

Document:-
A/CN.4/SR.2002

Summary record of the 2002nd meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1987, vol. I

*Downloaded from the web site of the International Law Commission
(<http://www.un.org/law/ilc/index.htm>)*

members, would be free to raise any general questions, especially during the discussion of draft article 10.

It was so agreed.

The meeting rose at 1 p.m.

2002nd MEETING

Friday, 22 May 1987, at 10 a.m.

Chairman: Mr. Stephen C. McCaffrey

Present: Mr. A-Khasawneh, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Koroma, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Visit by a member of the International Court of Justice

1. The CHAIRMAN, speaking on behalf of the members of the Commission, extended a warm welcome to Mr. Ago, a Judge of the International Court of Justice, who in the past had made an invaluable contribution to the Commission's work, particularly when he had been Special Rapporteur for the topic of State responsibility.

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/399 and Add.1 and 2,¹ A/CN.4/406 and Add.1 and 2,² A/CN.4/L.410, sect. G)

[Agenda item 6]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

2. Mr. BEESLEY said that, before discussing the Special Rapporteur's third report (A/CN.4/406 and Add.1 and 2), he wished to make a few general observations and refer to the earlier work on the topic, including the Special Rapporteur's first two reports. The topic had been on the Commission's agenda since 1971 and progress on it had been slow, not only because the subject was complex, but also because three changes of special rapporteur had had to be made. The work of all four of them was to be commended. The present Special Rapporteur had shown an excellent grasp of the problems to be overcome and his recommendations were sound. Accordingly, the Commission was in a position to make headway on the topic.

3. In 1984, the Commission had had before it a draft framework agreement consisting of 41 articles prepared by the previous Special Rapporteur, Mr. Evensen, and had referred articles 1 to 9 to the Drafting Committee, where they were still to be discussed. The present Special Rapporteur had, from the start, proposed that those articles should be dealt with by the Drafting Committee without further debate in plenary, and that the general organizational structure of the draft prepared by his predecessor should be followed for the purposes of the subsequent articles.

4. Notwithstanding his view that draft articles 1 to 9 should be left with the Drafting Committee, the Special Rapporteur had, in his second report (A/CN.4/399 and Add.1 and 2), discussed difficult questions raised by those articles and had also submitted five draft articles on the procedures to be followed by States when new uses were proposed for the waters of an international watercourse.

5. At its previous session, the Commission had not been able to consider in full the second report, which dealt with four important points. The first concerned the definition of an "international watercourse". At the outset of its work on the topic, the Commission had been divided as to the meaning of the term "international watercourse". It had been decided not to use the term "drainage basin", and the alternative term "international watercourse system" had also given rise to controversy. In 1980, the Commission had appeared to move closer to a broad definition of an international watercourse when it had adopted a note "describing its tentative understanding of what was meant by the term 'international watercourse system' ". Accordingly, Mr. Evensen had been able to incorporate the substance of that understanding in article 1 of his original draft, in 1983, an article entitled "Explanation (definition) of the term 'international watercourse system' . . .".

6. There had, however, been some criticism in the Commission regarding the use of the word "system", and Mr. Evensen had abandoned it in his revised draft, in 1984, using instead the shorter expression "international watercourse". However, due to the persisting differences of opinion regarding the meaning of the latter expression, the present Special Rapporteur had recommended in his second report (*ibid.*, para. 63) that article 1 be withdrawn from the Drafting Committee and that the Commission proceed on the basis of the provisional working hypothesis which it had accepted in 1980. Obviously, the problem would have to be faced sooner or later, and all attempts to limit the scope of application of the principles embodied in the draft articles should be resisted. The drainage basin concept, or the system concept, was supported by the best expert opinion, and the interdependence of waters made it highly desirable that a system-wide approach should be taken.

7. The change made by Mr. Evensen from the drainage basin concept to the concept of an "international watercourse system" could provide a suitable basis for developing a coherent and rational body of general principles on international watercourses, without impinging upon those watercourses that were regulated by their own particular régimes.

¹ Reproduced in *Yearbook* . . . 1986, vol. II (Part One).

² Reproduced in *Yearbook* . . . 1987, vol. II (Part One).

8. Support for the drainage basin or system approach was reflected in the provisions of the 1978 Agreement between the United States of America and Canada on Great Lakes Water Quality,³ article I of which defined the expressions “boundary waters of the Great Lakes System”, “Great Lakes Basin Ecosystem” and “tributary waters of the Great Lakes System”, terms that were found in the substantive articles of the Agreement. He therefore considered it desirable for the “system” concept to be retained, but would not press the point unduly. The fact that the word “system” was not used in article 1 of Mr. Evensen’s draft did not preclude an interpretation that would make the draft articles applicable to the furthest limits of a drainage basin, if circumstances so warranted.

