Document:-
A/CN.4/SR.2008

Summary record of the 2008th meeting

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

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

Secretary of State Stettinius in connection with United States-Mexican litigation over a watercourse problem.

42. His second point related to the assertion that natural law could not be transformed or transferred into legal rules. Legal rules and principles must none the less take account of physical as well as human realities. To ignore the essential features of a river's waters would be to ignore those realities, to the detriment of watercourse States and mankind as a whole.

43. Another point to be considered was the relationship between the Commission and States. As the servant of the General Assembly, the Commission was under a duty to pay regard to the wishes and attitudes of States, and it could not therefore embark on a pointless enterprise of progressive development of the law in any field. At the same time, in the interests of the United Nations and of States themselves, the Commission should not be too reluctant to make reasonably progressive suggestions whenever they seemed necessary. It should not be discouraged by the possibility that some of them would not find favour with States, which were in any event free to reject any element of progressive development of the law that did not appeal to them.

44. He fully agreed that the duty to co-operate should not be expressed in unduly general and vague terms. It was a duty that should be stated in terms of the specific aims of watercourse utilization, conservation and development, and strengthened by an indication of appropriate procedures and methods. Moreover, the obligation to co-operate should be formulated by reference to such fundamental principles as sovereignty, territorial integrity, good faith, equality and good-neighbourliness. At the same time, the Drafting Committee should bear in mind that, while equality, good faith and good-neighbourliness were likely to exert a positive influence on compliance with the duty to co-operate, too much emphasis on sovereignty would weaken the duty to co-operate.

45. At the previous session, the Commission had arrived at a consensus on the organization or arrangement of the draft articles and had requested the Special Rapporteur to prepare a set of rules and principles corresponding to the existing rules and principles of international law on the subject, as well as a set of guidelines and recommendations, including machinery. The guidelines and recommendations, being "soft law", were to be placed in a section separate from the one containing the "hard law", namely the principles and rules. The distinction thus drawn between hard law and soft law had not been strictly adhered to at the present session. More particularly, the notion of a "principle" had sometimes been treated as soft law. He could not accept that approach, for the international legal system had its own general principles, which were part of hard law. They played an essential role in the application and development of legal rules and also served to fill the gaps in the rules.

46. The essential distinction between binding rules and principles, on the one hand, and non-binding guidelines and recommendations, on the other, had been blurred in the course of the discussion. He therefore urged the Commission to maintain that distinction.

The meeting rose at 1 p.m.

2008th MEETING

Wednesday, 3 June 1987, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Present: Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, 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] (*concluded*)

1. Mr. BENNOUNA said that the Commission and the Sixth Committee of the General Assembly appeared to have reached a consensus on the approach to be taken to the formulation of draft articles which would give States a general framework for the harmonization of their relations in respect of the non-navigational uses of international watercourses. Such a general framework would be extremely useful, for although there had been many examples of positive and mutually beneficial arrangements and agreements, there had unfortunately also been many failures, as well as many disputes concerning the use of water. That was not at all surprising in view of the problems of that kind that could arise between communities in the same country. In his own country, for example, a complex set of customary rules had been developed to govern water uses and settle disputes arising therefrom.

---

[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.

2. Moreover, the spiritual and religious symbolism that had always associated water with life and creativity encouraged harmony rather than confrontation. As the source of life, water heightened the sense of justice which was reflected in the draft by means of the rule concerning reasonable and equitable utilization, a highly relative concept that depended on the States and the situations involved. The main purpose of the draft was to help States initiate permanent negotiations to solve their problems in an equitable manner. Care therefore had to be taken in referring to objective factors and the Special Rapporteur had done so by not proposing any kind of binding system that would not reflect the realities of inter-State relations.

3. The Commission had to avoid the temptation of drawing analogies with the concept of equity as used in the law of the sea. Such analogies could be quite dangerous, because they did not take account of the subject-matter of the sovereign rights at stake. Watercourses bore the stamp of absolute sovereignty, whereas the sea was the subject only of derived rights that stemmed precisely from absolute sovereignty, Moreover, man's impact on the environment was obviously much greater in the case of watercourses. In the law of the non-navigational uses of international watercourses, therefore, the concept of shared resources did not have the same meaning as it did in the law of the sea. Although States were bound to co-operate at sea, they were not bound to do so on land or in the area with which the Commission was dealing—or at least not in the same way. At sea, the exercise of rights required mutual acceptance, but that was not always true in the case of watercourses. The objective was thus to avoid any abuses of right, particularly abuse of the right to territorial sovereignty.

