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**Summary record of the 2542nd meeting**

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## 2542nd MEETING

Friday, 5 June 1998, at 10.05 a.m.

Chairman: Mr. João BAENA SOARES

Present: Mr. Addo, Mr. Al-Baharna, Mr. Bennouna, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Economides, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Yamada.

**Reservations to treaties (continued) (A/CN.4/483, sect. B, A/CN.4/491 and Add.1-6,<sup>1</sup> A/CN.4/L.563 and Corr.1)**

[Agenda item 4]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. The CHAIRMAN asked the Special Rapporteur to continue his presentation of the draft guidelines contained in the Guide to Practice (ILC(L)/INFORMAL/12).

GUIDE TO PRACTICE

DRAFT GUIDELINE 1.1.1

2. Mr. PELLET (Special Rapporteur) said that draft guideline 1.1.1, which bore a provisional title, read:

“1.1.1 *Joint formulation of a reservation*

The unilateral nature of reservations is not an obstacle to the joint formulation of a reservation by several States or international organizations.”

As he had already largely introduced draft guideline 1.1.1 at the previous meeting, it was unnecessary to present it once again at any great length. Needless to say, and his remark applied to all of the draft guidelines, he had proceeded on the basis of the definition in the 1969 Vienna Convention, in keeping with the method agreed upon in the Commission, although a number of members, in particular Mr. Lukashuk and Mr. Galicki (2541st meeting), had made him wonder whether there really was agreement on that method.

3. It was to be hoped that no one would challenge the fact that a reservation was a unilateral statement and not a contractual instrument. In practice, however, that unilateral character was somewhat nuanced. First of all, States sometimes consulted each other before formulating a reservation in identical terms. That had long been the case

for the Eastern European countries, and it was the case today for the Nordic countries and for the European Union. However, he had seen no point in devoting one of the guidelines in the Guide to Practice to that phenomenon, because first, it did not seem to cause any problems, and secondly, it did not appear to have any impact whatsoever on the definition of reservations. As Mr. Pambou-Tchivounda had rightly pointed out (*ibid.*), it was an aspect of the political context in which reservations were formulated and had no legal consequences.

4. On the other hand, that was not the case with jointly formulated reservations, that is to say, those which appeared in a single instrument signed by or emanating from two or more States or international organizations. As he had said, he had not found any clear examples of joint reservations, but as early as 1962, at least one member of the Commission, Mr. Paredes, had referred to that possibility.<sup>2</sup> But failing examples of joint reservations as such, there were joint objections to reservations and, above all, joint interpretative declarations, which could often be regarded as veritable reservations. The practice of joint interpretative declarations by the European Community and its member States was quite abundant. It seemed inevitable that the problem would arise of a reservation which had not only been jointly concerted but also jointly formulated. It would be better to make provision for that eventuality—after all, the purpose of the Guide to Practice was not only to intervene as a sort of firefighter once problems appeared, but to suggest conduct for dealing with future events or problems.

5. The Commission would be excessively formalistic if it were to rule out the possibility of joint reservations, which, like joint declarations, joint interpretative declarations and joint objections, simplified matters for reserving States and international organizations, for the depositary and above all for other parties to the treaty, which then had to react not several times, but just once. From the standpoint of legal theory, he agreed with Mr. Rodríguez Cedeño that in any case, a single act emanating from several States joining forces could be regarded as a unilateral act. That was enough to justify, if not the drafting, at least the spirit of draft guideline 1.1.1.

6. Mr. ROSENSTOCK said it was important to make it clearer that, as between State A which was a party to a treaty and States B and C which filed a joint reservation, the legal and other relations between B and C were irrelevant to A and could not affect the obligations of A towards B and of A towards C. He had the feeling that with the suggestion of the joint activity having a certain concrete meaning, there was a risk of embroiling other States in the legal relations among those party to the joint activity. He therefore wondered whether it was reasonable or useful to speak of the joint activity as in some way legally different from a reservation by a single State and to what extent it was possible to argue that the rights of another State could in any way be affected. That seemed to raise the same sorts of questions that could arise if it was claimed that domestic illegality had some impact on another State party to a convention. Hence, he was somewhat concerned that the Commission did not sufficiently

<sup>1</sup> Reproduced in *Yearbook . . . 1998*, vol. II (Part One).

<sup>2</sup> See *Yearbook . . . 1962*, vol. I, 651st meeting, p. 146, para. 87.

deny the possibility of any consequences flowing from the joint activity vis-à-vis States which were parties to the treaty in question without being participants in that joint activity.

