Draft article 12 corresponds to article 19 the 1996 text. This article, with the exception of subparagraph (d), is taken verbatim from the 1996 text. The purpose of this article is to provide some guidance for the States in their consultations about an equitable balance of interests. In reaching an equitable balance of interests, one has to establish many facts and to weigh all the relevant factors and circumstances. The provisions of this draft article should be interpreted in the light of the rest of the draft articles, in particular draft article 3 which places the obligation of prevention on the State of origin.

The opening clause of the draft article provides that "in order to achieve an equitable balance of interests,..., the States concerned shall take into account all relevant factors and circumstances". The draft article then sets forth a non-exhaustive list of such factors and circumstances. The wide diversity of types of activities which is covered by these articles, and the different situations and circumstances in which they will be conducted, make it impossible to compile an exhaustive list of factors relevant to all individual cases. Some of the factors may be relevant in a particular case, while others may not, and still other factors not contained in the list may prove relevant. Furthermore, no priority of weight is assigned to the factors and circumstances listed, since some of them may be more important in certain cases while others may deserve to be accorded greater wightage in others.

Paragraph (a) of the draft article compares the degree of risk of significant transboundary harm to the availability of means of preventing harm or minimizing the risk thereof. For example, the degree of risk of harm may be high, but there may be measures that can present or reduce that risk, or there may be good possibilities for repairing the harm. The comparisons are both quantitative and qualitative.

Paragraph (b) of the draft article compares 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.

Paragraph (c) of the draft article compares, in the same fashion as paragraph (a), the risk of harm to the environment and the availability of means of preventing or minimizing such a risk and the possibility of restoring the environment.

Paragraph (d) of draft article takes into account the fact that States concerned frequently embark on negotiations concerning the distribution of costs for preventive measures. In doing so, they proceed from the basic principle derived from article 3 according to which these costs are to be assumed by the operator or the State of origin. These negotiations mostly occur in cases where there is no agreement on the amount of the preventive measures and where the affected State contributes to the costs of preventive measures in order to ensure a higher degree of protection that it desires over and above what is essential for the State of origin to ensure. This link between the distribution of costs and the amount of preventive measures is in particular reflected in sub-paragraph (d).

Paragraph (e) of the draft article provides that the economic viability of the activity in relation to the costs of prevention and the possibility of carrying out the activity elsewhere or by other means or replacing it with an alternative activity should be taken into account. This is one of the criterion of balancing interests.

Paragraph (f) of the draft article compares the standard of prevention demanded of the State of origin to that applied to the same or comparable activity in the State likely to be affected. The rational is that, in general, it might be unreasonable to demand that the State of origin should comply with a much higher standard of prevention than do the States likely to be affected. This factor, however, is not in itself conclusive.

Draft article 13 entitled "Procedures in the absence of notification" addresses the situation in which a State has reasonable grounds to believe that an activity planned or carried out in another State may have a risk of causing

significant transboundary harm although it has not received any notification to that effect. This issue had been dealt with in draft article 18 of the 1996 text, but the Special Rapporteur deemed it preferable to use in this connection the language of Article 18 of the Convention on the Non-navigational Uses of International Watercourses which envisages a more progressive mechanism. Thus, instead of immediately proceeding to request consultations as in the 1996 text, the State which believes that it is likely to be affected would first request the State of origin to notify the activity and to transmit relevant information. It is only if the State of origin refuses, on the grounds that it is not required to do so that consultations may take place at the request of the other State.

It was felt necessary to specify in paragraph 2 of the draft article that the response of the State of origin must be given "within a reasonable time". Indeed, consultations are preempted as long as this response is not forthcoming, and State which believes that an activity in the State of origin may have a risk of causing significant transboundary harm would be left without recourse.

Paragraph 3 of draft article 13 envisages that the State which believed that the activity was hazardous could request the State of origin to suspend the activity for six months. It was felt that this obligation imposed on the State of origin was unduly stringent in view of the fact that the draft articles deal with an activity which is not prohibited by international law in the circumstances where there is disagreement between States concerned as to whether or not it involves a risk of significant transboundary harm. The obligation of the State of origin in this regard has been softened by requiring it to take appropriate and feasible measures to minimize the risk". Suspension of the activity would only be required "where appropriate". There is thus a sliding scale of measures that can be taken by the State of origin.