4. Reference had often been made to the law of the sea to justify the obligation to co-operate as a corollary of the principle of reasonable and equitable utilization. In fact, the obligation to co-operate had come to have different meanings in theory and in practice. It was a general obligation when the rights of States were not well established, but it became a genuine obligation to negotiate when sovereign rights were at stake. In the present case, it was full territorial sovereignty that was being exercised. The Commission's role would therefore be to enable the sovereignties involved to coexist positively, as well as to prevent any abuses of right: it had to promote the establishment of good-neighbourly relations.

5. That did not mean that a general provision such as the one contained in draft article 10 was unnecessary. That provision would serve a useful purpose because the harmonization procedures which would be elaborated at a later stage could not be exhaustive and the States concerned had to be allowed to show some creative imagination. It could also be asked whether the concept of co-operation should be maintained in article 10. That concept was not neutral, for it had ideological and political connotations. It concerned friendly relations between States. In legal terms, co-operation meant that States had to find peaceful solutions to their problems. That was why he preferred the term "harmonization". States would endeavour to harmonize their obligations and their rights under the draft articles, in the light of the object and purpose of the draft, which did not, moreover, have to be explicitly stated in the text.

6. Mr. AL-BAHARNA congratulated the Special Rapporteur on his reports, which contained a wealth of material on treaty provisions, court decisions, legal writings, the practice of States and the general rules of international law relevant to the topic under consideration.

7. The topic was a complex and sensitive one. For one thing, some States appeared hesitant to accept binding rules and took the view that the topic should be covered primarily by bilateral agreements. It was, however, quite clear that the Commission's mandate, as specified in General Assembly resolutions, included both the progressive development and the codification of rules of general international law relating to the non-navigational uses of international watercourses. Since the vital interests of so many States were at stake and more than two thirds of the 200 international river basins in the world were still not governed by agreements among the riparian States, there was every justification for the view that the Commission should prepare a draft convention which would develop and codify the relevant rules of international law.

8. As shown by the divergent views expressed in the Sixth Committee of the General Assembly in 1986, the Commission faced the difficult task of reconciling the doctrine of State sovereignty *stricto sensu* with the obligation of riparian States to co-operate in the reasonable and equitable utilization of international watercourses. Rules that would be legally binding on sovereign States could be drafted if, as some members of the Commission had suggested, the duty to co-operate provided for in draft article 10 was regarded as a general obligation to co-operate in good faith with other States. The basis for such co-operation would therefore be good faith, mutual respect and good-neighbourliness. Article 10 would then be a well-balanced text that took account of all the divergent views that had been expressed.

9. On the whole, articles 1 to 9 and article 10 should be drafted in a flexible manner so as to strike a balance between the sovereign rights of riparian States and their obligation to co-operate in good faith. It must be recognized that the classical doctrine of territorial sovereignty, which allowed a State to do what it pleased in its own territory regardless of the consequences outside that territory, now had to be reconciled with the principle that a State could not do anything within its territory that might produce harmful effects in the territory of another State. In that connection, most publicists had adopted a compromise position which required States to act in such a way as to avoid causing appreciable harm in the territory of neighbouring States.

10. The Sixth Committee's debate on the present topic during its consideration of the Commission's report on its thirty-eighth session had focused on four main points (see A/CN.4/L.410, paras. 708 *et seq.*). The first point was whether the Commission could, for the time being, defer the attempt to define the term "international watercourse". The Special Rapporteur had suggested

that the attempt could be postponed and, in the Sixth Committee, some representatives had supported that suggestion, while others had considered that the term had to be defined because the nature and scope of the obligations of riparian States depended on such a definition. The latter argument was theoretically sound, but prudence required that definitional questions should be deferred. He therefore supported the Special Rapporteur's position on that point.