7. Mr. LUKASHUK said he agreed with Mr. Rosenstock about the joint formulation of reservations. Although States could make joint reservations, they signed and ratified them individually, and thus he did not think that such reservations could constitute a legal phenomenon, but merely a political statement. He did not believe the Commission should embark upon that path.

8. The Special Rapporteur had, in paragraph 23 of ILC(L)/INFORMAL/11, reformulated the 1969 Vienna Convention when he had stated that a reservation might be formulated by a State or an international organization when that State or that organization expressed its consent to be bound (draft guideline 1.1.2). But under the 1969 Vienna Convention, the State had a right to formulate a reservation when it signed a convention. As he saw it, the 1969 Vienna Convention was more convenient for practice.

9. Again, it was said that a reservation could exclude or modify a provision of the treaty. It could not do so in a general treaty. A reservation modified a provision in terms of the relations between two States, one of which had made the reservation and the other which recognized it. If that was not changed, would it be possible to change obligations too? Obligations derived from provisions, and if it was not possible to change the provision, it would not be possible to change the obligation either.

10. Mr. BENNOUNA noted that, according to the Special Rapporteur, joint reservations to treaties would simplify matters. If that was merely a formal matter, he had no objection. He wondered, however, whether the formulation of a joint reservation did not go beyond the purely practical aspect of the question. For example, in the European Community's agreements with the outside world, its member States often committed themselves individually. Was it compatible to have individual commitments by States and a joint reservation at the same time? If the commitment was unilateral, would that not create difficulties in dealing with a reservation? That might complicate things for the depositary. In any case, the commitment of an international organization was for the organization itself. Assuming there was a difference in conduct from one State to another, had thought been given to the possible effects on the reservation itself or the objection to the reservation?

11. The other question, which Mr. Rosenstock had also raised, was whether the joint reservation actually stemmed from the state of the relations between the reserving States. For example, if the joint reservation was a function of certain positions of the reserving States, either in the framework of an international organization or elsewhere, would that state of relations impose itself on third States? Clearly, that concerned only the countries in question, but through their reservation they would be jointly imposing a position upon a third State. He could endorse the idea itself if it really could simplify matters and was only technical in nature, but he wondered

whether the Commission had considered all of the legal implications of such an innovation.

12. Mr. HAFNER said he was not sure whether it emerged from the current reading, but in any case it must be understood that the unilateral nature of reservations was retained despite the fact that a reservation had been jointly formulated.

13. Mr. GOCO inquired what the effect would be of a withdrawal from a joint reservation by one of the parties, as authorized by article 22 of the 1969 Vienna Convention. Would it result in the withdrawal of the other parties? He thought that there would be ramifications in the context of the 1969 Vienna Convention.

14. Mr. ECONOMIDES said that draft guideline 1.1.1 constituted a new rule which could prove useful: in the past, there had been cases of several States which had each individually formulated the same reservation in exactly the same terms, although they could very well have formulated an identical joint reservation. In principle, he had no objection to draft guideline 1.1.1, which offered a new possibility for formulating a reservation. A joint reservation meant that each State made a reservation individually, which was then presented jointly. It was not a collective reservation, but one in which each State committed itself separately. The act itself was always unilateral. Thus, if a State wanted to withdraw from a joint reservation, it made a declaration to that effect, and the other States retained their reservation. He did not think that that would pose any difficulties for the depositary.

15. In the matter of drafting, he proposed replacing the word "or" by "and/or", so that the last phrase would then read "several States and/or international organizations". After all, it was also possible to conceive of the case of two or more international organizations wanting to formulate the same reservation. In his view, draft guideline 1.1.1 would constitute a valuable addition to the subject.

16. Mr. MELESCANU said that, in practice, States formulated reservations to multilateral treaties if they were unable to secure modification of some of its provisions. The reserving State did not want to modify the legal effect of the treaty as far as it was concerned, but only to modify that of a particular provision. Technically, it was clear that the reservation had a legal effect only for the State that formulated it. Assuming that a large number of States was formulating the same reservation, even if each one did so unilaterally, it was worth considering whether that could be regarded as an attempt to modify the legal effect of the treaty in their regard, or whether it was actually a clear expression of the idea that there was a large number of States for which the treaty had another value or for which certain provisions should be interpreted differently. The last part of the definition in draft guideline 1.1.1 was entirely correct, and it was the only approach the Commission should accept, but the idea of States that formulated reservations was to send a message as to how certain provisions should have been drafted. The fact that a minority had been unable to impose its point of view could sometimes be expressed by one State. He wondered whether the notion of joint reservations might not lead to situations in which in reality there were, for certain provisions, two major approaches concerning the substance of

the treaty in question. He said that he was greatly in favour of including in the Guide to Practice matters pertaining to withdrawal from a reservation to a multilateral treaty.

