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Summary record of the 2009th meeting

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

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

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

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[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.

for appropriate procedural solutions. It would be helpful to all parties concerned if, on the one hand, potentially or actually affected States could lodge objections against measures that did not take adequate account of their interests and, on the other, the State planning such measures could duly inform its neighbours and thus be certain that it had done all that was required of it. A notified State which remained silent was precluded from making any complaints about the situation later on. Thus the proposed rules should not be seen as a unilateral sacrifice on the part of States wishing to develop the resources of an international watercourse within their territory. Most States were, in fact, likely to find themselves in both positions and few would have to consider the situation purely from the standpoint of an upstream State.

4. He wondered whether the Commission would classify the process contemplated in articles 11 to 15 as international co-operation or as a special form of international dispute settlement. Notification and information, which were provided for in article 11, could perhaps best be labelled mechanisms of international co-operation. As soon as consultations began under paragraph 2 of article 13, however, or at the latest at the negotiation stage under paragraph 3 of article 13, States would enter the realm of dispute settlement, in which there would be two conflicting claims: the notifying State claiming that the intended use was perfectly lawful, and the notified State claiming that the intended use would exceed the relevant equitable share of the use of the waters of the international watercourse in question and thus deprive it of its rightful benefits. He saw no obstacle to moving in that way from co-operation to dispute settlement. Normally, however, such negotiations would mark the final stage of the procedures to be provided for in the draft. It would be deceptive to think that a world-wide agreement could be usefully supplemented by provisions on arbitration. The progress achieved by placing States under an obligation to consult and negotiate should not, however, be underestimated.

5. The first issue to be faced in regard to draft article 11 was the most difficult, namely when and in what circumstances a duty of notification would arise. The Special Rapporteur had opted for the concept of "appreciable harm" and had explained that a new use which might cause appreciable harm to other States would not *per se* be unlawful. In that connection, the Special Rapporteur had drawn a distinction between instances in which uses entailing appreciable harm would still be within the equitable share accruing to the acting State, and instances in which appreciable harm would be coterminous with legal injury. A change in the wording none the less seemed desirable, for most lawyers would equate the term "appreciable harm" with legal injury, which would in turn imply an unlawful use of the waters in question.

6. Moreover, under article 11 as it was now worded, and in spite of the Special Rapporteur's intentions, a duty of notification could be seen to arise if, and only if, a use prohibited by international law was intended, with the unfortunate consequence that, by providing notification, a State would implicitly admit that it was potentially in breach of its international obligations. That being so, there would be virtually no voluntary compliance with the duty of notification and States would be at pains to refrain from notifying others of their plans, so as to make sure that they were not questioned.

7. Some more neutral form of wording should therefore be found to avoid prejudging the issue of whether an intended use was lawful or unlawful. It might be possible to borrow from the terminology used in the wealth of material presented by the Special Rapporteur in his third report (A/CN.4/406 and Add.1 and 2) and to provide that a duty to take procedural steps usually arose if and when another State would be "seriously", "significantly" or "materially" affected by an intended use.

8. Article 11 now covered major works such as the construction of canals or hydroelectric power stations. Day-to-day routine uses which could not be traced back to a single, major new polluting factor could, however, also result in a significant deterioration of the waters of an international watercourse. For instance, a series of factories sited along a river might each dispose of waste water in the river, and a point would come at which the regenerating capacity of the river would be exceeded. That situation occurred in many industrialized countries. For example, nobody would dream of using the waters of the Seine, the Rhine, the Elbe, the Oder or the Vistula for irrigation purposes. The main problem was pollution to which everyone contributed, not only factories, but also farmers who used pesticides and insecticides in ever-increasing amounts, and individuals who readily availed themselves of all the benefits of modern hygiene. Articles 11 to 15 failed to have any bearing on that phenomenon of creeping pollution. An entirely new provision was required specifically establishing that a State which considered that it was being deprived of its equitable share in the utilization of an international watercourse—not by a new use but in any other fashion—might notify the State affecting its interests, whereupon that second State would be obliged to consult and eventually negotiate with the notifying State.

9. A further point concerned the opening words of article 11, "If a State contemplates a new use . . . ". Obviously, it was not only States that made use of international watercourses. In a modern industrialized country, there was a multitude of private uses of watercourses. To refer simply to the State would create the false impression that only acts of State organs were being considered. The Commission could well revert to the wording proposed in earlier drafts and refer to a State which "undertakes, authorizes or permits a project". That would also be in line with draft article 9, under which States had a general responsibility to control any activity relating to an international watercourse within their territories.

10. It was a little dangerous and misleading to use the word "determine" in the second sentence of article 11, since it suggested that the notified State might make a unilateral determination of a binding character. The notified State should have the opportunity of evaluating and assessing the potential harm, according to its sub-

jective judgment, but it should not be able to impose its views on the notifying State. It would therefore be preferable to speak of "assessment" or "evaluation". It would also be better to refer to any other potentially affected "State", in the singular rather than the plural, for in many instances only one State would be involved.

11. The substantive provisions of articles 11 to 15 should be separated from the genuinely procedural rules, particularly in the case of the standstill provision in paragraph 2 of article 12, which could easily be overlooked if the text were not read with the necessary attention. Paragraph 3 of article 14, which provided that a State would incur liability for any harm caused to other States by a new use which it had not notified them of, should also form the subject of a separate article. The standstill clause and the liability provisions were crucial and therefore deserved the closest attention. The standstill clause, in particular, posed a dilemma because, on the one hand, States planning certain major works should be encouraged to provide full information on the wide range of activities that might entail serious consequences, and, on the other hand, if a notifying State was bound to refrain from pursuing its activities on an intended project it might decide that it was in its best interest to make notification only in extreme circumstances. Those two positions could perhaps be reconciled in the manner indicated by Mr. Reuter, but the issues involved were so important that they should be dealt with in a special article. He would like to know whether any authority existed in international sources for a "freeze" on activities, or whether the Commission would be breaking new ground, which it was fully entitled to do under its mandate to engage in the progressive development of international law.

