), annex 2, pp. 404-433).

\*\* Resumed from the 2339th meeting.

<sup>10</sup> Reproduced in *Yearbook* . . . 1994, vol. II (Part One).

ing Committee on the articles on the law of the non-navigational uses of international watercourses that it had adopted on second reading at the current session (A/CN.4/L.492 and Corr.1 and 3).

44. Mr. BOWETT (Chairman of the Drafting Committee), introducing the report of the Drafting Committee, said that it had devoted a total of 13 meetings, held between 9 May and 20 June 1994, to the topic under consideration. He expressed his gratitude to the Special Rapporteur, Mr. Rosenstock, the members of the Drafting Committee and the secretariat for their valuable assistance.

45. He recalled that at the forty-fifth session the then Chairman of the Drafting Committee had presented the text of articles 1 to 6 and articles 8 to 10 adopted on second reading by the Drafting Committee.<sup>11</sup> The Drafting Committee had retained the texts as recommended with the exception of a few minor changes, based on suggestions made by the Special Rapporteur in his second report (A/CN.4/462). In addition, the Committee had examined on second reading articles 5 and 7, which had been left pending, as well as all the articles that the Commission had referred to it at the current session, namely, articles 11 to 32 and the new article 33 proposed by the Special Rapporteur to deal with the settlement of disputes. Lastly, in accordance with the mandate entrusted to it by the Commission, the Drafting Committee had adopted a draft resolution (A/CN.4/L.492/Add.1) in which it suggested how the Commission should proceed if it should decide to deal with unrelated confined groundwaters in the draft articles.

46. The titles and texts of articles 1 to 33, as adopted by the Drafting Committee on second reading, read:

#### PART ONE

#### INTRODUCTION

##### *Article 1. Scope of the present articles*

1. The present articles apply to uses of international watercourses and of their waters for purposes other than navigation and to measures of conservation and management related to the uses of those watercourses and their waters.

2. The use of international watercourses for navigation is not within the scope of the present articles except in so far as other uses affect navigation or are affected by navigation.

##### *Article 2. Use of terms*

For the purposes of the present articles:

(a) "international watercourse" means a watercourse, parts of which are situated in different States;

(b) "watercourse" means a system of surface waters and groundwaters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus;

(c) "watercourse State" means a State in whose territory part of an international watercourse is situated.

##### *Article 3. Watercourse agreements*

1. Watercourse States may enter into one or more agreements, hereinafter referred to as "watercourse agreements", which apply and adjust the provisions of the present articles to

the characteristics and uses of a particular international watercourse or part thereof.

2. Where a watercourse agreement is concluded between two or more watercourse States, it shall define the waters to which it applies. Such an agreement may be entered into with respect to an entire international watercourse or with respect to any part thereof or a particular project, programme or use, provided that the agreement does not adversely affect, to a significant extent, the use by one or more other watercourse States of the waters of the watercourse.

3. Where a watercourse State considers that adjustment or application of the provisions of the present articles is required because of the characteristics and uses of a particular international watercourse, watercourse States shall consult with a view to negotiating in good faith for the purpose of concluding a watercourse agreement or agreements.

##### *Article 4. Parties to watercourse agreements*

1. Every watercourse State is entitled to participate in the negotiation of and to become a party to any watercourse agreement that applies to the entire international watercourse, as well as to participate in any relevant consultations.

2. A watercourse State whose use of an international watercourse may be affected to a significant extent by the implementation of a proposed watercourse agreement that applies only to a part of the watercourse or to a particular project, programme or use is entitled to participate in consultations on, and in the negotiation of, such an agreement, to the extent that its use is thereby affected, and to become a party thereto.

#### PART TWO

#### GENERAL PRINCIPLES

##### *Article 5. Equitable and reasonable utilization and participation*

1. Watercourse States shall in their respective territories utilize an international watercourse in an equitable and reasonable manner. In particular, an international watercourse shall be used and developed by watercourse States with a view to attaining optimal utilization thereof and benefits therefrom consistent with adequate protection of the watercourse.

2. Watercourse States shall participate in the use, development and protection of an international watercourse in an equitable and reasonable manner. Such participation includes both the right to utilize the watercourse and the duty to cooperate in the protection and development thereof, as provided in the present articles.

##### *Article 6. Factors relevant to equitable and reasonable utilization*

1. Utilization of an international watercourse in an equitable and reasonable manner within the meaning of article 5 requires taking into account all relevant factors and circumstances, including:

(a) geographic, hydrographic, hydrological, climatic, ecological and other factors of a natural character;

(b) the social and economic needs of the watercourse States concerned;

(c) the dependency of the population on the watercourse;

(d) the effects of the use or uses of the watercourse in one watercourse State on other watercourse States;

(e) existing and potential uses of the watercourse;

(f) conservation, protection, development and economy of use of the water resources of the watercourse and the costs of measures taken to that effect;

<sup>11</sup> *Yearbook* . . . 1993, vol. I, 2322nd meeting, para. 5.

(g) the availability of alternatives, of corresponding value, to a particular planned or existing use.

2. In the application of article 5 or paragraph 1 of this article, watercourse States concerned shall, when the need arises, enter into consultations in a spirit of cooperation.

*Article 7. Obligation not to cause significant harm*

1. Watercourse States shall exercise due diligence to utilize an international watercourse in such a way as not to cause significant harm to other watercourse States.