17. Mr. PELLET (Special Rapporteur) said he had thought that the problem was purely a drafting matter and did not or ought not to have any legal implications: for instance, it would be more convenient for the 15 States in the European Community—after all, it was essentially for the Community that the problem arose—to present a single document. One could cite as an example the joint declaration which each member State of the Community had made, in an identical text, in respect of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction.<sup>3</sup> His idea was meant solely as a practical simplification. Listening to the remarks of his colleagues, he began to wonder whether he was not tampering with the very definition of reservations, which was not at all his intention.

18. As to Mr. Hafner's remark, it had been his fundamental intention to retain the reservation's unilateral character. The presentation that he had just given had been awkwardly put, and he did not plan to use it in the commentary, because on no account did he consider such a reservation to be a joint act. When he had said that, basically it could be regarded as a unilateral act as understood by Mr. Rodríguez Cedeño, he realized, in listening to the comments by members, that he had made a serious mistake. In his mind, it was not a unilateral act, but simply the formulation, in a single document, of several unilateral acts. He gathered that the members of the Commission were prepared to accept that aspect of the matter, but were reluctant to consider that the act itself could be joint. He appreciated the concern which had been voiced; perhaps the problem was just one of drafting. On the other hand, he would not want to leave out from the Guide to Practice the guideline's underlying practical concern, because he believed that it would simplify matters considerably. He hoped, however, it was clear that in no way was he suggesting a change in the legal nature of reservations. In any case, he had understood the message a number of members of the Commission had given.

19. While recognizing that the wording of the 1986 Vienna Convention was unduly cumbersome in some respects, he did not care for the "and/or" formulation and had tried to avoid it. If the Commission decided to use that formulation after all, the decision would, he thought, have to be explained in a special final clause or note, or at the very least, in the commentary. He was pleased to note that Mr. Lukashuk had taken the 1986 Vienna Convention as the basis for his observations, but could not see how the draft guideline "rewrote" article 23 of the Convention. It merely indicated the procedure for the formulation in writing of a reservation. In reply to Mr. Melescanu, he said that his current proposals, far from signalling the end of the exercise, represented only its beginning. Matters would be taken up point by point.

<sup>3</sup> See *Multilateral Treaties Deposited with the Secretary-General* (United Nations publication (Sales No. E.98.V.2), document ST/LEG/SER.E/16), pp. 890-892.

20. Lastly, with reference to the comment by Mr. Goco, the joint formulation proposal in no way affected the regime governing the withdrawal of reservations. A State which had used the joint method of formulating its unilateral declaration could withdraw that declaration either separately or jointly with others. He regretted having failed to make that clear, and undertook to make the requisite changes in draft guideline 1.1.1.

21. Mr. PAMBOU-TCHIVOUNDA suggested that the point just made by the Special Rapporteur in reply to Mr. Goco's observation might be included in the commentary, if it was the Special Rapporteur's intention to produce one.

22. Mr. PELLET (Special Rapporteur) said that he certainly intended to draft a commentary to the Guide to Practice, but was not sure that it would suffice for the current purposes. In his opinion, the draft guideline needed to be appropriately reworded in the Drafting Committee.

23. Mr. HE thanked the Special Rapporteur for his excellent third report on reservations to treaties (A/CN.4/491 and Add.1-6). While he did not think that joint formulation of a reservation could as yet be said to represent State practice, he had no objection to including a reference to it in the proposed Guide to Practice. Like Mr. Goco, he thought that the position with regard to the withdrawal of reservations should be clearly spelled out.

24. Mr. PELLET (Special Rapporteur) confirmed that joint formulation of a reservation by several States or international organizations was a purely formal arrangement from which every State or international organization could withdraw separately. As already stated, the text of the guideline would be expanded accordingly. As for the point that joint formulation was not part of State practice, he did not entirely agree. The practice might be new in the case of reservations to treaties but it already existed with regard to interpretative declarations.

25. Mr. YAMADA said that he had no objection to referring draft guideline 1.1.1 to the Drafting Committee but wondered whether there was to be no further discussion on draft guideline 1.1 (Definition of reservations). In particular, he would point out that the words "by a State", which appeared in square brackets in the composite text proposed in paragraph 81 of the third report, was no longer placed in square brackets in the text of draft guideline 1.1 currently before the Commission. Did that mean the Special Rapporteur intended the text to cover not only the succession of States but also the succession of international organizations, such as had taken place when the League of Nations had become the United Nations or when PCIJ had become ICJ?