11. The second point related to the use of the term "shared natural resources". The Special Rapporteur had proposed that effect should be given to the principles underlying that concept without using the term itself in the text of the draft articles. That approach had been supported by some representatives, but others had expressed the view that the term "shared natural resources" should be specifically mentioned, since it formed the basis for all the applicable principles in the area of law under consideration. Another opinion had been that the "shared natural resource" concept tended to cast doubts on the sovereign rights of States over their natural resources. In view of the variety of opinions expressed in the Sixth Committee, the Special Rapporteur had adopted a sound and pragmatic position. The "shared natural resource" concept could thus be rendered by stating the legal principles underlying it, without necessarily using the term itself in the text of the draft articles.

12. The third point was whether an article concerning the determination of reasonable and equitable use should contain a list of factors to be taken into account, or whether such factors should be referred to in the commentary. The Special Rapporteur had proposed that the article on equitable use should contain an indicative list of factors. In the Sixth Committee, most representatives had been in favour of the inclusion of a list of factors in draft article 8. Others had urged that the list should not differ essentially from that contained in article V of the Helsinki Rules,[5] which they regarded as part of the well-established practice of States. In his view, the list of factors was too important to be left to the commentary: only if it were included in the text of article 8 would it have its full significance and offer normative guidance. The list should, of course, be an indicative one, as proposed by the Special Rapporteur.

13. The fourth point was whether the relationship between the obligation to refrain from causing appreciable harm and the principle of equitable utilization should be made clear in the text of an article. The Special Rapporteur had indicated that the Drafting Committee would be able to find a generally acceptable means of expressing that relationship. In his second report (A/CN.4/399 and Add.1 and 2, paras. 180-181), the Special Rapporteur had stated that the problem was that an equitable allocation of the uses and benefits of an international watercourse might entail some "factual harm", in the sense of unmet needs, without entailing "legal injury" or being otherwise wrongful. In that connection, some representatives in the Sixth Committee had considered that unmet needs should not be the sole criterion, and had suggested that reference should be made only to "appreciable harm". Others had expressed the view that the term "harm" must be interpreted to mean "legal injury". Personally, he agreed with the Special Rapporteur that the task of balancing the two principles should be left to the Drafting Committee. The matter was of such great importance, however, that the Commission itself would also have to consider it at some stage.

14. He supported the suggestion that article 10, on the duty to co-operate, should be transferred to chapter II of the draft.

15. The Commission should give further consideration to the question whether the draft articles should take the form of a framework agreement or of a multilateral convention. Those in favour of the framework agreement approach had argued that it would be the best means of taking account of the wide variety of problems involved in the use of international watercourses. It had also been argued that, because of the diversity of international watercourses in terms of their physical characteristics and the human needs they served, that approach would be the best suited to the formulation of draft articles setting forth general principles and rules and providing general guidelines to facilitate co-operation among riparian States and the negotiation of future agreements relating to specific watercourses. He had, however, not yet decided whether he would prefer a multilateral convention or a framework agreement.

16. Mr. GRAEFRATH said that the interesting debate on draft article 10 had focused attention on the relationship between the principles of the sovereign equality of States and the duty to co-operate, to which quite different approaches could obviously be taken. In his view, however, those principles were very much at the heart of the present topic. He therefore supported the proposals made by Mr. Yankov (2003rd meeting). Unlike some members of the Commission, he was convinced that the draft articles should refer to the basic principle of sovereignty, as the draft submitted by the previous Special Rapporteur, Mr. Evensen, had done. In that connection, he did not find it helpful to describe one position taken by members of the Commission as conservative and another as more or less progressive: that sort of classification was purely a matter of opinion. The Commission had to take account not only of the competing interests of States, but also of different legal approaches to the topic under discussion. It had always refrained from characterizing any particular view as "conservative" or "progressive" and it would do well to abide by that tradition.

17. He supported the view that, in placing article 10 in the general part of the draft, the Commission should be careful not to water down the principle of the duty to co-operate to the point of rendering it devoid of legal meaning. It could therefore either define the content and purpose of co-operation on the basis of State sovereignty, or introduce a new article on the specific types of co-operation envisaged. He would welcome the Special Rapporteur's response to that suggestion.

18. Mr. FRANCIS pointed out that many parts of the world were subject to changing weather patterns and

[5] See 2002nd meeting, footnote 5.

asked whether that fact had been taken into account in article 10 and other articles of the draft.