2. Where, despite the exercise of due diligence, significant harm is caused to another watercourse State, the State whose use causes the harm shall, in the absence of agreement to such use, consult with the State suffering such harm over:

(a) the extent to which such use has proved equitable and reasonable taking into account the factors listed in article 6;

(b) the question of ad hoc adjustments to its utilization, designed to eliminate or mitigate any such harm caused and, where appropriate, the question of compensation.

*Article 8. General obligation to cooperate*

Watercourse States shall cooperate on the basis of sovereign equality, territorial integrity and mutual benefit in order to attain optimal utilization and adequate protection of an international watercourse.

*Article 9. Regular exchange of data and information*

1. Pursuant to article 8, watercourse States shall on a regular basis exchange readily available data and information on the condition of the watercourse, in particular that of a hydrological, meteorological, hydrogeological and ecological nature, as well as related forecasts.

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

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

*Article 10. Relationship between different kinds of uses*

1. In the absence of agreement or custom to the contrary, no use of an international watercourse enjoys inherent priority over other uses.

2. In the event of a conflict between uses of an international watercourse, it shall be resolved with reference to the principles and factors set out in articles 5 to 7, with special regard being given to the requirements of vital human needs.

PART THREE

PLANNED MEASURES

*Article 11. Information concerning planned measures*

Watercourse States shall exchange information and consult each other on the possible effects of planned measures on the condition of an international watercourse.

*Article 12. Notification concerning planned measures with possible adverse effects*

Before a watercourse State implements or permits the implementation of planned measures which may have a significant ad-

verse effect upon other watercourse States, it shall provide those States with timely notification thereof. Such notification shall be accompanied by available technical data and information in order to enable the notified States to evaluate the possible effects of the planned measures.

*Article 13. Period for reply to notification*

Unless otherwise agreed:

(a) 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 the findings to it;

(b) this period shall, at the request of a notified State for which the evaluation of the planned measure poses special difficulty, be extended for a period not exceeding six months.

*Article 14. Obligations of the notifying State during the period for reply*

During the period referred to in article 13, the notifying State shall cooperate 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.

*Article 15. 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 5 or 7, it shall communicate this finding to the notifying State within the period applicable pursuant to article 13, together with a documented explanation setting forth the reasons for the finding.

*Article 16. Absence of reply to notification*

1. If, within the period applicable pursuant to article 13, the notifying State receives no communication under paragraph 2 of article 15, it may, subject to its obligations under articles 5 and 7, proceed with the implementation of the planned measures, in accordance with the notification and any other data and information provided to the notified States.

2. Any claim to compensation by a notified State which has failed to reply may be offset by the costs incurred by the notifying State for action undertaken after the expiration of the time for a reply which would not have been undertaken if the notified State had objected within the period applicable pursuant to article 13.

*Article 17. Consultations and negotiations concerning planned measures*

1. If a communication is made under paragraph 2 of article 15, the notifying State and the State making the communication shall enter into consultations and, if necessary, negotiations with a view to arriving at an equitable resolution of the situation.

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

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

*Article 18. Procedures in the absence of notification*

1. If a watercourse State has serious reason to believe that another watercourse State is planning measures that may have a significant adverse effect upon it, the former State may request the latter to apply the provisions of article 12. The request shall be

accompanied by a documented explanation setting forth its reasons.

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

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

#### *Article 19. Urgent implementation of planned measures*

1. In the event that the implementation of planned measures is of the utmost urgency in order to protect public health, public safety or other equally important interests, the State planning the measures may, subject to articles 5 and 7, 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.

### PART FOUR

#### PROTECTION, PRESERVATION AND MANAGEMENT

##### *Article 20. Protection and preservation of ecosystems*

Watercourse States shall, individually or jointly, protect and preserve the ecosystems of international watercourses.

##### *Article 21. Prevention, reduction and control of pollution*

1. For the purposes of this article, "pollution of an international watercourse" means any detrimental alteration in the composition or quality of the waters of an international watercourse which results directly or indirectly from human conduct.

2. Watercourse States shall, individually or jointly, prevent, reduce and control pollution of an international watercourse that may cause significant harm to other watercourse States or to their environment, including harm to human health or safety, to the use of the waters for any beneficial purpose or to the living resources of the watercourse. Watercourse States shall take steps to harmonize their policies in this connection.

3. Watercourse States shall, at the request of any of them, consult with a view to establishing lists of substances, the introduction of which into the waters of an international watercourse is to be prohibited, limited, investigated or monitored.

##### *Article 22. Introduction of alien or new species*

Watercourse States shall take all measures necessary to prevent the introduction of species, alien or new, into an international watercourse which may have effects detrimental to the ecosystem of the watercourse resulting in significant harm to other watercourse States.

##### *Article 23. Protection and preservation of the marine environment*

Watercourse States shall, individually or jointly, take all measures with respect to an international watercourse that are necessary to protect and preserve the marine environment, including estuaries, taking into account generally accepted international rules and standards.

##### *Article 24 [26]. Management*

1. Watercourse States shall, at the request of any of them, enter into consultations concerning the management of an international watercourse, which may include the establishment of a joint management mechanism.

2. For the purposes of this article, "management" refers, in particular, to:

(a) planning the sustainable development of an international watercourse and providing for the implementation of any plans adopted; and

(b) otherwise promoting rational and optimal utilization, protection and control of the watercourse.

##### *Article 25 [27]. Regulation*

1. Watercourse States shall cooperate, where appropriate, to respond to needs or opportunities for regulation of the flow of the waters of an international watercourse.