26. Mr. PELLET (Special Rapporteur) said that, following his detailed presentation of the proposed composite text (2541st meeting), he had not imagined there would be any need for further discussion, as all the components were to be found in the relevant Vienna Conventions. The words referred to by Mr. Yamada were new and had, for that reason, been placed in square brackets. The explanation he had already given—namely, that the addition of those words was necessitated by drafting considerations—had emboldened him to omit the square brackets without first consulting the Commission. As to

Mr. Yamada's other question, that of succession between international organizations, he agreed that the problem existed but did not think it needed to be discussed in the current context. Perhaps Mr. Mikulka, the Commission's chief expert in matters of succession, could be asked to take it up at some later stage.

27. Mr. ECONOMIDES said that Mr. Yamada deserved thanks for reopening the discussion on guideline 1.1, in respect of which some suggestions had been made at the previous meeting. He had doubts about the suggestion regarding the possible acceptance of oral reservations and thought that the matter could be dealt with more appropriately in the context of the form, rather than the definition, of reservations. On the other hand, he did feel that there was a case for inserting the word "limit" between the words "exclude" and "modify" in guideline 1.1. He also agreed with the observations on guideline 1.1.2 made by Mr. Galicki at the previous meeting to the effect that the reference to article 11 of the 1969 and 1986 Vienna Conventions could be consigned to an explanatory footnote. The paragraph would then read: "A reservation may be formulated by a State or an international organization when that State or that organization expresses its consent to be bound by the treaty." Such a text would be considerably clearer for the reader.

28. Mr. BROWNLIE, after congratulating the Special Rapporteur on his excellent work, said that if the Commission accepted the underlying premise that the exercise consisted in clarifying and not in revising the Vienna Conventions, he saw no reason why the first two of the proposed guidelines should not be transmitted to the Drafting Committee without further discussion. The Special Rapporteur would doubtless take up in the commentary some of the points made in the discussion that had already taken place.

29. Mr. PELLET (Special Rapporteur) said he wished to make it very clear once again that there was no question of modifying the text of the Vienna Conventions unless absolutely necessary. He was quite prepared to amend the proposed composite text, but not to tamper with the wording employed in the Vienna Conventions. Unlike Mr. Economides, he thought that the modification proposed by Mr. Galicki would be disastrous and would turn the clock back to the 1960s. True, the Vienna Conventions were not holy writ, but the Commission was bound by a moral contract not to change them. It was free to interpret the Vienna Conventions but not to replace them.

30. Mr. MIKULKA said he agreed with Mr. Brownlie that it would be best to leave drafting matters to the Drafting Committee. The point raised by Mr. Yamada was well taken but was perhaps too technical to be discussed in the current context. He entirely agreed with the Special Rapporteur that the Commission's mandate was only to clarify any points not made sufficiently clear by the 1969, 1978 and 1986 Vienna Conventions and that there was no point in discussing definitions or formulations already to be found in those Conventions.

31. Mr. GALICKI said he deeply regretted that the Special Rapporteur viewed his proposal, put forward in a constructive spirit, as a monster of Frankenstein proportions. It was simply his perception that the attempt to combine

all the definitions contained in the Vienna Conventions had led to unwieldiness and certain logical inconsistencies.

32. Mr. AL-BAHARNA suggested that, in the interests of clarity, the phrase "or by a State when making a notification of succession to a treaty" should be incorporated in a separate sentence or clause.

33. Mr. PELLET (Special Rapporteur) referred Mr. Al-Baharna to the definition contained in the 1978 Vienna Convention, which contained exactly the same phrase. If the Commission was unhappy with a composite definition, it was welcome to reject his proposal, but he resolutely refused to tamper with the work of his predecessors.

34. Mr. LUKASHUK said that Mr. Al-Baharna had not been suggesting an amendment to the Vienna Conventions but making the point, which he supported, that the wording needed to be simplified without changing the substance. If the idea was to provide practical guidance, an unduly broad definition was inappropriate. He proposed starting with a brief definition of reservations as a unilateral statement and following up with a clause containing the other details.

35. Mr. PELLET (Special Rapporteur) said he disagreed with any proposal that amounted to redrafting a definition which was currently in force and had been accepted by a large number of States. If it attempted to do so, the Commission would be exceeding its mandate.

36. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to take note of draft guideline 1.1 and draft guideline 1.1.1 and to refer them to the Drafting Committee, on the understanding that all remarks made by members would be taken into consideration.

*It was so agreed.*

#### DRAFT GUIDELINE 1.1.2

37. The CHAIRMAN invited the Special Rapporteur to introduce draft guideline 1.1.2, which read:

##### *"1.1.2 Moment when a reservation is formulated"*

A reservation may be formulated by a State or an international organization when that State or that organization expresses its consent to be bound in accordance with article 11 of the 1969 and 1986 Vienna Conventions on the Law of Treaties."

