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**Report of the Sub-Committee on the Law of Non-Navigational Uses of International
Watercourses**

Topic:
Law of the non-navigational uses of international watercourses

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relating to the non-navigational uses of international watercourses submitted by the Secretary-General pursuant to General Assembly resolution 2669 (XXV) (A/CN.4/274).⁶⁵²

156. Pursuant to the recommendation contained in paragraph 4 of General Assembly resolution 3071 (XXVIII) the Commission, at the present session, set up a Sub-Committee composed of Mr. Kearney (Chairman), Mr. Elias, Mr. Šahović, Mr. Sette Câmara and Mr. Tabibi which was requested to consider the question and to report to the Commission.

157. During the twenty-sixth session, the Sub-Committee held three meetings. Members of the Sub-Committee submitted memoranda which were reproduced in a working paper (ILC (XXVI) SC.1/WP.1). On the basis of those memoranda and the discussions thereon, the Sub-Committee adopted and submitted to the Commission a report (A/CN.4/283) which is annexed to this chapter.

158. The Commission considered the report of the Sub-Committee at its 1297th meeting held on 22 July 1974 and adopted it without change.

159. The Commission also unanimously appointed Mr. Richard D. Kearney Special Rapporteur for the question of the law of the non-navigational uses of international watercourses.

ANNEX

Report of the Sub-Committee on the Law of the Non-Navigational Uses of International Watercourses⁶⁵³

I. INTRODUCTION

1. The Sub-Committee on the Law of the Non-Navigational Uses of International Watercourses was set up by the International Law Commission at its 1256th meeting of 14 May 1974, pursuant to the recommendation contained in paragraph 4 of General Assembly resolution 3071 (XXVIII) of 30 November 1973. The members of the Sub-Committee are: Mr. Kearney (Chairman), Mr. Elias, Mr. Šahović, Mr. Sette Câmara and Mr. Tabibi.

2. The Sub-Committee was requested to consider the question of the law of the non-navigational uses of international watercourses which had been included by the Commission in its general programme of work at its twenty-third session in 1971, and to report to the Commission.

3. During the Commission's twenty-sixth session, the Sub-Committee held three meetings on 23 May and 1 and 15 July 1974.

4. The Sub-Committee had before it background documentation submitted by the Secretariat, including the records of the consideration of the matter in the General Assembly and, in particular, the report of the Secretary-General on the "Legal Problems relating to the utilization and uses of international rivers" (A/5409) and the supplement thereto (A/CN.4/274, vols. I and II) the latter prepared pursuant to the request made by the General Assembly in resolution 2669 (XXV) of 8 December, as well as a volume of the *United Nations Legislative Series* entitled *Legislative Texts and Treaty Provisions concerning the Utilization of International Rivers for Other Purposes than Navigation*.⁶⁵⁴

⁶⁵² To be printed in *Yearbook . . . 1974*, vol. II (Part Two).

⁶⁵³ Document A/CN.4/283.

⁶⁵⁴ See foot-note 645, 646 and 652 above.

5. Members of the Sub-Committee submitted memoranda setting forth suggestions on the content of a working plan as well as on organizational and substantive matters having a bearing on such a plan. Those memoranda are reproduced in a working paper (ILC(XXVI)/SC.1/WP.1).

6. On the basis of these memoranda and the discussions thereon, the Sub-Committee reached the following conclusions, which it submits to the Commission for its consideration.

II. THE NATURE OF INTERNATIONAL WATERCOURSES

7. The threshold question that arises in a study of the legal aspects of non-navigational uses of international watercourses is determination of the meaning and scope that should be given to the term "international watercourses". Some of the more recent multilateral treaties relating to international uses of water have used "river basin" as the measure of scope of application. The 1963 Convention between Guinea, Mali, Mauritania and Senegal deals with the general development of "the Senegal River Basin" (see A/CN.4/274, paras. 36-39). Article 13 states that the Senegal River, including its tributaries, is "an international river". The 1964 Convention between the same States (*ibid.*, paras. 45-50) provides that the Inter-State Committee, established by the 1963 Convention, shall be responsible, *inter alia*, for assembling basic data relating to the River basin as a whole and informing the riparian States of all projects or problems concerning the development of the River basin (article 11). Also in 1963, Cameroon, Chad, Dahomey, Guinea, the Ivory Coast, Mali, Niger, Nigeria and Upper Volta concluded the Act regarding navigation and economic co-operation between the States of the Niger basin (*ibid.*, paras. 40-44, which provides that the utilization of the River Niger, its tributaries and subtributaries, is open to each riparian State in respect of the portion of the Niger River basin lying in its territory and without prejudice to its sovereign rights in accordance with the principles defined in the Act and in the manner that may be set forth in subsequent special agreements (article 2).