2. Unless otherwise agreed, watercourse States shall participate on an equitable basis in the construction and maintenance or defrayal of the costs of such regulation works as they may have agreed to undertake.

3. For the purposes of this article, "regulation" means the use of hydraulic works or any other continuing measure to alter, vary or otherwise control the flow of the waters of an international watercourse.

##### *Article 26 [28]. Installations*

1. Watercourse States shall, within their respective territories, employ their best efforts to maintain and protect installations, facilities and other works related to an international watercourse.

2. Watercourse States shall, at the request of any of them which has serious reason to believe that it may suffer significant adverse effects, enter into consultations with regard to:

(a) the safe operation or maintenance of installations, facilities or other works related to an international watercourse; or

(b) the protection of installations, facilities or other works from wilful or negligent acts or the forces of nature.

### PART FIVE

#### HARMFUL CONDITIONS AND EMERGENCY SITUATIONS

##### *Article 27 [24]. Prevention and mitigation of harmful conditions*

Watercourse States shall, individually or jointly, take all appropriate measures to prevent or mitigate conditions that may be harmful to other watercourse States, whether resulting from natural causes or human conduct, such as flood or ice conditions, water-borne diseases, siltation, erosion, salt-water intrusion, drought or desertification.

##### *Article 28 [25]. Emergency situations*

1. For the purposes of this article, "emergency" means a situation that causes, or poses an imminent threat of causing, serious harm to watercourse States or other States and that results suddenly from natural causes, such as floods, the breaking up of ice, landslides or earthquakes, or from human conduct, such as in the case of industrial accidents.

2. A watercourse State shall, without delay and by the most expeditious means available, notify other potentially affected States and competent international organizations of any emergency originating within its territory.

3. A watercourse State within whose territory an emergency originates shall, in cooperation with potentially affected States and, where appropriate, competent international organizations,

immediately take all practicable measures necessitated by the circumstances to prevent, mitigate and eliminate harmful effects of the emergency.

4. When necessary, watercourse States shall jointly develop contingency plans for responding to emergencies, in cooperation, where appropriate, with other potentially affected States and competent international organizations.

#### PART SIX

#### MISCELLANEOUS PROVISIONS

##### *Article 29. International watercourses and installations in time of armed conflict*

International watercourses and related installations, facilities and other works shall enjoy the protection accorded by the principles and rules of international law applicable in international and internal armed conflict and shall not be used in violation of those principles and rules.

##### *Article 30. Indirect procedures*

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

##### *Article 31. Data and information vital to national defence or security*

Nothing in the present articles obliges a watercourse State to provide data or information vital to its national defence or security. Nevertheless, that State shall cooperate in good faith with the other watercourse States with a view to providing as much information as possible under the circumstances.

##### *Article 32. Non-discrimination*

Unless the watercourse States concerned have agreed otherwise for the protection of the interests of persons, natural or juridical, who have suffered or are under a serious threat of suffering significant transboundary harm as a result of activities related to an international watercourse, a watercourse State shall not discriminate, on the basis of nationality, or residence, or place where the injury occurred, in granting to such persons in accordance with its legal system access to judicial or other procedures or a right to claim compensation or other relief in respect of significant harm caused by such activities carried on under its jurisdiction.

##### *Article 33. Settlement of disputes*

In the absence of an applicable agreement between the watercourse States concerned, any watercourse dispute concerning a question of fact or the interpretation or application of the present articles shall be settled in accordance with the following provisions:

(a) If such a dispute arises, the States concerned shall expeditiously enter into consultations and negotiations with a view to arriving at equitable solutions of the dispute, making use, as appropriate, of any joint watercourse institutions that may have been established by them;

(b) If the States concerned have not arrived at a settlement of the disputes through consultations and negotiations, at any time after six months from date of the request for consultations and negotiations they shall at the request of any of them have recourse to impartial fact-finding or, if agreed upon by the States concerned, mediation or conciliation;

(i) Unless otherwise agreed, a Fact-Finding Commission shall be established, composed of one member nominated by each State concerned and in addition a member not hav-

ing the nationality of any of the States concerned chosen by the nominated members who shall serve as Chairman;

(ii) If the members nominated by States are unable to agree on a Chairman within four months of the request for the establishment of the Commission, any State concerned may request the Secretary-General of the United Nations to appoint the Chairman. If one of the States fails to nominate a member within four months of the initial request pursuant to paragraph (b), any other State concerned may request the Secretary-General of the United Nations to appoint a person who shall not have the nationality of any of the States concerned who shall constitute a single member Commission;

(iii) The Commission shall determine its own procedure;

(iv) The States concerned have the obligation to provide the Commission with such information as it may require and, on request, to permit the Commission to have access to their respective territory and to inspect any facilities, plant, equipment, construction or natural feature relevant for the purpose of its inquiry;

(v) The Commission shall adopt its report by a majority vote, unless it is a single member Commission, and shall submit that report to the States concerned setting forth its findings and the reasons therefor and such recommendations as it deems appropriate;

(vi) The expenses of the Commission shall be borne equally by the States concerned.

(c) If, after 12 months from the initial request for fact-finding, mediation or conciliation or, if a fact-finding mediation or conciliation Commission has been established, 6 months after receipt of a report from the Commission, whichever is the later, the States concerned have been unable to settle the dispute, any of them may, subject to the agreement of the States concerned, submit the dispute to a permanent or ad hoc tribunal or to the International Court of Justice.