38. Mr. PELLET (Special Rapporteur) said he was gratified to note that Mr. Galicki, who had accused him (2541st meeting) of adopting a casuistic and anti-progressive approach, had reached precisely the same conclusion by approaching the matter from what he presumably thought was the opposite direction, namely that the *ratione temporis* element in article 2, paragraph 1 (d), of the 1969 and 1986 Vienna Conventions was not to be interpreted in a narrow and formalist sense and that a reservation could, in general, be formulated by a State or international organization when it expressed its definitive consent to be bound.

39. While oral reservations to a multilateral treaty were, in his view, inconceivable, he agreed in substance with Mr. Galicki that reservations should in all cases be formulated in writing, something which, again, he had himself pointed out at the previous meeting. He did not, however, share the view that a specification regarding written form needed to be included in the definition of a treaty, as had been done in article 2, paragraph 1 (a), of the 1969 Vienna Convention, since it was recognized that oral treaties could exist.

40. The draft did not rule out the possibility of entering a formal reservation to a treaty at the time of signing. However, as stipulated in article 23, paragraph 2, of the 1969 Vienna Convention, it must be formally confirmed at the time of ratification. A reference to that possibility was not necessary in guideline 1.1.2 and could be made in the commentary. The guideline supplemented and constructively interpreted the Vienna Conventions and did not synthesize them. He drew the Drafting Committee's attention in that connection to paragraphs 14 to 23 of ILC(L)/INFORMAL/11.

41. Mr. GALICKI, supported by Mr. MIKULKA, proposed adding a reference to article 20, paragraphs 1 and 2, of the 1978 Vienna Convention to the reference to article 11 of the 1969 and 1986 Vienna Conventions, so as to provide for the case of notification of succession to a treaty.

**International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities) (continued)\* (A/CN.4/483, sect. D, A/CN.4/487 and Add.1,<sup>4</sup> A/CN.4/L.556, A/CN.4/L.568)**

[Agenda item 3]

PROPOSAL BY THE SPECIAL RAPPORTEUR

42. Mr. YAMADA (Chairman of the Working Group on prevention of transboundary damage from hazardous activities) said that the Working Group, composed of Mr. Sreenivasa Rao (Special Rapporteur), Mr. Candioti, Mr. Dugard, Mr. Economides, Mr. Hafner, Mr. Rosenstock and Mr. Simma, had met four times between 15 and 28 May 1998 to assist the Special Rapporteur in preparing draft articles on the prevention of transboundary damage from hazardous activities. It had reviewed draft articles 3 to 22 adopted by the Working Group at the forty-eighth session of the Commission.<sup>5</sup> In the light of the proposed amendments and new elements, the Special Rapporteur had prepared the draft articles contained in document A/CN.4/L.556. No decision had been taken on them, but he could safely say that they enjoyed the Working Group's broad support. He trusted that the Commission would take note of the articles and refer them to the Drafting Committee together with any observations members wished to make.

43. Mr. Sreenivasa RAO (Special Rapporteur) said that the draft articles had been reviewed to assess whether any amendments or additions were required in the light of the current scope of the topic and such important developments as the adoption of the Convention on the Law of the Non-Navigational Uses of International Watercourses, to make their presentation more systematic, to eliminate duplication and to group them under more appropriate headings.

44. Draft articles 1 and 2 had already been referred to the Drafting Committee. New draft articles 3 to 16 covered previous draft articles 3 to 22.

45. Article 3 of the draft articles at the forty-eighth session had been deleted. One of its constituent ideas was reflected in new article 4 (Cooperation) and the second idea had merely been a statement of the obvious.

46. Former article 4 (Prevention), became new article 3 and had been redrafted to address the question of prevention rather than a situation in which harm had already occurred. A further important modification had been to change the words "prevent or minimize" to read "prevent, and minimize" in new article 3 and throughout the draft in order to reinforce the underlying obligations.

47. Former article 5, concerning liability, had been deleted as being outside the scope of the topic and new articles 4 and 5 (Implementation) were broadly similar to former articles 6 and 7, respectively.

48. It had been felt that former article 8 (Relationship to other rules of international law) which had been redrafted and became new article 6 was somewhat inadequate as a saving clause and that the Commission should re-examine the new version after a decision was taken on the form of the draft articles.

49. There was broad consensus within the Commission and elsewhere that no hazardous activity should be embarked upon without prior authorization. Former article 9 (Prior authorization) had been reworded in new article 7 in such a way as to express that idea more clearly. The idea for paragraph 2 had been taken from former article 11, which had been deleted.