19. Mr. McCAFFREY (Special Rapporteur) said that there was, of course, a close relationship between weather patterns and the hydrological cycle. Problems such as drought therefore provided an impetus for the Commission's work on the present topic. It would, however, be inappropriate for the draft articles to deal with the question of changes in weather patterns.

20. There had been a very rich discussion on draft article 10 and he thanked the members of the Commission for the constructive suggestions they had made. The discussion had focused on the existence and nature of a general obligation to co-operate in accordance with international law, on the position of article 10 in the draft and on the wording of the article.

21. Some speakers had expressed the view that a general duty to co-operate existed by virtue of the provisions of the Charter of the United Nations and the 1970 Declaration on Friendly Relations and Co-operation among States[6] and had drawn attention to the fact that it was recognized in a number of international instruments, including the 1982 United Nations Convention on the Law of the Sea. Other speakers had expressed doubts about the existence of such a duty and had stressed its vague nature. It had also been asked whether the duty to co-operate was an obligation of conduct or an obligation of result. Perhaps it might be more to the point to ask what specific obligations it entailed.

22. The relevant international instruments, as well as State practice and decisions in disputes relating to watercourses, clearly showed that States recognized co-operation as a basis for such important obligations as those relating to equitable distribution and the avoidance of causing appreciable harm. In fact, most agreements on watercourse uses referred to co-operation for a specific purpose and many of them indicated the legal basis for co-operation.

23. No one had objected to the idea of including an article on co-operation in the draft, provided that it was appropriately worded. In that connection, he welcomed Mr. Yankov's proposal (2003rd meeting, para. 10), which would improve the wording of article 10.

24. In his view, the duty to co-operate was quite clearly an obligation of conduct. What it involved was not a duty to take part with other States in collective action, but rather a duty to work towards a common goal. A watercourse State would thus not be under a duty to participate in waterworks planned by another watercourse State, but it would have the duty not to prevent a new project from being discussed.

25. Several members had stressed that the obligation set forth in article 10 was an umbrella obligation that covered other, more concrete, obligations, and had suggested that those obligations be specified in the draft. Some of them had, of course, already been specified in other articles, such as the obligation to avoid causing appreciable harm.

[6] See 2003rd meeting, footnote 5.

26. As to the question of the fulfilment of legal obligations, he stressed that the law of the non-navigational uses of international watercourses was very different from diplomatic law or the law of treaties, where it was comparatively easy to ascertain whether an obligation had been complied with or not. Such problems as determining whether a riparian State's equitable share was being exceeded or not called for co-operation between the States concerned to achieve and maintain an equitable apportionment. Some degree of contact and co-operation was essential. The content of the obligation stated in article 10 would therefore have to be spelt out as clearly as possible.

27. With regard to the position of article 10 in the draft, he agreed that it should be included in chapter II, dealing with general principles, rather than in chapter III, dealing with procedural rules, since the co-operation in question went beyond co-operation in matters of procedure. It was true that the other obligations set forth in chapter II, such as those relating to equitable utilization and the avoidance of causing appreciable harm, were obligations of result, whereas the obligation contained in article 10 was an obligation of conduct. But that fact should not deter the Commission from placing the provisions of article 10 in chapter II.

28. The time had come to refer article 10 to the Drafting Committee, which was currently considering articles 1 to 9. Mr. Yankov had rightly proposed that article 10 should refer to the specific purposes and objectives of co-operation, as well as to the principles of international law on which co-operation was based. Accordingly, he suggested that the Drafting Committee might consider the following revised text:

> "Watercourse States shall co-operate in good faith in the utilization and development of an international watercourse [system] and its waters in an equitable and reasonable manner, and in order to achieve optimum utilization and protection thereof, on the basis of the equality, sovereignty and territorial integrity of the States concerned."

29. A provision along those lines should not preclude the adoption of Mr. Graefrath's suggestion (para. 17 above) for the introduction of a new article on specific types of co-operation. The Drafting Committee might wish to consider whether such a new article should be included in the draft.