Draft Article 14 on the "Exchange of Information" deals with the steps to be taken after an activity has been undertaken. The purpose of this step is to prevent, or minimize

the risk of causing, significant transboundary harm. It is based on the phraseology employed in draft article 14 of the 1996 text except for the addition of the word "available" before the word "information" in the second line as the title of the draft article suggests its provisions require the exchange of information between the State of origin and the States that are likely to be affected, after the activity involving risk has been undertaken. The prevention of transboundary harm and minimizing the cause thereof is a continuing effort and, therefore, the duties of prevention do not terminate after granting authorization for the activity; they continue for as long as the activity continues.

The information that is required to be exchanged, under this draft article comprises whatever would be useful and relevant for the purpose of prevention. The information required under this article has been qualified by the word "available" and refers to "all available information relevant". Under this article such relevant information should be exchanged in a "timely manner". That means that when the State becomes aware of such information, it should inform the other State quickly so that there will be enough time for all States concerned to consult on appropriate preventive measures. The requirement of this article becomes operational only when States have information relevant to preventing, or minimizing transboundary harm.

Draft Article 15 entitled "National Security and Industrial Secrets" reproduces without change the corresponding draft article 16 of the 1996 text. The Drafting Committee felt that draft article 15 reflected in an adequate manner a narrow exception to the obligation of the State of origin to provide information under the other provisions of the draft articles. This type of clause is not unusual in treaties, which require exchange of information. However, Article 31 of the Watercourses Convention only deals with national defense or security information, while the present draft article 14 also protects industrial secrets. In the context of this topic, it is highly probable that some of the activities might involve the use of sophisticated technology protected under domestic

legislation as industrial secrets. As in all provisions in the present draft article, an attempt has been made to balance the legitimate interests of all States concerned. Thus, the State of origin, while allowed to withhold certain information, must "cooperate in good faith with the other States concerned to provide as much information as can be provided under the circumstances."

Draft Article 16 entitled "Non-discrimination" is based on Article 32 of the Convention on the Law of the Non-navigational uses of International Watercourses. It sets out the basic principle that the State of origin is to grant access to its juridical and other procedures without discrimination on the basis of nationality, residence or the place where the damage occurred. The provisions of this draft article would obligate States to ensure that any person, whatever his or her nationality or residence should, regardless of where the harm may occur, receive the same treatment as that afforded by the State of origin to its nationals under its domestic law. This provision should be understood as preventing States discrimination based on their legal systems and not as a general non-discrimination clause in respect to human rights. In fact, it deals with equal access by nationals and non-nationals and by residents and non-residents to courts and administrative agencies of the State concerned.

Finally, draft article 17 entitled "Settlement of Disputes" is a new provision proposed by the Special Rapporteur and does not have an equivalent in the 1996 draft. It is inspired by article 33 of the Convention on the Non-Navigational Uses of International Water courses, 1997 in that it envisages compulsory resort to a fact-finding commission at the request of one of the parties if the dispute has to been settled by any other means within a period of six months. Among these other means, the Special Rapporteur had highlighted the binding procedures of arbitration and judicial settlement. The Drafting Committee, however, felt that it was also important to expressly mention other means of third-party settlement, in particular mediation and conciliation. As regards the fact-finding procedure, the Drafting Committee was aware of the

fact that the basic obligation in draft 17 for the parties to "have recourse to the appointment of an independent and impartial fact-finding commission" will not be sufficient in practice for the actual establishment of such commission. In international instruments this type of provision is normally accompanied by a detailed procedure on the appointment and functioning of the commission, as it the case for example in Article 33 of the Watercourses Convention. However, since the nature of the draft articles on the topic of prevention had yet to be decided, the Drafting Committee deemed it premature to set out such a detailed procedure in the text.