50. The title of new article 8, formerly article 10, had been changed to "Impact assessment" from "Risk assessment" because it referred essentially to environmental impact assessment. The more focused wording would, in his view, achieve the objective of ensuring that any decision on prior authorization would be linked to a careful evaluation of its possible adverse impact on the persons, property and environment of other States. Paragraph 2, based on former article 15, was designed to ensure that the general public was properly informed about the issues involved. The phrase "likely to be affected by an activity" extended that obligation, where appropriate, to the general public in other States, a provision strongly advocated in the literature on the topic.

51. Former article 12, concerning non-transference of risk, had certain implications regarding liability and had been deleted.

\* Resumed from the 2531st meeting.

<sup>4</sup> See footnote 1 above.

<sup>5</sup> See 2527th meeting, footnote 16.

52. As to the other important aspects of the duty of prevention, namely notification and information, new article 9 (Notification and information) was based on former article 13, with certain minor modifications. The phrase “pending any decision on the authorization of the activity” had been added to make it perfectly clear that if the assessment referred to in new article 8 indicated a risk of causing significant transboundary harm, the State of origin must postpone giving such authorization. Paragraph 2 stressed that the response from the States likely to be affected must be provided within a reasonable time: in the earlier version, it had been the State of origin that had indicated the time-frame in which it expected a response. The new formulation was intended to reconcile better the interests of the two States by allowing the affected State to indicate, on the basis of its particular circumstances, the time-frame it deemed reasonable.

53. New article 10 (Consultations on preventive measures) drew on former article 17 and was based on the idea of consultations as a basic requirement and as something that any State could request in order to achieve an equitable balance of interests. The most important change was in paragraph 3, where the phrase “may proceed with” an activity had been replaced by “in case it decides to authorize” the activity. That made it clear it was not the State but a separate operator that carried out the activity, something which was true in most cases.

54. New article 11 (Factors involved in an equitable balance of interests), was formerly article 19. The factors themselves remained unchanged in the new version. He had received various suggestions as to how the listing of those factors might be reorganized, but thought that was a matter best dealt with by the Drafting Committee.

55. Former article 18 had been extensively recast to produce new article 12 (Procedures in the absence of notification). The new article spelled out the stages involved when there had been no notification and when authorization for an activity was being requested or had already been provided, but the State likely to be affected felt the need for additional information or consultation or did not concur with the State of origin’s assessment of the amount of significant risk involved. In redrafting former article 18, he had taken into account the language of a similar article in the Convention on the Law of the Non-Navigational Uses of International Watercourses.

56. New article 13 (Exchange of information) was largely unchanged from former article 14. Former article 15 had been deleted and the content transferred to new article 8, paragraph 2. New article 14 (National security and industrial secrets) took up the subject dealt with in former article 16, for which an exception could be made in responding to a request for information. It was mostly unchanged from the earlier version.

57. New article 15 (Non-discrimination) dealt with the principle of non-discrimination in the context of prevention and was drawn from former article 20, which had focused on compensation or other relief after the damage had occurred. Article 21 of the draft at the forty-eighth session, concerning the nature and extent of compensation or other relief, had been deleted. Former article 22, on factors for negotiations, had likewise been deleted

because such matters were to be considered in the context of liability.

58. In response to suggestions received, he had added an article, new article 16 (Settlement of disputes), again borrowing from the experience gained in the drafting and adoption of the Convention on the Law of the Non-Navigational Uses of International Watercourses. He had used a much simpler and more economical formulation, however, to get across the idea that if, in respect of a problem concerning the interpretation or application of the articles, States could not reach agreement by using the dispute-settlement machinery they themselves had chosen, they would be required to appoint an independent and impartial fact-finding commission. That idea was part of the progressive development of international law, as indeed was much of the material in the draft articles being recommended.

59. He believed such development was essential and would meet the best interests of all States. The draft articles were forward-looking, while containing important elements of existing obligations in law and practice such as notification and the obligation to consult and to permit the operation of dispute-settlement mechanisms. With those thoughts, he was submitting the draft articles to the Commission with a request that they be referred to the Drafting Committee for further refinement.

60. Mr. HAFNER said there was always some uncertainty involved when dealing with customary international law, as the Commission was. Nevertheless, so much uncertainty surrounding the programme of work, especially now, with the first part of the session drawing to a close, was unfortunate. Even with the best of wills, which most members of the Commission showed, it was hard to keep pace with all the reverses and changes in scheduling the work. He did not mean to imply that the Chairman should be held accountable for the changes. He was simply expressing the wish for greater stability in implementing the programme of work.

61. He commended the Chairman of the Working Group on prevention of transboundary damage from hazardous activities on the outcome of the Working Group’s deliberations and congratulated the Special Rapporteur on his willingness to elaborate the draft articles, which were an important step in the right direction. Certainly, they constituted progressive development of international law.