9. The “shared natural resource” concept, which had originated in article 6 of Mr. Evensen’s initial draft, in 1983, had met with strong objections from some members of the Commission. Mr. Evensen had therefore revised article 6 and replaced that concept by the formula “the watercourse States concerned shall share in the use of the waters”. That change was not regarded as significant by the present Special Rapporteur, who had stressed in his second report that it had “not resulted in the elimination of any fundamental principles from the draft as a whole” (*ibid.*, para. 74). Since that view was shared by many members of the Commission, it was to be hoped that the matter was no longer controversial.

10. Another disputed question was whether to include in the draft a list of factors to be taken into account in determining what constituted “equitable utilization”. Mr. Evensen had included such a list in article 8 of his draft, and the text had made it clear that the list was not exhaustive. The present Special Rapporteur, during the Commission’s consideration of his second report, had supported a compromise position, namely that the Commission “should strive for a flexible solution, which might take the form of confining the factors to a limited indicative list of more general criteria”.⁴

11. Personally, he thought that the question whether or not to include such a list was not a major issue, but that a list should be given in the commentary if it was to be omitted from the text of the article. A list of that kind was needed as a useful guide in applying the somewhat vague language of the fundamental principle of equitable utilization. It was also worth noting that a list of factors had been included in the corresponding provision of the Helsinki Rules adopted in 1966 by the International Law Association,⁵ rules which had been widely recognized as useful.

12. Under the principle of equitable utilization, which was firmly established in international law, a State was entitled to a reasonable and equitable share of the beneficial uses of the waters of an international watercourse in its territory; but it could not do anything in its

territory that would cause appreciable harm in the territory of another State. Hence there was an apparent conflict between the equitable utilization principle and the duty to refrain from causing appreciable harm. If the right of the second State not to be harmed was given priority, the entitlement of the first State to a reasonable and equitable share of the beneficial uses of the water was overridden.

13. No solution had yet been found to deal with that contradiction. The second Special Rapporteur, Mr. Schwebel, had maintained that, in the event of a conflict, the principle of equitable utilization had priority. In his third report, Mr. Schwebel had stated that the degree of harm would, of course, be an important factor in determining whether the use was reasonable and equitable, but inflicting some harm was not an automatic prohibition on action by a State proposing to undertake a utilization.⁶

14. That argument had not met with the approval of the third Special Rapporteur, Mr. Evensen, who had introduced the concept of “appreciable harm” into article 9 of his draft by requiring a watercourse State to refrain from uses that could cause appreciable harm to the rights or interests of other watercourse States, but with the proviso “unless otherwise provided for in a watercourse agreement or other agreement or arrangement”. That downgrading of the principle of equitable utilization had proved controversial both in the Commission and elsewhere, and Mr. Evensen had been urged to consider incorporating a qualification that would make the obligation to refrain from causing appreciable harm subject to the overriding obligation to share the resource equitably, bearing in mind the need to balance all the relevant factors, including any applicable principles of international law.

15. The present Special Rapporteur had heeded that advice. With a view to reconciling the two principles, he had in his second report (*ibid.*, para. 184) proposed the following formulation for article 9:

In its use of an international watercourse, a watercourse State shall not cause appreciable harm to another watercourse State, except as may be allowable within the context of the first State’s equitable utilization of that international watercourse.

arguing that both States concerned had legal rights and were entitled to have them protected. The right of one State should not be recognized at the expense of ignoring the right of the other. As the Special Rapporteur saw it, what was prohibited was conduct whereby one State exceeded its equitable share or deprived another State of its equitable share, the focus being on the duty not to cause legal injury through non-equitable use, rather than on the duty not to cause factual harm. At the previous session, the Special Rapporteur, referring to the relationship between the principle of equitable utilization and the obligation not to cause appreciable harm, had concluded that the Commission “seemed to be in basic agreement on the manner in which the two principles were interrelated”.⁷

³ *United States Treaties and Other International Agreements, 1978-1979* (Washington, D.C.), vol. 30, part 2, p. 1383.

⁴ *Yearbook . . . 1986*, vol. II (Part Two), p. 63, para. 239.