30. Mr. Sreenivasa RAO said that the discussion had served to highlight the fact that the world was interdependent and made up of independent sovereign States. It had therefore rightly been said that the doctrine of co-operation should be viewed in its broader context, notwithstanding the importance of the procedural aspects. The duty to co-operate was a matter of general policy and, as such, could not be elevated to the status of a principle or a prescription in a vacuum. It would, however, be erroneous to make a watertight distinction between policy and prescription, which interacted closely even if they were distinct. Furthermore, the duty to co-operate was a reciprocal duty and central to the peaceful coexistence and co-operative interaction of all members of the international community.

31. The framework agreement approach was the only way in which to deal with such a unique subject as watercourses. As he understood it, such an agreement represented an effort to capture general norms at the level of policies and at the level of more specific rules, both of which formed part of the process of the progressive development and codification of the law. Accordingly, the duty to co-operate should be seen not as a principle whereby certain conduct was required of a State, but as a general policy willingly adopted whenever interdependence and common interests so required.

32. Proceeding on the basis of such general policies, it could perhaps be stated with some assurance that, in the context of international watercourses, a State was entitled to reasonable and equitable use and enjoyment of the watercourse in accordance with the primary principle of sovereignty and territorial integrity. That primary principle of the sovereignty of a State over the portion of an international watercourse which flowed through its territory was, however, subject to a secondary principle, namely that, in using the watercourse, the State had a duty not to cause any adverse effects on uses by other riparian States. The Commission should therefore not only identify general and specific principles, but also seek to articulate priorities among those principles. In so doing, it should endeavour to avoid placing undue emphasis on the principle of territorial sovereignty or on the concept of collective ownership. It should likewise be wary of such general concepts as good faith, good-neighbourliness, shared natural resources, equitable use, etc., which had been used as a basis for propounding the collective or common-ownership concept.

33. Following a brief procedural discussion, the CHAIRMAN said he would take it that the Commission agreed to refer draft article 10 as submitted by the Special Rapporteur in his third report to the Drafting Committee for consideration in the light of the discussion and the summing-up by the Special Rapporteur.

It was so agreed.

ARTICLE 11 (Notification concerning proposed uses)

ARTICLE 12 (Period for reply to notification)

ARTICLE 13 (Reply to notification: consultation and negotiation concerning proposed uses)

ARTICLE 14 (Effect of failure to comply with articles 11 to 13) *and*

ARTICLE 15 (Proposed uses of utmost urgency)[7]

34. The CHAIRMAN invited the Commission to consider draft articles 11 to 15.

35. Mr. REUTER, noting that some members of the Commission were still not sure of the exact nature of the work done thus far, said that only when the entire text had been considered could it be decided whether the draft would take the form of recommendations or of a convention. In any event, the final decision would be made not by the Commission, but by the General Assembly. The Commission must nevertheless continue, as it had always done, to elaborate texts in the form of draft articles and to regard the provisions it formulated as binding legal rules entailing obligations which, even though they might be worded in a flexible manner, were obligations of conduct, not obligations of result. That was the Commission's role. The text it was preparing was, of course, intended to become universal and it had therefore been drafted in very general terms. That meant that States would be able to derogate from it and that specific agreements, whether regional or otherwise, would also have to be concluded. In that sense, the text might be described as a framework agreement, but it was binding all the same. That was the spirit in which the rules which the Commission had considered thus far must be regarded, for all of them, including draft article 10, about which some doubts had been expressed, were substantive rules.

36. In chapter III of the draft, the Commission was discussing procedural matters. He was, however, not sure whether the articles that remained to be considered really contained only procedural rules. They related to such questions as the obligation to provide notice of a proposed new use, the obligation to refrain for a certain period of time from initiating a proposed new use, and consultations and negotiations. The Special Rapporteur had rightly not gone beyond negotiation in the draft articles. But the Commission had to try to determine what would happen when negotiations came to a standstill. In his view, the only possible solutions in such a case were that the parties would either resort to arbitration or some other compulsory form of settlement, or recover their freedom of action. The second solution was probably preferable. There was, of course, nothing to prevent the Commission from proposing a compulsory arbitration procedure, but it must do so only by way of a recommendation and not in the draft articles, for two reasons: first, because its usual practice had been to leave it to Governments to decide whether the text should establish such a procedure; and secondly, because of the problems involved in arbitration, where, save in entirely exceptional cases, the arbitrators were not called upon to replace the parties to make a settlement or revise a contract, and where decisions were not taken on the basis of purely legal considerations and usually represented only an imperfect compromise solution.