62. Members of working groups did not normally comment on their efforts, but he felt compelled to do so in order to place on record his understanding of the draft articles and the report of the Working Group. In his view, the articles did not apply to those activities that entailed no risk of significant harm and whose existence must therefore be tolerated by possibly affected States, nor to those activities, on the opposite side of the spectrum, which entailed a high risk of great damage and which were already prohibited under existing international law. The articles dealt exclusively with activities that fell in between those two categories, namely those activities which entailed either a low risk of high damage or a high risk of small but nevertheless significant damage. The articles sought to apply to those activities a regime derived from the shared resources regime, as was evident

from the duty of achieving a balance of interests, for instance, in new article 10, paragraph 2. Previous Special Rapporteurs had cited in that connection cases that dealt with the particular problem of shared resources. Hence it could be said that the concept applied in particular to the grey area of activities whose prohibition by international law was open to doubt. They certainly became prohibited activities if the State of origin did not comply with the duties incumbent upon it under the regime set out in the draft.

63. He interpreted new article 5 as potentially giving rise to a duty to provide for a monitoring system and, in particular, to establish adequate procedures to ensure that individuals could participate in the relevant decision-making. The need to provide access for individuals had already been confirmed in a number of international instruments, for example, principle 10 of the Rio Declaration.<sup>6</sup> In citing that Declaration, he did not wish to imply that he considered it as binding or as reflecting *opinio juris*. It did, however, show a certain tendency that had been agreed upon by the world community and which it was worthwhile to take into account in dealing with the progressive development of international law.

64. The precautionary principle must also be reflected in the draft, and the most appropriate place to do so would be in new article 11, on factors involved in an equitable balance of interests. He was prepared to submit an appropriate formulation to the Drafting Committee. The principle had been confirmed in a great many instruments of a non-binding nature, including the 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972, the Agreement for the implementation of the provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the conservation and management of straddling fish stocks and highly migratory fish stocks and the United Nations Framework Convention on Climate Change. The principle had also been referred to in a number of cases before international courts, including the pleadings in the *Gabčíkovo-Nagymaros Project* case.

65. He greatly regretted that it had not been possible to include a reference to the “polluter-pays” principle, which was mentioned in principle 16 of the Rio Declaration. The Institute of International Law, at its 1997 session held at Strasbourg, in its resolution on Responsibility and Liability under International Law for Environmental Damage, had also referred explicitly to that principle. To illustrate the necessity of such a principle, one could take the case of a State that set up a nuclear power plant on its very border, something that would enable it to transfer to the other State half of the costs of the preventive measures, which was certainly not what the Commission intended with its draft.

66. It had been argued that that was an economic, not a legal, principle. He could not share that view, since the question of sovereignty was involved: specifically, the issue of how to achieve the coexistence of the sovereignties of two States and to distribute the burdens and the benefits of activities in an appropriate manner. That issue

must be reflected in the draft, and the best place to do so would be in new article 11.

67. His comments had been made exclusively for the purpose of placing on record his views: they should by no means be understood as a critique of the draft articles, quite the contrary. He greatly appreciated the work done by the Working Group and the Special Rapporteur, but thought additions along the lines he had set out should be considered.

68. The CHAIRMAN said he entirely agreed with Mr. Hafner’s initial remarks about the organization of the work of the Commission, a task that was proving very difficult. He was sure he had the support of all members, particularly the Special Rapporteurs, in his efforts to achieve a programme of work that would be respected.

69. Mr. ROSENSTOCK said he joined the Chairman in agreeing entirely with Mr. Hafner’s opening remarks, including his statement that the problem originated, not with the Chair, but elsewhere. The notion of the officious intermeddler in tort law in common-law countries might usefully be borne in mind. If one was walking past a body of water in which someone was drowning, one was not obliged to intervene. However, if one did intervene, the action had to be effective: otherwise, one could be held responsible. Some overtones of that problem appeared to be present at certain levels of the Commission’s work.

70. He was slightly concerned about Mr. Hafner’s conclusion that because—as he had rightly said—there were three categories of dangerous activities, only one of which was covered in the draft, the Commission was saying something about the permissibility or impermissibility of other categories. That conclusion was not necessarily wrong, but it was overly hasty and one for which there was no basis in the previous work of the Commission.

71. Mr. ECONOMIDES said he, too, wished to thank the Chairman of the Working Group, of which he had been a member, and the Special Rapporteur, for their endeavours and the presentation of the draft articles. The work done had greatly improved on the previous articles, resulting in an excellent product that could be referred to the Drafting Committee.