As mentioned earlier, the Commission has referred two issues to the General Assembly related to the further work on this topic. The issues referred are (i) what kind of regime should be made applicable to activities which actually cause harm for the purpose of developing and applying the duty of prevention, and (ii) in a prevention regime whether the duty of prevention should be treated as an obligation of conduct or failure to comply and be met with suitable consequences under the law of State responsibility or civil liability or both where the state of origin and the operator are both accountable for the same? If the answer to the question is in the affirmative, what type of sanctions are appropriate or applicable?

The first of these issues is based on the fact that the Commission intended to separate activities which have a risk of causing significant harm from those which actually cause such a harm for the purpose of developing and applying the duty of prevention, the latter type of activities. It is generally understood that the duty of prevention is an obligation of conduct and not of result and non-compliance with duties of prevention in the absence of any damage actually occurring would not in itself give rise to any liability. The Commission have decided to recommend a regime on prevention, separating it from a regime of liability, it has to address the question whether the duty of prevention should be treated as an obligation of conduct or failure to comply be visited with suitable consequences under the law of State responsibility or civil liability or both.

III. Reservations to Treaties

The International Law Commission had at its 49th session, adopted a set of Preliminary Conclusions On Reservations To Normative Multilateral Treaties, Including Human Rights Treaties. The General Assembly at its 52nd session had taken note of the Commission's preliminary conclusions and of the invitation to all treaty bodies set up by normative multilateral treaties that might wish to do so to provide their comments and observations on the conclusions.

The General Assembly has by its Resolution 52/156 drawn the attention of Governments to the importance for the International Law Commission of having their views on the Preliminary Conclusions on reservations to normative multilateral treaties, including human rights treaties.

In response to that invitation the Secretariat of the Asian African Legal Consultative Committee had organized, within the administrative arrangements of the Thirty seventh session of the Committee held in New Delhi in April 1998,. a Special Meeting on the Reservation To Treaties.

Thereafter, when the Secretary -General of the Asian African Legal Consultative Committee visited Geneva to participate in the Fiftieth session of the International Law Commission he presented to the Chairman of the Commission a Report of the Special Meeting on the Reservations to Treaties that the Committee had organized. It maybe mentioned that the Special Reapporteur had in his Third Report on the Reservation to Treaties made a mention of the aforementioned Special Meeting.

At its fiftieth session the Commission considered the Third Report of the special Rapporteur, Professor Alain Pellet, on the reservation to treaties.[8] The Third report of the Special Rapporteur was divided into two chapters, the first of which surveyed the earlier work of the Commission on the topic. The

[8] A/CN.4/491 and Add. 1-5.

second chapter of the Report of the Special Rapporteur addressed the question of definition of reservations (and interpretative declarations), and to reservations (including interpretative declarations) to bilateral treaties.

While presenting his report the Special Rapporteur said that "he had been favourably impressed by the interest which states had shown in the Commission's work on reservations to Treaties. That interest was illustrated not only by the large number of statements made in the Sixth Committee, but also by the work done on the topic by the Asian-African Legal Consultative Committee and the Council of Europe's Committee of Legal Advisers on Public International Law (CAHDI), which had established a group of specialists on reservations to international treaties".

In his survey of the earlier work of the Commission on the topic, the special Rapporteur drew attention to 2 decisions of the Commission (a) that in principle and subject to an unlikely "state of necessity", the Commission would not call into question the provisions of the Vienna Conventions on reservations and would simply try to fill the lacunae and if feasible to remedy the ambiguities and clarify the obscurities in them; and (b) that its work would lead to the preparation of a Guide to Practice, which would-be grafted on to the existing provisions, filling the lacunae therein and would-be accompanied by model clauses relating to reservations which the Commission would recommend to States and international organizations for their inclusion in treaties they would conclude in future.

As to the definition of reservations to Treaties and of interpretative declarations the Special Rapporteur, Mr. Alain Pellet, observed that none of the 3 Vienna Conventions furnished a comprehensive definition of reservations and he had therefore drafted a composite text. The definition, he suggested, could be used at the beginning of the Guide to Practice and could be called the "Vienna definition".

