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Summary record of the 2365th meeting

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

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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.

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[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. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Jacovides, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Yamada, Mr. Yankov.

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

[Agenda item 6]

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

CHAPTER II (Prevention) (*concluded*)

ARTICLE 18 (Consultations on preventive measures) (*concluded*)

Paragraph 3 (concluded)

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

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

It was so agreed.

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

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

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

6. Mr. ROSENSTOCK said that, if the words "at its own risk" were deleted—as they should be, in his view—it would be preferable also to delete the words that went before: "and may proceed with the activity". They stated the obvious and their inclusion could suggest that the State of origin required the authorization to proceed with the activity it would be given under the draft articles. That, however, was not so.

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

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

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

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

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

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

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

[2] See 2362nd meeting, para. 89.

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

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

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

It was so agreed.

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

Paragraph 3 was adopted.

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

17. Mr. PELLET said that he was not satisfied with that solution: a formal vote should have been taken as the opposition to the retention of the expression in question had been significant. He reserved the right to ask for a vote in that kind of situation in future.

Article 18 was adopted.

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

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

Article 19. Rights of the State likely to be affected

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

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

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

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

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

[3] See 2353rd meeting, para. 46.

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

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

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

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

Paragraph 1

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

It was so agreed.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

It was so agreed.

Paragraph 1 was adopted.

Paragraph 2

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

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

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

It was so agreed.

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

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

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

46. Mr. BOWETT (Chairman of the Drafting Committee) said that it would be a great pity to delete a paragraph which, even if it did not import strict legal obligations, did provide extremely helpful guidelines for any State that requested consultations and did indicate a reasonable basis for asking the other State to pay some part of the cost of assessment. To delete the provision on the ground that it would suffice to rely on the law of State responsibility would be depriving States of valuable guidance.

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

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

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

It was so agreed.

Paragraph 2, as amended, was adopted.

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

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

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

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

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

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

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

* Resumed from the 2363rd meeting.

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

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

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

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

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

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

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

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

61. Mr. TOMUSCHAT said that some of the ambiguity of the last sentence of the article would be dispelled if the words "Pending such compliance, the State may permit ..." were replaced by the words "Pending authorization, the State may permit ...".

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

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

It was so agreed.

Article 13, as amended, was adopted.

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

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

It was so agreed.

Article 11, as amended, was adopted.

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

ARTICLE 20 (Factors involved in a balance of interests)

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

Article 20. Factors involved in a balance of interests

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

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

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

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

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

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

** Resumed from the 2362nd meeting.

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

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

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

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

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

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

72. Subparagraph (*e*) provided that one of the elements which determined the choice of preventive measures was the willingness of the States likely to be affected to contribute to the cost of prevention. If such States were prepared to contribute to the expense of preventive measures, it might be reasonable to expect, all other things being equal, that the State of origin could take more costly, but also more effective, preventive measures.

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

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

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

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

It was so agreed.

Article 20, as amended, was adopted.

The meeting rose at 1.05 p.m.

2366th MEETING

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

Chairman: Mr. Vladlen VERESHCHETIN

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