⁵ ILA, *Report of the Fifty-second Conference, Helsinki, 1966* (London, 1967), pp. 484 *et seq.*; and *Yearbook . . . 1974*, vol. II (Part Two), pp. 357 *et seq.*, document A/CN.4/274, para. 405.

⁶ See *Yearbook . . . 1982*, vol. II (Part One), pp. 91 *et seq.*, document A/CN.4/348, paras. 111-185 (art. 8).

⁷ *Yearbook . . . 1986*, vol. II (Part Two), p. 63, para. 241.

16. With regard to the concept of "appreciable harm", it was generally agreed that States must tolerate insignificant adverse effects or other minor inconveniences resulting from the uses of a watercourse by neighbouring States. Nevertheless, a number of States had criticized the use of the adjective "appreciable", maintaining that it was vague and called for clarification. For his part, he favoured retention of the word "appreciable" until a better one was found, for it should also be borne in mind that the fundamental principle of equitable utilization was itself vague. The qualification "appreciable" was clearly necessary in articles dealing with substantive law, such as draft article 9, but not so necessary in articles setting forth procedural rules providing for notification, exchange of information, consultation and the duty to negotiate.

17. The draft articles submitted by the Special Rapporteur in his second report had dealt with the duty of a watercourse State to suspend the implementation of a project if objections were raised by another watercourse State. Provision was made for prior notification of a proposed use, for a reply from a notified State within a reasonable time, and for consultations and negotiations in the event of objections. The watercourse State proposing to implement a project was clearly under a duty to suspend implementation until the requisite notice had been given and consultations and negotiations had been attempted. Under draft article 13, failure to notify or to consult or negotiate rendered a State liable for any harm caused to other States by the new use, whether or not such harm was in violation of article 9. A penalty was thus imposed, even though the project was within the legal entitlement of the notifying State. On the other hand, if the notified State failed to reply to the notice within a reasonable time, the notifying State could proceed to implement its project. In doing so, it was subject to article 9, but would be liable only for the harm caused by exceeding its entitlement under the principle of equitable utilization.

18. Those rules did not deal with cases in which notice had been given and negotiations had gone on for a reasonable time, but without success. Mr. Evensen's proposals in that regard had been unsatisfactory; but the present Special Rapporteur's solution was not satisfactory either, for draft article 14 had specified that only in the event of "utmost urgency" could the notifying State's project proceed in the absence of agreement. Consequently, apart from that exceptional circumstance, an objecting State could in effect veto the proposed project by refusing to agree to a settlement or to submit the issue in dispute to binding third-party adjudication.

19. Perhaps the most reasonable course would be to insert a provision to the effect that the project was suspended until the notifying State had made reasonable attempts to reach agreement with the objecting State or States, and in particular until an offer had been made to submit the matters in dispute to adjudication and that offer had been rejected.

20. Draft article 9 raised the problem of selectivity in dealing with the issues raised. A number of authors referred to the matter in detail, including Jan Schneider,

whose book *World Public Order of the Environment: Towards an International Ecological Law and Organization*⁹ was based on the preparations for and the follow-up to the United Nations Conference on the Human Environment, held at Stockholm in 1972. The legal principles which had emerged from that Conference had been developed in the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter,⁹ and at the Third United Nations Conference on the Law of the Sea. Twenty-three important principles, unanimously agreed by working groups prior to the Stockholm Conference, had all subsequently been endorsed in the Declaration adopted by the Conference, with one important exception, namely the principle of the duty to notify and consult. On that issue, therefore, there might still be controversy.

21. Principles 21 and 22 of the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration)¹⁰ were of particular relevance to the Commission's work. They read:

Principle 21

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

Principle 22

States shall co-operate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction.

22. At the very time when some of the issues involved in those principles had been under discussion in the Sixth Committee of the General Assembly, serious damage had been caused to a major European river, and, as he understood the position, the country in which the damage had occurred, to the detriment of downstream States, had accepted State responsibility. That situation clearly reflected the development of the law since 1972. Yet another development was reflected in the negotiation of the 1979 Convention on Long-range Transboundary Air Pollution,¹¹ which had chiefly been called for by the very States which, a decade earlier, had not approved of such a method of developing the law, preferring to leave the matter to State practice. It was therefore incumbent on the Commission to take account of the continuing development of international environmental law in its approach to the topic under consideration.

23. Draft principle 20, discussed at the Stockholm Conference, was also relevant to the Commission's work. It read:

20. Relevant information must be supplied by States on activities or developments within their jurisdiction or under their control whenever

⁹ Toronto, University of Toronto Press, 1979.