72. In the matter of substance, if consultations on preventive measures under new article 10 did not yield results, and if the State of origin decided to authorize the continuation of the activity and the other State requested an independent and impartial investigation, the activity should not be pursued, pending the conclusion of the investigation. That was the logical inference to be drawn from the existing draft article, but perhaps it could be underlined further in the Drafting Committee.

73. Mr. LUKASHUK said Mr. Hafner had used the phrase “non-binding” documents, but it was more accurate to refer to “legally non-binding” documents. The draft proposed by the Working Group and the Special Rapporteur was in general quite satisfactory. In new article 12, paragraph 3, the phrase “the State of origin shall, if so requested by the other State, arrange to suspend the activity in question for a period of six months” was of some concern, because the activity in question could be linked with significant financial outlays, for example,

<sup>6</sup> Ibid., footnote 8.



construction work. He urged the Special Rapporteur to take that problem into consideration and to deal with it, perhaps in the commentary.

74. Mr. Sreenivasa RAO (Special Rapporteur) said he was most grateful for the initial reaction to his efforts to move the articles forward to the Drafting Committee. Many valuable comments had been made and would be studied further. He agreed with Mr. Rosenstock that no aspect of the topic was being endorsed or rejected by the mere fact of being covered in the draft and that matters which were not covered were subject to the normal application of international law. The view had frequently been expressed that many other areas impinged upon the consideration of the topic, and they must not be adversely affected by any excessively specific formulations in the draft: some constructive ambiguity was helpful. The commentaries to the draft articles had been adopted by the Working Group at the forty-eighth session, not by the Commission, and had been of great assistance, particularly in connection with article 2 (Use of terms). They would be scrutinized very carefully in the future work on the draft.

75. If the articles, which appeared to be generally acceptable, were referred to the Drafting Committee, the prospects for adoption by the Commission at the current session were excellent.

76. Mr. GOCO said he joined the chorus of congratulations to the Chairman of the Working Group and the Special Rapporteur. His only comment related to the settlement of disputes. It was apparent from the second sentence of new article 16, that an impasse would be created if one of the parties did not wish to accept the intervention of an independent and impartial fact-finding commission. That was true even though the sentence mentioned a time period of six months after which the party was obligated to accept such intervention.

77. Mr. Sreenivasa RAO (Special Rapporteur) said that the difficulty had not gone unnoticed, but the expectation was that the ultimate form of the draft would influence the way the problem was handled. If it was a convention, then certain obligations, including that of observance of an article containing provisions on dispute settlement, were immediately incumbent upon any State that became a party to the convention. If it proved to be a recommendation adopted first by a few and then by more and more States on the basis of a certain amount of practice, then it was hoped that the experience of States with fact-finding commissions would be sufficiently positive to persuade other States to submit to such machinery.

78. In response to a further question by Mr. GOCO, he said fact-finding commissions were becoming more common. Generally, the decisions of such commissions were non-binding, for they were intended to aid the parties in appreciating the facts in the same way. Disputes, it was thought, were in most cases based on an inability by States to do so, and the theory was that once the facts were established by a third party, States would be willing to accommodate each other much more quickly.

79. Mr. ROSENSTOCK added that the decision to include a reference to fact-finding institutions in the Convention on the Law of the Non-Navigational Uses of

International Watercourses had been based on extensive indications in the literature that, in the environmental field, fact-finding was a particularly effective dispute-settlement mechanism. A very great many cases could be cited, including the ones between the United States and Mexico and the United States and Canada.

80. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to refer the draft articles to the Drafting Committee.

*It was so agreed.*

*The meeting rose at 1.05 p.m.*

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## 2543rd MEETING

*Monday, 8 June 1998, at 10.15 a.m.*

*Chairman:* Mr. João BAENA SOARES

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Bennouna, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock.

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### Unilateral acts of States (*concluded*)\* (A/CN.4/483, sect. F, A/CN.4/486,<sup>1</sup> A/CN.4/L.558)

[Agenda item 7]

#### REPORT OF THE WORKING GROUP

1. Mr. CANDIOTI (Chairman of the Working Group on unilateral acts of States), introducing the report of the Working Group (A/CN.4/L.558), said that it had held two meetings and had based its work on the first report of the Special Rapporteur on unilateral acts of States (A/CN.4/486), as well as on the discussion in plenary.
2. As indicated in paragraph 7 of its report, the Working Group had agreed that, according to the Commission's usual practice, the Special Rapporteur and the Commission should prepare draft articles with commentaries, without prejudice to the final form it might decide to give

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\* Resumed from the 2527th meeting.

<sup>1</sup> Reproduced in *Yearbook* . . . 1998, vol. II (Part One).