#### PART ONE (Introduction)

##### ARTICLE 1 (Scope of the present articles)

47. No change had been made in the text of article 1, which had been adopted by the Drafting Committee on second reading at the forty-fifth session and which, as explained at the time,<sup>12</sup> included the notion of "management" taken from Agenda 21<sup>13</sup> adopted at the United Nations Conference on Environment and Development and from article 26 of the draft articles under consideration.

##### ARTICLE 2 (Use of terms)

48. The Drafting Committee had discussed at length the Special Rapporteur's proposal that the phrase "and flowing into a common terminus" should be deleted from the definition of "watercourse" given in paragraph (b). It had noted that, during the general debate, attention had been drawn to a number of cases in which retention of the "common terminus" requirement would exclude from the scope of the draft articles major international watercourses universally recognized as such, in particular, the Rhine, the Danube, the Rio Grande and

<sup>12</sup> Ibid., para. 6.

<sup>13</sup> Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992 (A/CONF.151/26/Rev.1 (Vol. I, Vol.I/Corr.1, Vol. II, Vol. III and Vol. III/Corr.1)) (United Nations publication, Sales No. E.93.I.8 and corrigenda), Vol. I: Resolutions adopted by the Conference, resolution 1, annex II.

the Mekong, cited by the Special Rapporteur. But the Drafting Committee had also noted that such situations were rather exceptional. Moreover, in some other instances, also cited by the Special Rapporteur, the watercourses in question separated into a number of streams and tributaries which reached the sea far removed from each other. In the Drafting Committee's opinion, the "common terminus" requirement did not mean that the watercourse must terminate at a precise geographic location. According to that interpretation, which would be elaborated in the commentary, the phrase "common terminus" did not unduly limit the scope of the draft articles. On the other hand, it had the advantage, as noted in paragraph (7) of the commentary to article 2 adopted on first reading,<sup>14</sup> of imposing certain limitations on the geographic scope of the draft articles and avoiding the situation in which the construction of a canal linking two different systems would be regarded as turning them into a single system.

49. In the light of those considerations, the Drafting Committee recommended that the phrase "flowing into a common terminus" should be retained, but qualified by the adverb "normally" in order to make it clear that there were cases to which that requirement did not apply. In addition, in the English text of paragraph (b), the Drafting Committee had replaced the term "underground water" by the term "groundwater", which was the one used in the commentaries adopted on first reading.

#### ARTICLE 3 (Watercourse agreements)

50. At the preceding session, the Drafting Committee had decided to replace the word "appreciable" by the word "significant" (*significatif* in French and *sensible* in Spanish) and to indicate in the commentary that it had done so in order to avoid the ambiguity of the word "appreciable", which might mean either "capable of being measured" or "significant", and not as a means of raising the threshold.

#### ARTICLE 4 (Parties to watercourse agreements)

51. The text adopted on first reading had not been changed.

#### PART TWO (General principles)

#### ARTICLE 5 (Equitable and reasonable utilization and participation)

52. The text adopted on first reading had not been changed.

#### ARTICLE 6 (Factors relevant to equitable and reasonable utilization)

53. At the preceding session, the Drafting Committee had made no change in the text of article 6 adopted on first reading. At the present session, it had added a factor to the list of factors in paragraph 1: the dependency of the population on the watercourse (subpara. (c)), as an

element which watercourse States must take into account to ensure that their conduct was in conformity with the obligation of equitable utilization contained in article 5. The concept of dependency was both quantitative and qualitative in that both the size of the population dependent on the watercourse and the extent of its dependence were to be taken into account.

54. The French version of the title had been simplified and brought into line with the English version by eliminating the words *à prendre en considération*.

#### ARTICLE 7 (Obligation not to cause significant harm)

55. In the comments made both in writing and in the Sixth Committee, Governments, taking the view that the relationship between the concepts of "equitable and reasonable utilization" and "significant harm" was unclear, had raised questions about the relationship between articles 5 and 7. From the text adopted on first reading, it was impossible to determine whether "equitable and reasonable utilization", the subject of article 5, was subordinated to the obligation not to cause "significant harm", as provided for in article 7, or vice versa. Some Governments as well as some members of the Commission had proposed that article 7 should be deleted on the ground that the principle of "equitable and reasonable utilization" provided sufficient protection and incorporated the obligation not to cause "significant harm". But other Governments and some members of the Commission had not agreed with that interpretation and felt that it was important to keep article 7.

56. Taking everything into account, the Drafting Committee had decided not to delete article 7, but instead to redraft it to avoid inconsistency with article 5 and to respond to the concern of the Governments and members of the Commission who believed that the concept of "reasonable and equitable utilization" should not relieve watercourse States of the obligation not to cause significant harm to other watercourse States.

57. The Drafting Committee had finally agreed on a text for article 7. It was generally agreed that, in certain circumstances, "equitable and reasonable utilization" of an international watercourse might still involve some significant harm to another watercourse State, for example, when a watercourse State built a dam which would provide hydroelectric power to hundreds of thousands of people, but which would cause significant harm to a few hundred people in another riparian State whose recreational fishing would be destroyed. Taking into account the factors listed in article 6, the most likely conclusion would be that in the hypothetical case in question the construction of the dam was reasonable and equitable even though it caused significant harm to the other riparian State.