⁹ United Nations, *Treaty Series*, vol. 1046, p. 120.

¹⁰ See *Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972* (United Nations publication, Sales No. E.73.11.A.14 and corrigendum), chap. I.

¹¹ E/ECE/1010.

they believe, or have reason to believe, that such information is needed to avoid the risk of significant adverse effects on the environment in areas beyond their national jurisdiction.¹²

24. Only one State participating in the Stockholm Conference had objected to draft principle 20, on the ground that it was controversial. The text of the principle had subsequently been referred to the General Assembly, but a watered-down provision had eventually emerged in the form of resolution 2995 (XXVII), from which principle 20 had seemingly been effectively erased. The States which had fought for the principle before and during the Stockholm Conference had, however, introduced resolution 2996 (XXVII), which had declared that no resolution adopted by the General Assembly at its twenty-seventh session could affect Principles 21 and 22. It was therefore gratifying to note that the Special Rapporteur, in his report, had managed to extract the essence not only of Principles 21 and 22, but also of draft principle 20.

25. In considering the present topic, the Commission should also take account of the various recommendations submitted in the Action Plan for the Human Environment adopted by the Stockholm Conference,¹³ and particularly recommendation 2 (1) (a), in which countries were invited "to share internationally all relevant information on the problems they encounter and the solutions they devise in developing these areas"; recommendation 4, paragraph 2, to the effect that Governments should consider "co-operative arrangements to undertake the necessary research whenever . . . problem areas have a specific regional impact" and that, in such cases, "provision should be made for the exchange of information and research findings with countries of other geographical regions sharing similar problems"; recommendation 32, that Governments should give attention to the need to "enact international conventions and treaties to protect species inhabiting international waters or those which migrate from one country to another"; recommendation 48, referring in part to estuaries and intertidal marshes; recommendation 51, already referred to by the Special Rapporteur in his report; and recommendation 55 (b), advocating the establishment of a world registry of clean rivers.

26. The principles adopted at the Stockholm Conference, a conference that had itself been a high-water mark, had been acknowledged in the consultations that had followed the Chernobyl disaster in 1986. They had also been reflected in a series of regional agreements on management of the oceans, concluded under the auspices of UNEP, and to a lesser extent in the 1985 Protocol to the Convention on Long-range Transboundary Air Pollution.¹⁴ The importance of the provision of adequate information and of the duty of States to consult had also been recognized in the draft protocol on chlorofluorocarbons¹⁵ to the 1985 Vienna Convention for the Protection of the Ozone Layer. With regard to the duty to notify and consult, he would prefer to

place more emphasis on the duty to consult, the first step of which would then be the duty to notify.

27. At the Stockholm Conference, some of the strongest views had been voiced by the African representatives, who had considered that certain dams then under construction served to perpetuate a system of human degradation. The problem was none the less a global one and merited the Commission's serious attention. Zambia had also issued a communiqué at the Stockholm Conference concerning two dams being built in southern Africa. Detailed information on the way in which the negotiations had developed at the Stockholm Conference was provided in a book by Wade Rowland entitled *The Plot to Save the World*.¹⁶ Again, some very useful principles relating to the topic had been developed at the Third United Nations Conference on the Law of the Sea, where, for the first time, a positive duty not to pollute had been imposed on States in treaty form. It would be a mistake for the Commission to ignore that principle and the underlying concept in its work on the law of international watercourses.

28. The CHAIRMAN thanked Mr. Beesley for his interesting historical account of the background to the present topic. Since no other members were included in the list of speakers for the present meeting, the remaining time would be assigned to the Drafting Committee.

The meeting rose at 11.15 a.m.

¹⁶ Toronto, Clarke, Irwin, 1973.

2003rd MEETING

Monday, 25 May 1987, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Present: Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Yankov.

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/399 and Add.1 and 2,¹ A/CN.4/406 and Add.1 and 2,² A/CN.4/L.410, sect. G)

[Agenda item 6]

THIRD REPORT OF THE SPECIAL RAPPORTEUR
(*continued*)

¹² See *Report of the United Nations Conference on the Human Environment* . . . , chap. X, para. 331.

¹³ *Ibid.*, chap. II.

¹⁴ ECE/EB.AIR/12.

¹⁵ Adopted on 16 September 1987 as the Montreal Protocol on Substances that Deplete the Ozone Layer.

¹ Reproduced in *Yearbook* . . . 1986, vol. II (Part One).

² Reproduced in *Yearbook* . . . 1987, vol. II (Part One).