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Summary record of the 2003rd meeting

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

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

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 chlorofluorocarbons[15] 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.

[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.

[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*)

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

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

CHAPTER III OF THE DRAFT:[3]

ARTICLE 10 (General obligation to co-operate)[4]

1. Mr. YANKOV expressed appreciation to the Special Rapporteur for his well-documented third report (A/CN.4/406 and Add.1 and 2) and the sound analysis of State practice and doctrine it contained.

2. The formulation in draft article 10 of a principle whereby States had a duty to co-operate could be justified on two grounds. First, it was a relatively new legal concept that should be set forth explicitly as a general rule of positive international law; secondly, it was a general rule of conduct which, as the Special Rapporteur himself noted throughout his report, was of paramount importance in connection with the uses of international watercourses. Until fairly recently, the principle of co-operation had been regarded not as a duty but as a matter of discretion for States in their relations on affairs of common interest. It was on that basis that the principle had been incorporated, as a rule, in a number of bilateral treaties. In the case of the uses of international rivers, however, the principle of co-operation was more often identified as a rule of good-neighbourly relations.

3. The duty of States to co-operate with each other had first been enunciated as a general principle of international law in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.[5] Its significance in international relations had gradually been recognized as an important rule in the determination of matters relating to such global issues as water supply, protection and preservation of the marine environment, new and renewable sources of energy and the more rational use of national resources. The duty to co-operate had also acquired importance in dealing with the adverse effects of the technological revolution, the risks inherent in the uses of nuclear energy, the exploration of outer space and, as was apparent from the 1982 United Nations Convention on the Law of the Sea, the new dimensions of the uses of the world's oceans.

4. Against that background, it would seem that, for the principle of co-operation to be effective, three basic requirements had to be met. First, the scope and objective of the co-operation should always be specified. Secondly, co-operation should be viewed in terms of the way it interacted with other fundamental principles of international law, more particularly those embodied in Article 2 of the Charter of the United Nations. Thirdly, a reference to the modalities of implementation should be included in article 10, for otherwise the principle might sound more like a declaration of intent than a legally binding rule.

5. Accordingly, as far as the uses of international watercourses were concerned, the duty of States to co-operate should be spelt out and it should be made clear that the main objective was to secure reasonable and quitable utilization of the watercourse in question. Furthermore, the duty to co-operate should be considered within the framework of the fundamental principles of international law, especially the principles of sovereign equality and respect for the sovereignty and territorial integrity of States, fulfilment in good faith of international obligations, and the peaceful settlement of disputes.

6. The implementation of the principle of co-operation as a substantive rule of international law should be backed up by appropriate and specific modalities. In that connection, he agreed with the Special Rapporteur's conceptual approach that the operation of the principle as a substantive norm should be complemented by procedural rules or requirements (*ibid.*, paras. 35-36). Yet the Special Rapporteur seemed to confine the principle of co-operation to equitable utilization, for he stated:

> . . . The corner-stone of this normative régime is the principle of equitable utilization, according to which States are entitled to a reasonable and equitable share of the uses and benefits of the waters of an international watercourse. (*Ibid.*, para. 31.)

7. Moreover, as stated in his second report (A/CN.4/399 and Add.1 and 2, para. 188) and reiterated in his third report (A/CN.4/406 and Add.1 and 2, paras. 6-7), the Special Rapporteur considered that procedural requirements were an indispensable adjunct to the general principle of equitable utilization. That seemed to be an unnecessary limitation of the scope of application of the principle of co-operation and its procedural requirements. Co-operation between States might involve common activities, for example in the protection and preservation of the environment or joint research activities. Another unwarranted limitation in connection with the uses of international watercourses was to confine the procedural requirements for the operation of the principle to "cases in which a State contemplates a new use of an international watercourse—including an addition to or alteration of an existing use—where the new use may cause appreciable harm to other States using the watercourse" (A/CN.4/406 and Add.1 and 2, para. 6). He agreed that the procedural requirements in those specific cases might be of particular practical importance, but failed to see why co-operation should be limited in scope to those cases alone.

8. Draft article 10 could serve as a basis for a provision embodying the principle of co-operation as it applied to the uses of international watercourses. But the article should make more explicit reference to the object of co-operation and specify that the duty of the States that shared an international watercourse was to achieve optimum utilization, protection and control of that watercourse. The words "respective obligations under the present articles" were too general and, in effect, confined the principle of co-operation to the *pacta sunt servanda* principle. His own understanding of the scope and legal significance of the principle of co-operation was that it might operate even in cases where there was

[3] The revised text of the outline for a draft convention, comprising 41 draft articles contained in six chapters, which the previous Special Rapporteur, Mr. Evensen, submitted in his second report, appears in *Yearbook . . . 1984*, vol. II (Part One), p. 101, document A/CN.4/381.