58. However, while it was true that the State wishing to construct the dam should be permitted to do so because the activity was within the parameters permitted by article 5 on reasonable and equitable utilization, it was equally true that the State should not be relieved from the obligation to consider the interests of the other riparian State. That obligation was the exercise of due

<sup>14</sup> For the commentary to article 2, see *Yearbook . . . 1991*, vol. II (Part Two), pp. 70-71.

diligence in the utilization of the watercourse in such a way as not to cause significant harm to other watercourse States. In the example cited, that would mean that the State constructing the dam should exercise, even in the design, construction and operation of the dam, due diligence not to cause significant harm to other riparian States.

59. If, despite the equitable and reasonable utilization of the watercourse and the exercise of due diligence, significant harm was caused to another watercourse State, the parties should consult, first, to verify whether the use of the watercourse was reasonable and equitable; secondly, to check whether some ad hoc adjustments to the utilization could eliminate or minimize the harm; and, also, in case harm had occurred, whether compensation would be possible for the victims.

60. Article 7 had thus been drafted in two paragraphs. Paragraph 1 dealt with the general obligation of watercourse States to exercise due diligence in their utilization of an international watercourse in order not to cause significant harm to other watercourse States. Article 7 as adopted on first reading was categorical that watercourse States should use the international watercourse in such a way as not to cause significant harm to other watercourse States. That obligation was now modified to the exercise of due diligence to avoid significant harm. Paragraph 2 dealt with the situation in which, even with the exercise of due diligence, significant harm had been caused. The watercourse States must then consult each other on the issues covered by subparagraphs (a) and (b). The words "in the absence of agreement to such use" meant that, if the watercourse States had already agreed to such a use of the watercourse, then there was no obligation to comply with the procedures provided for in subparagraphs (a) and (b). However, if they had not agreed to such a use, then the watercourse State which was suffering significant harm might invoke subparagraphs (a) and (b).

61. Obviously, the request for consultation would be made in most cases by the State suffering the harm. If the State utilizing the watercourse was in a position to know that, in the course of its utilization, harm would be caused to another watercourse State, it should take the initiative to begin consultations with that State. The issue had also been covered by other articles, but the Drafting Committee had felt that it would be preferable to keep the possibility open in article 7 as well.

62. The purpose of the consultations was spelt out in subparagraphs (a) and (b). Subparagraph (a) provided that the parties should consult to determine whether the use of the watercourse had been reasonable and equitable taking into account the factors referred to in article 6. In the view of the Drafting Committee, the burden of proof that a particular use had been reasonable and equitable lay with the State causing the harm. That rule was clear in international law. It was therefore not necessary to state it expressly in the article, but it would be mentioned in the commentary in order to avoid any misunderstanding. Subparagraph (b) provided that the watercourse States should also consult to see whether ad hoc adjustments might be made to the utilization causing the harm in order to eliminate or reduce the harm and

whether compensation should be paid to those suffering particular harm.

63. The title of the article remained unchanged.

#### ARTICLE 8 (General obligation to cooperate)

64. The text adopted on first reading had not been changed.

#### ARTICLE 9 (Regular exchange of data and information)

65. At the preceding session, the Drafting Committee had replaced the words "reasonably available", for which there was no adequate equivalent in some working languages, by the words "readily available". The Drafting Committee had maintained the text as adopted at the preceding session on second reading.

#### ARTICLE 10 (Relationship between different kinds of uses)

66. At the preceding session, the Drafting Committee had made a modification in the wording of the title only and had maintained the text as adopted on second reading.

#### PART THREE (Planned Measures)

#### ARTICLE 11 (Information concerning planned measures)

67. The text adopted on first reading had not been changed.

#### ARTICLE 12 (Notification concerning planned measures with possible adverse effects)

68. The text adopted on first reading had also been left unchanged except for the replacement of the word "appreciable" by the word "significant" for reasons of consistency, bearing in mind the change made to article 3 by the Drafting Committee at the preceding session.

#### ARTICLE 13 (Period for reply to notification)

69. The Drafting Committee had agreed that, as a rule, a period of six months should be sufficient for the notified State to study and evaluate the possible adverse effects of planned measures. It believed, however, that, in certain special or exceptional cases, the initial assessment by the notifying State of the effects of planned measures might have taken a much longer period of time and that, in such cases, it would not be fair to grant the notified State only six months to make its reaction known. Subparagraph (b) was intended to meet that concern. While it protected the interests of the notified State, it did so in a balanced fashion, first, by making it incumbent on that State to show that the evaluation of the planned measures posed special difficulties and, secondly, by limiting the possible extension of the initial period to six months. The Drafting Committee had decided that it was necessary to provide for a specified maximum, bearing in mind that the notifying State might be incurring costs during that period, for instance, for the payment of interest on loans, and that it should not be

subjected to undue delays. Of course, the parties could agree to depart from the time-limits provided for in subparagraphs (a) and (b), as was made clear by the words "Unless otherwise agreed" which governed both paragraphs.

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

ARTICLE 15 (Reply to notification)

70. The Drafting Committee recommended that articles 14 and 15 should remain as adopted on first reading. The commentary to article 15 would, however, clarify the relationship between that article and article 13 so far as time-limits were concerned and would make it clear that the words "as early as possible" left unimpaired the time-limits provided for in article 13 and the corresponding entitlements of the notified State. Its purpose was to encourage the notified State not to wait until the end of those time-limits to react, unless necessary. The sooner the consultations started and the earlier the notifying State could review its planned measures, the better it would be for all concerned.