37. He thus thought that the parties should recover their freedom of action if negotiations came to a standstill. Each State would then be free to decide what position to adopt and would be able to make its own assessment of the substantive rules contained in chapters I and II of the draft. If the text did not establish a compulsory arbitration procedure, the Commission would have to draft procedural articles in as precise a manner as possible in order to give the substantive rules approved thus far their full meaning.

38. In that connection, the provisions proposed by the Special Rapporteur in articles 11 and 12 were very important, because, for a State which was planning a new use of a watercourse, they constituted a recognition of the fact that rules applied to it, or in other words that its territorial sovereignty was no longer intact, even though it was still sovereign to assess the legal situations of concern to it. He personally would be inclined to strengthen

[7] For the texts, see 2001st meeting, para. 33.

the provisions of draft article 11 so that States would be under an obligation to explain why they thought a planned new use was reasonable and equitable. It was also obvious that notice had to be provided as soon as possible. The ideal solution would be for informal consultations to be held immediately, but unfortunately relations between States did not always make that possible. In any event, notice had to be provided before the Government had started the necessary internal procedures to give its project legal force—before the parliament was consulted, for example—because otherwise consultations and exchanges of views with the States concerned would serve no purpose.

39. The main question that arose in connection with draft article 12 was that of the length of the period of time to be allowed for replying to the notification. Initially, he had been in favour of general wording along the following lines: "within a reasonable period of time, taking account of the scope of the new use". Now, however, he thought that, if no provision was to be made for compulsory arbitration, article 12 should stipulate only a short period of time, so that there would be fewer disadvantages for the notifying State, which was already making a sacrifice by taking account of the interests of the other States concerned. A period of six months would be reasonable and, at the end of that period, the notifying State would recover its freedom of action.

40. He could not agree to the exception in the case of utmost urgency provided for in draft article 15, since a proposed use could be of utmost urgency only in the case where a disaster had occurred.

41. Finally, the future work on the topic would depend on the approach the Commission adopted now. If it decided to establish a compulsory arbitration procedure, it would probably have no difficulty in agreeing to a text proposed by the Drafting Committee, since any problems that might arise would be settled by the arbitrators. If it decided not to establish such a procedure, however, the substantive rules would assume even greater importance and would have to be carefully reconsidered.

The meeting rose at 1 p.m.

2009th MEETING

Thursday, 4 June 1987, at 10.05 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Present: Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Thiam, Mr. Tomuschat.

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 11 (Notification concerning proposed uses)

ARTICLE 12 (Period for reply to notification)

ARTICLE 13 (Reply to notification: consultation and negotiation concerning proposed uses)

ARTICLE 14 (Effect of failure to comply with articles 11 to 13) *and*

ARTICLE 15 (Proposed uses of utmost urgency)[4] (*continued*)

1. Mr. TOMUSCHAT said that he welcomed the Special Rapporteur's general approach to draft articles 11 to 15, which set forth a number of clear-cut principles. Chapter III of the draft was obviously intended to make the suggested rules effective by implying that the outcome of the Commission's endeavour should be a binding international treaty. In that respect, he fully agreed with the remarks made by Mr. Reuter at the previous meeting.

2. There was an inherent logic in the structure of the draft. A treaty on international watercourses that was universal in scope must of necessity be less specific than a treaty governing a single watercourse, although generality could easily become synonymous with weakness or even irrelevance. Too much abstraction meant that, in the absence of a provision establishing a mechanism for implementation, the substance of the relevant formulas tended to become volatile. Yet international lawyers had found that, in recent decades, even rather broadly framed principles could be remarkably effective, a case in point being the principle of self-determination, which, largely as a result of the efforts of the Committee of 24, had become a living reality. Good procedural rules were thus capable of compensating to a large extent for certain shortcomings in substantive provisions. He therefore agreed that the draft rules should contain a section on implementation mechanisms, which was the only way in which real progress could be achieved.

3. As demonstrated in the reports of both the present and the previous Special Rapporteurs, the basic substantive rules to be included in the draft were firmly rooted in contemporary practice and had already crystallized as customary rules. The Commission's main contribution, therefore, would lie in making proposals

---

[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 texts, see 2001st meeting, para. 33.