[4] For the text, see 2001st meeting, para. 33.

[5] General Assembly resolution 2625 (XXV) of 24 October 1970, annex; hereinafter referred to as "1970 Declaration on Friendly Relations and Co-operation among States".

no prior treaty obligation to adopt certain conduct entailing co-operative action. The *raison d'être* of the principle of co-operation should not be restricted to the fulfilment of existing treaty obligations, something that could be achieved simply by virtue of the duty of States to fulfil in good faith the obligations assumed under the treaty concerned. The Special Rapporteur should perhaps clarify whether the words "with other concerned States" meant only the States that shared the international watercourse, or any other State that might consider that it was affected by the use of the watercourse—on ecological, economic or other grounds, for instance. In its present form, draft article 10 was open to a very broad interpretation of which States were involved.

9. The reference to "good faith" in article 10 was not essential. By definition, co-operation should not be conducted other than in good faith. There was no such qualification in the 1970 Declaration on Friendly Relations and Co-operation among States,[6] in the Helsinki Final Act[7] or in the relevant General Assembly resolutions. Indeed, it seemed that, the more such qualifications were used, the more the substance of the provision in question was weakened.

10. The Special Rapporteur and the Drafting Committee might wish to take into consideration two elements incorporated in paragraph 1 of draft article 10 as submitted in 1983 by the previous Special Rapporteur, Mr. Evensen. The first element concerned the objective of co-operation, which, in Mr. Evensen's text, was the attainment of "optimum utilization, protection and control of the watercourse system". The second element concerned the basic principles of international law. In the light of those two elements, draft article 10 could be worded as follows:

> "States sharing an international watercourse shall co-operate in their relations concerning the uses of the watercourse in order to achieve optimum utilization and protection of the watercourse, based on the equality, sovereignty and territorial integrity of the watercourse States concerned."

The Commission would note that that wording made no reference, as did Mr. Evensen's text, to procedural and other modalities. In that connection, he agreed with the present Special Rapporteur that article 10 should be a general introductory article, followed by the articles relating to consultation and notification. Nor did his suggested wording refer to control, since the notion of optimum utilization seemed broad enough to cover that idea.

11. Mr. CALERO RODRIGUES noted that the title of chapter II of the Special Rapporteur's third report (A/CN.4/406 and Add.1 and 2) referred to "procedural rules relating to the utilization of international watercourses", whereas the title of chapter III referred to "general principles of co-operation and notification", which raised the question whether the draft should speak of rules or principles. Again, the Special Rapporteur stated (*ibid.*, para. 7) that the centre-piece of his third report was a set of draft articles on procedural requirements. Draft articles 11 to 15 were indeed rules on procedural requirements, and in that respect the Special Rapporteur had followed his own earlier scheme and the schemes proposed by Mr. Evensen.

12. Draft article 10, on the other hand, laid down a general obligation to co-operate. It had two limbs, one concerning the relations of States with regard to international watercourses, and the other concerning the fulfilment of their respective obligations under the present articles. There had been no similar article in the Special Rapporteur's second report (A/CN.4/399 and Add.1 and 2), but there had been in both of Mr. Evensen's drafts. In draft article 10 as submitted by Mr. Evensen in 1983, entitled "General principles of co-operation and management", only paragraph 1 had actually dealt with co-operation, while paragraphs 2 and 3 had dealt with consultation, exchange of information and the establishment of joint commissions. In 1984, in the revised text of the article, Mr. Evensen had added another element, namely the optional assistance of international agencies in that co-operation.

13. Article 10 was of a very different nature from the other articles now proposed. It raised not only the question of the difference between rules and principles, but also the very concept of co-operation. Rules, of course, created obligations and rights, as did principles, but in the latter case the obligations and rights were less precise, albeit wider. Co-operation was a vague and all-encompassing concept and, in his view, it should be admitted that under international law there was no general obligation on States to co-operate. The achievement of international co-operation was one of the purposes of the United Nations under the Charter. Hence co-operation was a goal, a guideline for conduct, but not a strict legal obligation which, if violated, would entail international responsibility. States could agree to limited obligations to co-operate in precisely defined fields, and they did so by agreement. Indeed, in many cases they had accepted such obligations in regard to the uses of international watercourses; but, even in those cases, there might be a doubt as to whether an obligation existed in the absence of an agreement.