8. The 1964 Convention and Statutes between Cameroon, Chad, Niger and Nigeria relating to the development of the Chad Basin (*ibid.*, paras. 51-56), provides that the exploitation of the Basin and especially the utilization of surface and underground waters has the widest meaning and refers in particular to the needs of domestic and industrial and agricultural development and the collecting of its flora and fauna products (Statutes, article 4). In this case, the term "basin" may, because of the inclusion of underground waters, have a somewhat broader meaning and be the equivalent of "drainage basin".

9. In this context, it should be noted that the International Rivers Sub-Committee of the Afro-Asian Legal Consultative Committee has been basing its work on the concept of "international drainage basin" (*ibid.*, paras. 364-367).

10. The Inter-American Juridical Committee, in its draft conventions on the industrial and agricultural use of international rivers and lakes of 1965 (*ibid.*, para. 379), restricted its coverage to contiguous and successive international rivers and international lakes. On the other hand, in 1966, the Inter-American Economic and Social Council adopted a resolution on control and economic utilization of hydrographic basins and streams in Latin America (*ibid.*, para. 380). In this resolution, the Council recommended to the member countries of the Alliance for Progress joint studies on "control and economic utilization of the hydrographic basins and streams of the region of which they are a part, for the purpose of promoting, through multinational projects, their utilization for the common good . . ."

11. The major multilateral convention on the subject in South America is the Treaty on the River Plate Basin, signed by Argentina, Bolivia, Brazil, Paraguay and Uruguay on 23 April 1969 (*ibid.*, paras. 60-64). This is an agreement in which the Parties agree to combine their efforts for promoting the harmonious development and physical integration of the River Plate Basin, and of its areas of influence

which are immediate and identifiable. The agreement contemplates the drafting of operating agreements and legal instruments with the end of ensuring reasonable utilization of water resources, particularly through regulation of watercourses and their multiple and equitable uses. Article II of the Treaty provides for annual meetings of the Foreign Ministers of the River Plate Basin States to draft policy directions to achieve the objectives of the Treaty.

12. At the Fourth Meeting in 1971 the Foreign Ministers adopted the "Act of Asunción" (*ibid.*, para. 326), to which were annexed 25 resolutions. These resolutions carried further the work of "promoting the harmonious development and physical integration of the River Plate Basin" (*ibid.*, para. 61). The treaty does not contain any specific definition of "basin". In resolution No. 25 which deals with the use of international rivers, the concepts of successive international rivers and contiguous international rivers are taken as a basis for the solution of legal problems in the following way:

"1. In contiguous international rivers, which are under dual sovereignty, there must be a prior bilateral agreement between the riparian States before any use is made of waters.

"2. In successive international rivers, where there is no dual sovereignty, each State may use the water in accordance with its needs provided that it causes no appreciable damage to any other State of the Basin."

Certain recent South American bilateral agreements adopt a somewhat different approach by using differing terminology for pollution problems and for utilization. For example, the Argentine-Chile "Act of Santiago concerning hydrologic basins" (*ibid.*, para. 327) of 1971 states: "The Parties shall avoid polluting their river and lake systems in any manner" (paragraph 2 of the Act). With respect to use, however, the terms "contiguous reaches of international rivers", "common lakes" and "successive international rivers" are employed (paragraphs 3-5 of the Act). The indication is that broader coverage is intended for dealing with "pollution" than for dealing with "uses".

13. The Great Lakes Water Quality Agreement of 1972 between Canada and the United States of America is concerned with "the boundary waters of the Great Lakes system (A/CN.4/274, para. 106). However, in order to raise the quality of the boundary waters, it was found necessary to provide for programmes to reduce pollution from sewage, industrial sources, agricultural, forestry and other land use activities (Art. V) in the entire Great Lakes system which is defined as "all of the streams, rivers, lakes and other bodies of water that are within the drainage basin of the St. Lawrence River . . ." (Art. 1 (d)).

14. For the purpose of ascertaining the meaning and the scope of the concept of international watercourses due consideration should be given to the 1911 resolution of the Institute of International Law entitled "International Regulations regarding the use of International Watercourses".⁶⁵⁵ However, there is no use of the term "watercourses" but instead reference to "stream" and "lake" in the text of the Resolution itself. Fifty years later, the resolution of the Institute of International Law on "Utilization of non-maritime international Waters (except for navigation)" (1961)⁶⁵⁶ adopted the concept of hydrographic basin as a synonym for "watercourses". Article 1 of the Resolution provides:

"The present rules and recommendations are applicable to the utilization of waters which form part of a watercourse or hydrographic basin which extends over the territory of two or more States."

