

Document:-
A/CN.4/SR.2364

Summary record of the 2364th meeting

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

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

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2364th MEETING

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

Chairman: Mr. Vladlen VERESHCHETIN

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

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

[Agenda item 6]

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

CHAPTER II (Prevention) (continued)

ARTICLE 15 (Notification and information) (concluded)

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

It was so agreed.

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

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

It was so agreed.

Article 15, as amended, was adopted.

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

ARTICLE 16 (Exchange of information)

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

Article 16. Exchange of information

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

It was so agreed.

Article 16 was adopted.

ARTICLE 16 *bis* (Information to the public)

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

Article 16 bis. Information to the public

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

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

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

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

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

⁴ Ibid.

⁵ See footnote 2 above.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

It was so agreed.

Article 16 bis, as amended, was adopted.

ARTICLE 17 (National security and industrial secrets)

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

Article 17. National security and industrial secrets

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

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

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

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

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

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

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

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

It was so agreed.

Article 17 was adopted.

ARTICLE 18 (Consultations on preventive measures)

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

Article 18. Consultations on preventive measures

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

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

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

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

⁶ See footnote 3 above.

⁷ See 2353rd meeting, para. 46.

⁸ See footnote 3 above.

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

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

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

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

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

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

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

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

Paragraph 1

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

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

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

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

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

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

It was so agreed.

Paragraph 1 was adopted.

Paragraph 2

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

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

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

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

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

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

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

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

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

It was so agreed.

Paragraph 2 was adopted.

Paragraph 3

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

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

The meeting rose at 6.05 p.m.

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

2365th MEETING

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

Chairman: Mr. Vladlen VERESHCHETIN

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