14. In his first report, Mr. Evensen had derived the general principle of co-operation between States from the concept of a shared natural resource, which in turn resulted from the very nature of things.[8] The explanation given by the present Special Rapporteur in his third report was less objectionable, although not entirely convincing. His illustrations of "broad support" for the obligation to co-operate came under four headings: international agreements; decisions of international courts and tribunals; declarations and resolutions adopted by intergovernmental organizations, conferences and meetings; and studies by intergovernmental and non-governmental organizations (A/CN.4/406 and Add.1 and 2, paras. 42-59). But it was doubtful whether all of those illustrations necessarily led to the conclusion that such an obligation existed in the case of international watercourses. For example, the

[6] See footnote 5 above.

[7] Final Act of the Conference on Security and Co-operation in Europe, signed at Helsinki on 1 August 1975.

[8] *Yearbook . . . 1983*, vol. II (Part One), p. 174, document A/CN.4/367, para. 107; and p. 170, para. 81, respectively.

agreements cited under the first heading were all of a very special regional or bilateral nature, from which it would be very difficult to deduce that there was a general rule of co-operation. The same applied to the decisions of courts and tribunals. The *Lake Lanoux* arbitration was admittedly a landmark, but it was difficult to discern in it any recognition of a general obligation to co-operate. The cases involving maritime delimitation applied to very different situations, particularly the *North Sea Continental Shelf* cases, which concerned the delimitation of territories and could hardly be said to apply to watercourses. The same was true of the *Fisheries Jurisdiction* cases.

15. He did not, however, altogether disagree with recognition of the principle of co-operation. The basis for the proposed article was questionable in some respects, but he did not doubt the need for co-operation. In many cases, States had in fact agreed to co-operate and it would be desirable for them to do so in the case of international watercourses. He did, however, have serious doubts whether an article on the principle, or obligation, of co-operation should stand as an introduction to chapter III of the draft, relating to procedural rules. Such an article, if it was necessary, should be placed in chapter II, relating to general principles.

16. Mr. Yankov was right to say that the reference to good faith was probably unnecessary. The text of the article should not be overburdened; in any event, co-operation conducted in bad faith was inconceivable. He also agreed that the provision should contain an objective indication of the terms of the obligation. While he readily understood co-operation as it applied to relations concerning international watercourses (the first limb of draft article 10), he found it more difficult to comprehend what was meant by co-operation in the fulfilment of the obligations under the present articles (the second limb). Article 10 as proposed by Mr. Evensen had referred to co-operation with regard to the uses, projects and programmes relating to the watercourse. That formulation seemed to have been acceptable, and he wondered why it had been changed. If it was thought to be too limitative, the phrase used by the present Special Rapporteur, namely "with regard to the utilization of an international watercourse" (*ibid.*, para. 42), could perhaps be adopted.

17. He also agreed that the purpose of co-operation should be specified, possibly by stipulating that the objective should be the attainment of equitable and optimal utilization of the international watercourse. It would likewise be useful to lay down that co-operation should be compatible with the other general principles of international law.

18. He favoured a provision of a general character which would not constitute a legal strait-jacket and would promote rather than restrict co-operation. The scope of co-operation should be defined, and a general indication should be given of its content. Therefore, on completion of the discussion, draft article 10 could be referred to the Drafting Committee to see how it could be fitted into the general scheme of the draft.

19. Mr. OGISO said that draft article 10 should contain a reference to the basis for the general obligation of riparian States to co-operate. The obligation actually rested on two principles: good faith, and good-neighbourly relations. The opening words of the article did mention good faith, but he wished to know why the principle of good-neighbourliness had been omitted. Perhaps the intention was for it to be covered by some other part of the draft.

20. The Commission could well consider another question, one that affected not only article 10, but the whole of the draft under consideration. The approach adopted appeared to be based on the assumption that the present articles were intended to deal with situations in which a new use by a riparian State of the waters of an international watercourse would have adverse effects on one or more of the other riparian States. In other words, it was the fact that the use of the waters was new that triggered the obligations provided for in the articles. However, similar problems could arise as a result of a natural change. A historical use of international waters by a riparian State which had not hitherto affected uses of the waters by other States could, as a result of an ecological change, have an adverse effect on uses by those other riparian States. One could imagine, for example, a diminution in the quantity of water available as a result of a change in climatic conditions: a use which had been innocuous under the earlier conditions might then become harmful to the other riparian States. He would like to know whether the Special Rapporteur contemplated including a provision to cover such a situation. The draft articles at present before the Drafting Committee were all based on the assumption that other riparian States would be adversely affected by a new use of a watercourse.