⁶⁵⁵ *Annuaire de l'Institut de droit international, 1911* (Paris), vol. 24 (1911), pp. 365-367. For an English translation of the text, see F. Berber, *Rivers in International Law* (London, Stevens, 1959), p. 27.

⁶⁵⁶ *Annuaire de l'Institut de droit international 1961*, (Basle), vol. 49 (1962), t. II, p. 381. The text of the resolution is reproduced in A/5409, para. 1076 (to be printed in *Yearbook . . . 1974*, vol. II (Part Two)).

And Article 2 reads:

"Every State has the right to utilize waters which traverse or border its territory, subject to the limits imposed by international law and, in particular, those resulting from the provisions which follow.

"This right is limited by the right of utilization of other States interested in the same watercourses or hydrographic basin."

15. The International Law Association, at its Helsinki Conference of 1966, prepared a set of articles on the Uses of the Waters of International Rivers (Helsinki Rules), which is based on the concept of "international drainage basin". The term is defined in article II as:

"An international drainage basin is a geographical area extending over two or more States determined by the watershed limits of the system of waters, including surface and underground waters, flowing into a common terminus."⁶⁵⁷

These studies, though not having the weight of State practice, provide additional examples of the various terms that have been used to denote "international watercourses".

16. Further examples are available from treaties, State practice, studies of regional organizations, and the researches of legal organizations to show that the term "international watercourses" does not possess a sufficiently well-defined meaning to delimit, with any degree of precision, the scope of the work which the Commission should undertake on the uses of fresh water. It is also clear that the nature of the problems studied may have an effect upon the scope of the work.

17. In view of these uncertainties, the Sub-Committee proposes that States be requested to comment on the following questions:

- (a) What would be the appropriate scope of the definition of an international watercourse, in a study of the legal aspects of fresh water uses on the one hand and of fresh water pollution on the other hand?
- (b) Is the geographical concept of an international drainage basin the appropriate basis for a study of the legal aspects of non-navigational uses of international watercourses?
- (c) Is the geographical concept of an international drainage basin the appropriate basis for a study of the legal aspects of the pollution of international watercourses?

III. NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES

18. Another question that must be considered at the outset is what activities are included within the term "non-navigational uses". Fresh water is put to a manifold number of uses and an exhaustive listing is not only impossible but unnecessary. However, at least the outlines of the Commission's field of activity should be fixed by determining the major uses to be considered.

19. The most general characterization would be to consider uses as (a) agricultural; (b) commercial and industrial; (c) social and domestic.

20. Agricultural uses account for the major proportion of fresh water use, at least in the sum of the amount of water removed from watercourses for irrigation and other farming purposes which is not returned directly to the watercourse. Nevertheless, there is a considerable amount of direct water return as well as return by seepage. In many cases, however, the quality of this return water has been debased to a greater or lesser extent by fertilizers, insecticides and various farm wastes.

21. In areas where, at least on a seasonal basis, water is in excess rather than in short supply, another agricultural use is the reduction in the moisture content of the soils through drainage. This use can

⁶⁵⁷ *International Law Association, Report of the Fifty-second Conference, Helsinki, 1966* (London, 1967), pp. 484-485.

give rise to erosion problems. It is connected, however, with a much larger problem that does not concern a "use" as such but is an essential element in river-planning. This is the problem of flood control. In view of the very substantial dangers and losses that result from flooding, a study of the legal aspects of international watercourses would appear to be incomplete without the inclusion of a consideration of this problem.

22. There is a question whether commercial fishing and other food production activities fall within the area of agricultural uses or of commercial and economic uses. At all events the flora and fauna of international watercourses are an essential part of a study of legal aspects of fresh water uses, particularly because the increase in the demands for water and the increase in pollution of international watercourses by all kinds of waste have had markedly adverse effects upon aquatic life in many areas throughout the world.

23. The limitation of the Commission's study to "non-navigational uses" causes certain difficulties. It would not seem feasible to consider non-navigational uses without taking account of the effect those uses have upon navigation; and, contrariwise, it would be short-sighted not to take account of the effect of navigation upon non-navigational uses. Thus, timber floating and navigation are, in the absence of strict control, not compatible uses, because of the dangers of collision. Hydro-electric production and navigation are also incompatible uses because the dam cuts off the passage of vessels unless locks are built to carry them round it. Consideration should be given to this interaction and the views of States sought on the point. In addition, the attention of the Sixth Committee, which proposed the scope of the study, should be drawn to the problem.