ARTICLE 16 (Absence of reply to notification)

71. Because of the possibility of a six-month extension of the period for reply to notification, the words "within the period referred to in article 13" were no longer accurate: that article now provided for two periods. The words in question had therefore been replaced, in paragraph 1, by the words "within the period applicable pursuant to article 13", which covered both of the possibilities envisaged in article 13.

72. At a more substantive level, the Drafting Committee had noted that the text as adopted on first reading was silent with regard to the consequences of failure by the notified State to respond to the notification. The Drafting Committee had felt that it was necessary to take some account of the possible hardships caused to the notifying State and to provide an incentive for the notified State to reply to the notification so as to encourage that State to seek solutions to problems of conflicting uses consistent with equitable and optimal utilization of watercourses and to protect the interests of the notifying State. It had therefore included in article 16 a paragraph 2 which provided that any claim to compensation by a notified State which had failed to reply within the periods prescribed by article 13 might be offset by the costs incurred by the notifying State for actions undertaken after the lapse of such periods which would not have been undertaken if the notified State had reacted in a timely fashion. Accordingly, the tardy reaction of the notified State would result in the amount to which it was entitled by way of compensation for any damage it had suffered being reduced by the amount of any costs incurred by the notifying State due to the lack of a timely response. Paragraph 2 of the article should be read jointly with paragraph 1, which meant that the notifying State was not relieved of its obligations under articles 5 and 7 or of its obligation to act in good faith in accordance with the terms of the notification. The commentary would explain the difference between the right to offset and the right to counterclaim.

73. The Drafting Committee had not dealt in the text of the article with the remote possibility that two notified watercourse States might fail to reply to the notification. The commentary would, however, make it clear that, in such a case, the claims of the States concerned would be reduced on a *pro rata* basis.

ARTICLE 17 (Consultations and negotiations concerning planned measures)

74. In order to make it clear that consultations did not necessarily have to evolve into full-fledged negotiations, the Drafting Committee recommended that, in paragraph 1 of the article, the words "if necessary" should be added before the word "negotiations". The reference to "consultations and negotiations", in paragraphs 2 and 3, should be interpreted accordingly.

ARTICLE 18 (Procedures in the absence of notification)

75. The Drafting Committee had noted that the words "for such belief", at the end of paragraph 1 of the text adopted on first reading, were somewhat odd in the context and difficult to render in other languages. It had therefore decided to replace the words "the reasons for such belief" by the words "its reasons" which, of course, referred to the serious reasons the watercourse State might have to believe that planned measures would have adverse effects upon it. Also, in paragraph 1, the word "appreciable" had been replaced by the word "significant". Paragraphs 2 and 3 remained unchanged. The words "consultations and negotiations" were to be interpreted along the lines indicated in paragraph 1 of article 17.

ARTICLE 19 (Urgent implementation of planned measures)

76. The text of the article as adopted on first reading had been left unchanged. The commentary would, however, specify that the words "or other equally important interests", in paragraph 1, encompassed security concerns.

PART FOUR (Protection, preservation and management)

77. Part four had originally been entitled "Protection and preservation". The Drafting Committee had, however, felt that former articles 26 (Management), 27 (Regulation) and 28 (Installations), which, on first reading, had been included in part six (Miscellaneous provisions) of the draft articles were too important to be relegated, as it were, to "miscellaneous provisions". It had therefore agreed to include them in part four bearing in mind that, in modern thinking, management was an integral part of protection and preservation. The title of part four had been modified accordingly and former articles 26, 27 and 28 had been renumbered as articles 24, 25 and 26.

ARTICLE 20 (Protection and preservation of ecosystems)

78. The text adopted on first reading had not been changed.

## ARTICLE 21 (Prevention, reduction and control of pollution)

79. The Drafting Committee had agreed that it was unnecessary to add the word "energy" in paragraph 3, as proposed by the Special Rapporteur, but had decided that the commentary should make it clear that the word "substances", which appeared in that paragraph, encompassed energy. Since the word "pollution" appeared only in article 21, the Drafting Committee had not thought it appropriate to move the definition of that word, as set forth in paragraph 1, to article 2 (Use of terms). Again, the word "appreciable", in paragraph 2, had been replaced by the word "significant".

## ARTICLE 22 (Introduction of alien or new species)

## ARTICLE 23 (Protection and preservation of the marine environment)

80. The only change made to the wording of articles 22 and 23 was the replacement, in article 22, of the word "appreciable" by the word "significant".

## ARTICLE 24 (former article 26) (Management)

81. The text of the article corresponded to that of article 26 as adopted on first reading. Several members had, however, noted that there was a difference between paragraph 2 of article 5, under which management had to be conducted in an equitable and reasonable manner, and paragraph 2 of article 26, which provided for the criteria of sustainable development and rational and optimal utilization, protection and control of the watercourses. It had therefore been decided that the commentary should indicate that the criteria in subparagraphs 2 (a) and 2 (b) of article 24 were to be applied in the overall context of article 5.

## ARTICLE 25 (former article 27) (Regulation)

82. The only changes made to the wording of former article 27 were of an editorial nature. In paragraph 2, the words "Unless they have otherwise agreed" had been replaced by the words "Unless otherwise agreed", which was the wording used in article 13. The other drafting change related to the French version of paragraph 3, where, for the sake of consistency with article 2, the words *on entend par "régularisation"* had been replaced by the words *le terme "régularisation" s'entend de*.