The Special Rapporteur had proposed that the Commission refer the 8 draft guidelines of the Guide to Practice which he had proposed in his report to the Drafting Committee. Accordingly, the Commission decided to transmit the draft guidelines on the (1) definition of reservations; (2) Joint formation of a renovation; (3) moment when a reservation is formulated; (4) reservations formulated when notifying territorial application; (5) object of reservation; (6) statements designed to increase the obligations of their author; (7) statements designed to limit the obligations of their author; (8) reservations relating to non-recognition; (9) reservations having a territorial scope; (10) definition of interpretative declarations; and (11) scope of definitions to Drafting Committee.

The Drafting Committee adopted the text of 9 guidelines of the Guide to Practice and referred them to the International Law Commission. The titles and the text of the draft guidelines adopted by the Drafting Committee had included the (1) definition of reservations; (2) object of reservations;(3) instances in which reservations may be formulated; (4) reservations having territorial scope; (5) reservations formulated when notifying territorial application; (6) statements designed to limit the obligations of their author; (7) statements purporting to increase the obligations of their author; (8) reservations formulate jointly; and (9) an untitled provision relating to the scope of the draft guidance.

Draft Guidelines adopted at the Fiftieth session of the International Law Commission

The Commission at its fiftieth session has adopted the text of 7 guidelines of the guide to practice relating to the reservations to treaties together with commentaries thereto.[9] The text of the provisions adopted include the guidelines relating to (i) the definition of reservations (draft guidelines 1.1); (ii) object of reservations (draft guideline 1.1.1.); (iii) cases

[9] See A/CN.4/L.561 and Add 1-4.

in which reservations may be formulated (draft guideline 1.1.2); (iv) reservations having territorial scope (draft guideline 1.1.3); (v) reservations formulated when notifying territorial application (draft guideline 1.1.4); (vi) reservations formulated jointly; and (vii) a provision relating to unilateral statement of reservation.

Definitions

Draft Guideline 1.1 defines the term reservations as a unilateral statement, however phrased or named, made by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty or by a State when making a notification or succession to a treaty, whereby the State or organization purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organization.

The Special Rapporteur has pointed out that the definition incorporates three formal components viz. (1) a unilateral statement; (2) the moment when the State of international organization expressed its consent to be bound by the treaty; and (3) its wording or designation. The definition of reservation must also contain the substantive element that the reservation was intended to exclude or to modify the legal effect of certain provisions of the treaty.

The aim and function of the definition of reservations contained in the first part of the Guide to Practice is to distinguish between reservations and other unilateral statements with respect to a treaty. The largest group of such unilateral statements is that of interpretative declarations, but the two are subject to different legal regimes.

Object of Reservations

Draft Guideline 1.1.1 on the Object of reservations stipulates that a reservation may relate to one or more provisions of a treaty or, more generally, to the way in which

the State intends to apply the treaty as a whole. The aim of this draft guideline is to take into account the well established practice of across - the -board reservations in the interpretation of the Vienna definition, a simple reading of which would lead to an interpretation that may be restrictive and contrary to the reality.

Cases in which reservations may be formulated

Drat Guideline 1.1.2 entitled Cases in which reservations may be formulated provides that instances in which a reservation may be formulated under guideline 1.1. include all the means of expressing consent to the bound by a treaty mentioned in article 11 of the Convention of 1969 and 1986 on the Law of Treaties. It is felt that the provisions of articles 2, paragraph 1(d) on one hand and article 11 on the other both of the 1969 and 1986 Vienna Conventions are not formulated in the same terms and may give rise to confusion. The primary purpose of the present draft guideline is to see to remedy that in those formulations.

Reservations having territorial scope

Draft Guideline 1.1.3. on Reservations having territorial scope provides that a unilateral statement by which a State purports to exclude the application of a treaty or some of its provisions to a territory to which that treaty would be applicable in the absence of such a statement constitutes a reservation. As the title of this draft guideline indicates, it relates to unilateral statements by which a State purports workers to exclude the application of a treaty, in part or in whole, *ratione loci* A state consents to the application of the treaty as a whole except in respect of one or more territories which are under its jurisdiction. In the past such reservations were known as "colonial reservations" but the practice of formulating territorial reservations persists in the context of non-colonial situations for a number of reasons.