24. Manufacturing of all kinds give rise to constantly increasing requirements for fresh water. These demands are particularly high in connexion with the processing of raw materials. Much production is geared to the use of watercourses as a means for the disposal of industrial wastes. The growth of industry in many cases has exceeded the capacity of rivers to deal with these wastes. The problem has been complicated by the production of a great range of synthetic materials which are impervious to the natural processes of decomposition.

25. The social and domestic uses of fresh water are probably the most important to mankind as a whole. Urban civilization, which is becoming the dominant pattern of life in the second half of this century, requires the availability of large supplies of fresh water of substantially good quality. Most of the water used for domestic consumption is returned to the drainage system—even if not to the same watercourse from which it is taken. There is, therefore, not a great loss in quantity of available water, but usually a very substantial drop in quality as a result of using the watercourse for waste disposal.

26. As industry is usually a part of an urban complex, the combination of industrial wastes and domestic wastes has had disastrous effects upon lakes and rivers. Also, as in industrial wastes, a wide variety of synthetic materials are found in domestic wastes that are non-biodegradable.

27. The combination of these factors generally has an adverse effect of some magnitude upon the social uses of watercourses. These uses, while not having the economic importance of those previously discussed, are still high on this list of human values. Recreation of all kinds has always been one of the most appealing aspects of lakes and rivers. Sport, fishing, swimming, boating and like activities are uses that should be preserved. They are, like other uses, dependent upon the two basic factors of water quantity and water quality. It is worth noting that they may be particularly affected by a variety of recent developments such as the discharge of large quantities of heated water into the watercourse as a result of certain industrial processes or energy production.

28. From what has been said, it is clear that the major effects of various uses upon watercourses is to change the quantity of water available, the rate of flow of water and the quality of water. All of these effects are interrelated. Thus, from the point of view of irrigation, a reduction in water quality, among other consequences, may reduce the quantity of usable water available because the lower

quality of the water may require the use of a larger quantity of water to produce the same effect. Because there is only a limited quantity of water available, it is also clear that increasing demand, which is the chronic condition because of increasing population, results in competition among the various uses for the available water.

29. When the water concerned is that of an international drainage basin or an international watercourse, the competition among the various users can become an international competition, and the problem which faces the Commission is largely, though not entirely, to determine and to formulate the legal principles which should be applied to regulate this competition. This will require, as the first step, an examination of existing international practice, and particularly practice as reflected in conventions or administrative arrangements, for dealing with trans-boundary water problems.

30. Because uses can be conflicting, both on the national and on the international level, this examination should be directed to the consequences of a reasonably broad range of water uses in the international context. The Sub-Committee believes that the views of States should be sought as to the range of uses that the Commission should take account of in its work. In addition, certain special problems, such as those previously referred to above, need to be considered. The Sub-Committee recommends that the following questions should be put to States:

A. Should the Commission adopt the following outline of fresh water uses as the basis for its study?

1. Agricultural uses
 - (a) Irrigation
 - (b) Drainage
 - (c) Waste disposal
 - (d) Aquatic food production
2. Economic and commercial uses
 - (a) Energy production (hydroelectric, nuclear and mechanical)
 - (b) Manufacturing
 - (c) Construction
 - (d) Transportation other than navigation
 - (e) Timber floating
 - (f) Waste disposal
 - (g) Extractive (mining, oil production, etc.)
3. Domestic and social
 - (a) Consumptive (drinking, cooling, washing, laundry, etc.)
 - (b) Waste disposal
 - (c) Recreational (swimming, sport, fishing, boating, etc.)

B. Are there any other uses that should be included?

C. Should the Commission include flood control and erosion problems in its study?

D. Should the Commission take into account in its study of the interaction between use for navigation and other uses?

IV. ORGANIZATION OF WORK

31. The uses to which international watercourses are put vary widely according to factors such as climate, the physical characteristics of the watercourse, the availability of raw materials for industrial production, and the stages of economic and social development in the basin States. This variety of existing uses could give rise to the viewpoint that it may be desirable to give priority to the study of particular uses, such as industrial uses, in view of the continually mounting demand for water by industry or agriculture because of the obvious requirement for much greater food production in the light of the rapidly multiplying world population.