## ARTICLE 26 (former article 28) (Installations)

83. In paragraph 2, the word "appreciable" had been replaced by the word "significant". In the French text, the Drafting Committee had also decided to replace the phrase *qui est sérieusement fondé à croire* by the phrase *qui a de sérieuses raisons de croire*, which, in its view, was a better rendering of the English wording "which has serious reason to believe", better conveyed the intention of the text and had already been used in paragraph 1 of article 18.

## PART FIVE (Harmful conditions and emergency situations)

## ARTICLE 27 (former article 24) (Prevention and mitigation of harmful conditions)

84. The text of former article 24, as adopted on first reading, remained unchanged.

## ARTICLE 28 (former article 25) (Emergency situations)

85. The Drafting Committee had recommended only a minor editorial change in paragraph 1, namely, the replacement of the words "as for example in the case of industrial accidents" by the words "such as in the case of industrial accidents". In response to those members who had queried the meaning of the words "competent international organizations", which appeared in paragraphs 2, 3 and 4, it had been decided that the commentary would explain that the word "competent" meant "empowered to respond".

## PART SIX (Miscellaneous provisions)

## ARTICLE 29 (International watercourses and installations in time of armed conflict)

86. As former articles 26, 27 and 28 of part six had become, respectively, articles 24, 25 and 26 of part four, the first article in part six was now article 29 (International watercourses and installations in time of armed conflict), the text of which had been left unchanged.

## ARTICLE 30 (Indirect procedures)

87. Article 30 had also been left unchanged, even though some members of the Drafting Committee found it unnecessary.

## ARTICLE 31 (Data and information vital to national defence or security)

88. The text adopted on first reading remained unchanged.

## ARTICLE 32 (Non-Discrimination)

89. There was a corrigendum to the article (A/CN.4/L.492/Corr.1) providing for the addition, after the word "nationality", of the words "or residence", which had been omitted by error. There were, however, also other significant changes as compared with the wording adopted on first reading. The scope of the article was now confined to cases involving transboundary harm because it was in relation to such cases that the obligation not to discriminate was of real significance. At the same time, the new version of the article was broader in scope than the previous one in that it excluded not only discrimination based on nationality or residence, but also discrimination based on the place where the injury occurred. The new text thus sought to ensure that any person, whatever his nationality or residence, who had suffered significant transboundary harm or who was exposed to a serious risk of such harm as a result of activities related to an international watercourse should, regardless of where the harm had occurred or might occur, receive the same treatment as that afforded by the

country of origin to its nationals in the case of domestic harm.

90. The opening clause, reading “Unless the watercourse States concerned have agreed otherwise”, preserved the freedom of the watercourse States to agree on different arrangements such as resort to diplomatic channels. The words “for the protection of the interests of persons, natural or juridical, who have suffered” had been inserted to make it clear that States could freely agree to discriminate and that the purpose of an inter-State agreement should always be the protection of the interests of the victims or potential victims of harm.

91. An important element which was unchanged was the expression “in accordance with its legal system”, which made it clear that there was no intention to confer on persons outside the jurisdiction of the watercourse States where a judicial or other remedy was sought or compensation claimed more extensive rights than those enjoyed by nationals.

92. One member of the Drafting Committee had found the article as a whole unacceptable on the ground that the draft articles dealt with relations between States and should not extend into the field of actions by natural or legal persons under domestic law. In his opinion, the article dealt inadequately and possibly in a misleading way with the complex problem of private remedies in the context of international law.

#### ARTICLE 33 (Settlement of disputes)

93. The Special Rapporteur, in his second report, had proposed an article on the settlement of disputes, since he felt strongly that a provision on the issue was especially important for the better functioning of a convention of that kind. In general, the Commission shared that view, but it considered that the proposed dispute settlement mechanism should be simple and realistic and should not depart from the overall tone of the draft which was based on consent and cooperation among riparian States. It was with that in mind that the Drafting Committee proposed article 33.

94. The article consisted of a main (introductory) clause and three subparagraphs which set forth three successive modalities for settlement.

95. The main clause defined the subject-matter of the dispute which could relate to a question of fact or to the interpretation or application of the present articles. The opening phrase, reading “In the absence of an applicable agreement between the watercourse States concerned”, meant, of course, that the articles would apply only if the watercourse States did not already have an agreement that provided for the settlement of any disputes between them and any such agreement would prevail over the provisions of the article.

96. The mechanisms for dispute settlement set forth in paragraphs (a), (b) and (c) were intended to come into operation sequentially.

97. Paragraph (a) provided for what should normally be done when a dispute arose between watercourse States. Such States should expeditiously enter into con-

sultations and negotiations with a view to arriving at an equitable solution of the dispute. They were encouraged to make use, as appropriate, of any joint watercourse institutions that they might have established. Experience had shown that such joint institutions were most effective in resolving disputes between watercourse States and that was why they had been mentioned. However, watercourse States were not obliged to use those institutions and that was the purport of the words “as appropriate”.

98. Subparagraph (b) provided for two other mechanisms in case the parties failed to resolve their dispute through consultations and negotiations: a fact-finding commission, which could be established at the request of any of the parties to the dispute, and resort to mediation and conciliation if the parties so agreed. In the view of the Drafting Committee, many disputes which arose in respect of the utilization of watercourses were disputes over the facts. Clarification of the facts, therefore, could facilitate the parties’ settlement of their dispute more expeditiously and more efficiently. In the view of the Drafting Committee, even if the recommendations made by a mediation or conciliation commission were not binding on the parties, they could provide them with a very useful neutral view on questions both of fact and of law and thus make them more amenable to settlement.