21. Mr. McCAFFREY (Special Rapporteur) said he agreed with Mr. Ogiso that the duty expressed in draft article 10 could be considered as partly based on the two principles of good faith and good-neighbourliness. There was, of course, much support for the principle of good faith; a very scholarly analysis on that point was to be found in the thesis by Elisabeth Zoller.[9] The content of the principle of good-neighbourliness in international law was less certain. While he had no objection to including references to those two principles, care should be taken not to burden the text of the article with material that was not absolutely necessary. Such material would detract from the main purpose of the article, which was to set forth the general duty of the States concerned to co-operate.

22. In his second report, he had dealt with the case in which an adjustment of shares in the waters of the various riparian States might prove necessary because of developments in the natural situation and had suggested that the provisions of draft article 8, paragraph 2, could cover that situation (A/CN.4/399 and Add.1 and 2, para. 194). Those provisions could be taken as the basis of an obligation to adjust water uses as a consequence of changed natural phenomena. Of course, article 8 had been referred to the Drafting Committee, and if it emerged in a form that failed to provide a solution to the problem, a new article on the subject could be prepared.

[9] *La bonne foi en droit international public* (Paris, Pedone, 1977).

23. Mr. ARANGIO-RUIZ said that Mr. Ogiso's second question raised a much broader issue than that of the mere distinction between new uses and natural changes as the origin of the duty to co-operate.

24. Actually, the provisions of draft article 10 were much more general in scope. They did not refer solely to the obligation to co-operate in the event of a new use by a State, or indeed of a natural change. The obligations set forth in the article were tied not so much to good faith and to good-neighbourliness, but rather to the physical fact that the watercourse was international in character.

25. It was doubtful whether the obligation of States enunciated in article 10 could be said to rest on the principle of good faith. In reality, the basis of that obligation lay in the Charter of the United Nations and in the unwritten rules developed since the adoption of the Charter, such as those set forth in the 1970 Declaration on Friendly Relations and Co-operation among States.[10]

26. Mr. KOROMA said that a reference to the principle of good-neighbourliness should indeed be included in article 10. It was a principle that could be said to emanate from the *Trail Smelter* arbitration. He also supported the suggestion that article 10 should be placed in the general part of the draft.

27. Mr. McCAFFREY (Special Rapporteur) said he agreed that article 10 was intended to express a general obligation that was not limited to the problem of new uses. At the same time, he recognized that it was not logical to place it in a set of procedural provisions.

28. He wished to assure Mr. Koroma that he did not intend to rule out any element of the bases of the duty to co-operate. However, it was necessary to avoid expanding the text unduly by including references to a number of bases for the obligation, for such a course might dilute the expression of the essential rule embodied in the article.

29. Mr. ARANGIO-RUIZ said it was wise to suggest that article 10 should be placed among the general principles. Nevertheless, the new place assigned to the article should not have the effect of detracting from its significance.

The meeting rose at 11.30 a.m.

[10] See footnote 5 above.

2004th MEETING

Tuesday, 26 May 1987, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Present: Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Koroma, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, 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*)

CHAPTER III OF THE DRAFT:[3]

ARTICLE 10 (General obligation to co-operate)[4] (*continued*)

1. Mr. SHI said that the present topic was very difficult, complex and sensitive. Apart from general principles of international law, the Commission had little guidance from State practice. Every international watercourse had it own peculiarities, features and uses. Hence it was not surprising that, except for the Convention relating to the development of hydraulic power affecting more than one State (Geneva, 1923), there were practically no general conventions on the non-navigational uses of international watercourses. All the treaties or agreements on the subject had been concluded in connection with particular international watercourses and on a regional or bilateral basis. Even in the case of the 1923 Geneva Convention, the parties were few in number and actually included some that were not riparian States. It would be a difficult and possibly pointless task to try to draw generalized rules from the numerous regional and bilateral treaties. Perhaps the topic was one that involved progressive development more than codification. In formulating the draft articles, the Commission had to be fully aware of the nature of international law at its present stage of development, which, in the words of Georg Schwarzenberger, was a law of society, not a law of community.

2. In that task, two basic factors had to be taken into account. The first was that the waters of an international watercourse were a natural phenomenon which knew no political boundaries and constituted a natural hydrologic unity. That unity obeyed only the iron laws of nature, beyond human will. Therefore any use made of one part of an international watercourse affected other parts of it. The second factor was the sovereignty of a State over the part of an international watercourse situated within its territory: the waters thereof constituted natural resources over which that State had permanent territorial sovereignty, and hence exclusive use. The use and the development of international water-

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

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

[3] The revised text of the outline for a draft convention, comprising 41 draft articles contained in six chapters, which the previous Special Rapporteur, Mr. Evensen, submitted in his second report, appears in *Yearbook . . . 1984*, vol. II (Part One), p. 101, document A/CN.4/381.

[4] For the text, see 2001st meeting, para. 33.