32. The Sub-Committee does not consider that it would be wise to accord priority to any specific use. The discussion of the various uses indicate a series of complex relationships among them which require simultaneous exploration. However, the discussion of uses

also has indicated that there are two principal limitations upon the use of fresh water—the quantity and the quality of water available. Although, as previously mentioned, there is a definite interrelationship between these two limitations, each nevertheless raises legal considerations of a different character. The problem of quantity raises an issue of distributive justice, namely: to what extent is a State as a territorial sovereign entitled to divert water for its own uses when that diversion makes the water unavailable for use by another State which, without the diversion, would be able to make use of the water?

33. The problem of quality in relation to quantity involves issues that lie more in the field of the limits of liability for fault. The question really is: at what point does the legitimate use of an international watercourse for waste disposal become illegitimate because of the nature or amount of the waste which is passing into the territory of another State?

34. It would be possible to concentrate first on the question of quality, that is, pollution problems, or on the question of quantity. Taking up one first, however, would not mean that all consideration of the other should be postponed. For example, establishment of principles to bring waste disposal within acceptable limits would have a direct impact upon the other uses of water.

35. Whether to take up the study of uses in general or the problem of pollution first, is a close issue. There is a somewhat greater amount of State practice available regarding general uses, for example in respect of hydro-electric production and irrigation, than there is regarding waste disposal. On the other hand, there is the fact that waste disposal is a use that affects all the other uses of fresh water, whether as an essential element of the use, e.g. irrigation, industrial production, etc., or as destruction of the use, e.g. recreation or domestic uses, if the pollution is by dangerous chemicals or radioactive wastes. This would appear to afford a somewhat better opportunity to work out general principles and thus make it advantageous to deal with as the first stage. For these reasons the Sub-Committee considers that it would be desirable to ask States if they support taking up the pollution problem first. The Sub-Committee recommends that States be requested to reply to the following question:

Are you in favour of the Commission taking up the problem of pollution of international watercourses at the initial stage in its study?

V. CO-OPERATION WITH OTHER AGENCIES

36. As the excellent report of the Secretary-General on the "Legal Problems Relating to the Utilization and Uses of International Rivers" of 1963, together with the supplementary report of 1974, make clear, the specialized agencies of the United Nations and other international organizations have produced a great volume of technical and scientific work in the area of uses of fresh water. Such studies are currently being carried out. Exhaustive work is being done in many of the fields that relate to pollution as a result of the United Nations Conference on the Human Environment, held at Stockholm in 1972, and the establishment of the United Nations Environment Programme. The Commission should make full use of these studies in its work. The Sub-Committee recommends that the Secretary-General be requested to advise all international organizations that are engaged in studies of international watercourses of the legal work being carried on by the Commission and to request their co-operation in this work, particularly by designating an officer or officers of these organizations to serve as the channel of information and co-operation.

37. A further question is whether the technical, scientific and economic aspects of this area of study are both sufficiently complex and of such importance to the formulation of effective legal principles that special steps should be taken to ensure receipt by the Commission of the most competent and useful advice. In this connexion, the precedent of the Committee of Experts established to assist the Commission in dealing with certain aspects of the law of the sea and related conventions, might be taken into account. This again is a matter upon which the views of States should be solicited and, to this end, the Sub-Committee recommends the following question:

Should special arrangements be made for ensuring that the Commission is provided with the technical, scientific and economic advice which will be required through such means as the establishment of a Committee of Experts?

Chapter VI

OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

A. Succession of States in respect of matters other than treaties

160. At the present session of the Commission, Mr. Mohammed Bedjaoui, Special Rapporteur, submitted his seventh report (A/CN.4/282)⁶⁵⁸ on the succession of States in respect of matters other than treaties. The Commission, however, was unable to resume the consideration of the topic, as in pursuance of paragraph 3 (a) and (b) of General Assembly resolution 3071 (XXVIII) of 30 November 1973, it had to devote most of the time of the session to the second reading of the draft articles on succession of States in respect of treaties and to the preparation of a first set of draft articles on State responsibility.

⁶⁵⁸ See p. 91 above.

B. The most-favoured-nation clause

161. At the present session of the Commission, Mr. Endre Ustor, Special Rapporteur, submitted his fifth report (A/CN.4/280)⁶⁵⁹ on the most-favoured-nation clause. For the reasons indicated in the preceding paragraph, the Commission was unable to resume the consideration of the topic at its present session.

C. Long-term programme of work

162. The consideration by the Commission of the recommendation contained in paragraph 4 of General Assembly resolution 3071 (XXVIII), concerning commencement of work on the law of non-navigational uses

⁶⁵⁹ See p. 117 above.