99. One important difference between the two mechanisms for the settlement of disputes contemplated in the paragraph was that the fact-finding commission could be established at the request of any of the watercourse States party to a dispute, whereas resort to mediation and conciliation could be effected only with their consent. Indeed, all the mechanisms for dispute settlement provided for under the article, with the exception of the establishment of a fact-finding commission, came into operation only upon consent by all the watercourse States parties to a dispute.

100. Subparagraph (b) introduced a temporal criterion. In the view of the Drafting Committee, parties should be given some time to continue consultations and negotiations before the second set of dispute settlement mechanisms came into operation; six months from the date of the request for consultations and negotiations seemed a reasonable time. The parties were not forced to stop their consultations and negotiations after six months and to resort to the mechanisms provided for in subparagraph (b): the words “at any time after six months” were intended to convey that understanding.

101. Subparagraphs (b) (i) to (b) (vi) set out the procedure for the establishment of a fact-finding commission in the absence of an agreement between the parties. The words “Unless otherwise agreed”, at the beginning of subparagraph (i), were designed to guarantee the freedom of the watercourse States parties to a dispute to follow a procedure other than that provided for under that subparagraph.

102. The fact-finding commission established under subparagraph (b) was composed of three members, one member nominated by each of the States concerned and a third member, who did not have the nationality of

either of those States, chosen by the nominated members to serve as chairman.

103. If the members nominated by the watercourse States were unable to agree on a chairman within four months of the request for the establishment of the commission, any of the watercourse States party to the dispute could request the Secretary-General of the United Nations to appoint the chairman. If one of the parties failed to nominate a member within four months of the initial request pursuant to subparagraph (b), any other party could request the Secretary-General of the United Nations to appoint a person who must not have the nationality of any of the States concerned and who would constitute a single member commission.

104. The fact-finding commission determined its own procedure. The States concerned had the obligation to provide the commission with such information as it might require and, if requested, to permit the commission to have access to their respective territories and to inspect any facilities, plant, equipment, construction or natural feature relevant to the purpose of its inquiry.

105. The fact-finding commission would adopt its report by a majority vote unless it was a single member commission and would submit the report to the States concerned setting forth its findings and the reasons therefor and such recommendations as it deemed appropriate.

106. The expenses of the commission would be borne equally by the States concerned, unless they agreed on other ways of sharing expenses.

107. Subparagraph (c) of article 33 provided for another form of dispute settlement, namely, by a binding decision of a third party which could be a permanent or ad hoc tribunal or ICJ. That form of settlement was also based on the consent of the watercourse States parties to a dispute, which could, by agreement, be expressed prior to the dispute and also after a dispute had arisen.

108. The Drafting Committee had anticipated that there might be situations in which there were more than two watercourse States parties to a dispute and where some of them would not agree to submit the dispute to a tribunal or to ICJ. The rights of the other States could not, of course, be affected. That point would be explained in the commentary.

109. Like subparagraph (b), subparagraph (c) introduced a temporal criterion. The dispute settlement mechanisms for which it provided could be invoked only if, after 12 months from the initial request for a fact-finding commission, mediation or conciliation or, if a fact-finding, mediation or conciliation commission had been established, 6 months after receipt of a report from such commission, whichever was the later, the parties had been unable to settle the dispute.

110. The title of the article reflected its content.

DRAFT RESOLUTION PROPOSED BY THE  
DRAFTING COMMITTEE

111. Mr. BOWETT (Chairman of the Drafting Committee), having completed his introduction to the draft

articles proposed by the Drafting Committee, now wished to turn to the issue of groundwater not related to an international watercourse.

112. The Commission had requested the Drafting Committee to consider how that issue might be related to the topic under consideration. The Drafting Committee had discussed the various possibilities and had come to the conclusion that the Commission could not, in the context of its work on international watercourses, ignore water resources that were of vital importance to many States. Nor, however, could it rely on sufficient practice to work out draft articles that would be on a par with those devoted to international watercourses. It had therefore opted for a draft resolution which was currently before the Commission (A/CN.4/492/Add.1). The text was self-explanatory and he would therefore confine himself to recommending its adoption by the Commission. It should, however, be noted that operative paragraph 4 had given rise to reservations and that one member had objected to the draft resolution as a whole. In the view of that member, at the present stage the Commission should merely envisage the possibility of similarities between the principles elaborated in relation to international watercourses and those that might prove to be applicable to confined groundwaters and that it should do so in the light of an in-depth study based on information provided by Governments.

113. The CHAIRMAN thanked the Chairman and the members of the Drafting Committee and the Special Rapporteur for preparing and submitting the draft articles, which would be debated at the Commission's next plenary meeting.

114. Mr. AL-KHASAWNEH said that he had one comment to make immediately. The Chairman of the Drafting Committee had stated that some articles had been moved to part four of the draft as they were too important to be "relegated" to the miscellaneous provisions. The articles which appeared under the heading "Miscellaneous provisions" were, however, not of inferior standing and were no less important than those that appeared in other parts of the draft.

*The meeting rose at 12.10 p.m.*

## 2354th MEETING

*Wednesday, 22 June 1994, at 10.15 a.m.*

*Chairman: Mr. Vladlen VERESHCHETIN*

*Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Szekely, Mr. Thiam, Mr. To-*