12. The draft articles were not entirely clear as to the duration of the standstill. Article 12, paragraph 2, referred only to the initial period during which the notified State was expected to reply to the notification. It seemed from article 14, paragraph 2, that the freeze would normally extend beyond the initial six-month period. Since negotiations might take years, even decades, a clear-cut closing date was obviously needed. Possibly the point could be covered by extending the initial period for a flexible or fixed amount of time. The burden placed on the notifying State should not be unduly heavy, however, for otherwise the draft articles would not be acceptable to the States concerned.

13. He wondered whether it was wise to relate the standstill clause solely to notification under article 11, since no similar obligation would arise for a State if it simply refrained from providing any information. If a potentially affected State which had not been informed about an intended new use invoked the obligations of the author State under article 11, the author State was not bound to refrain from executing its project. Once again, it was apparent that any State which took its obligations seriously and provided notification under article 11 would be placed at a disadvantage, for notification would be tantamount to an admission of guilt. On the other hand, to confer upon a foreign State the right to obtain unilaterally, and merely by invoking article 11, the suspension of work undertaken by the author State would seriously encroach upon the latter's sovereign rights. The standstill clause would be operative only if the notifying State voluntarily undertook to abide by it, and that might make Governments very reluctant to provide notification. To his mind, they should not, however, have any inhibitions about establishing a channel of communication with neighbouring States. It was a problem that would require very careful consideration.

14. Mr. McCAFFREY (Special Rapporteur) said that creeping pollution, mentioned by Mr. Tomuschat, raised the question whether the obligations under articles 11 *et seq.* would be invoked if the harm or adverse effects for the other State did not result from a new use or project. There were two possible answers. One, which related more specifically to the kind of situation envisaged by Mr. Tomuschat, was to be found in the statement in paragraph (3) of the comments on draft article 11 that "the expression 'new use' comprehends an addition to or alteration of an existing use, as well as new projects, programmes, etc.". The difficulty there was that the State which was the source of the adverse effects might not be aware of its obligation to provide notice under article 11, and the burden would therefore fall on the affected State to request the source State to comply with its obligations under articles 11 *et seq.* The other answer, to which he had already referred in his second report (A/CN.4/399 and Add.1 and 2), was that the situation might be covered by paragraph 2 of draft article 8. He would, however, have no objection to Mr. Tomuschat's suggestion regarding a separate article on the matter.

15. As to the mechanism that would trigger the duty to notify, it might be advisable from the point of view of consistency to use in the articles on notification the same criterion as contained in draft article 9, which spoke of the duty to avoid causing appreciable harm. A triggering mechanism which would not necessarily entail the commission of an international wrong could none the less be considered. Rather than focus on harm, therefore, it would be useful to consider some standard based on appreciable, significant or material effect.

16. He did not attach the same connotations to the word "determination" as did other members, but if it caused problems another term could be found. It had not been his intention to imply that the notified State could make a unilateral and binding determination, but rather to provide that that State should decide for itself whether a contemplated use of a watercourse would pose a risk of harm to it. "Assessment" was a good alternative, and "evaluation" was also a possibility.

17. With regard to the standstill provision, authority for a freeze could be found more particularly in a large body of European practice, in which the duty to consult had reached the level of a duty to obtain prior consent. Such practice, which was summarized in his third report (A/CN.4/406 and Add.1 and 2, paras. 63-87), provided support for a reasonable standstill period, and he was entirely in agreement with that, since an unreasonably long period would merely deter States from providing notification.

18. One further question was whether a standstill obligation arose if a State believed that it would be af-

fected by an activity or project contemplated or initiated by another State and if it so informed that other State under article 14. Possibly some drafting changes might be required to make the position quite clear.

19. Mr. KOROMA, referring to the standstill clause in article 12, said that some situations did not appear to be covered at the present time and that the Commission might well have to prepare a new rule that would also contain an element of progressive development of the law. He had in mind instances in which a State invoked the obligation to notify on the grounds that a new project would cause appreciable harm to it but the author State decided that the case did not call for notification and went ahead with the project. The first State thereupon took countermeasures and embarked on a project of its own. The question was whether the obligation to freeze the project would apply in that situation.

20. Mr. McCAFFREY (Special Rapporteur) said that the whole purpose of draft articles 11 to 15 was to prevent a situation of that kind, namely one in which it was too late to turn back. The articles were intended to achieve and maintain an equitable allocation of the uses of the watercourse and to nip in the bud the type of problem that arose when the scales were tipped in favour of one riparian State.

21. A State contemplating a new use could consider that its project did not call for notification and then proceed with it, but another State which believed that the contemplated use would cause it appreciable harm could, by virtue of article 14, paragraph 1, invoke the obligation of the author State to notify under article 11. Discussions would then take place and an adjustment might be arrived at. If, however, the author State continued with the project and the project caused appreciable harm to the other State, such action would constitute an internationally wrongful act. The case was clearly one of international responsibility and, in that respect, he would draw attention to the provisions of article 14, paragraph 3. Bringing international responsibility into play was of course the last resort, when the balance of uses by the various riparian States could not be restored by means of consultation and negotiation.

22. When the author State failed to provide notice of the contemplated new use, the proper response by the other State was to invoke the obligation to notify, as indicated in article 14, paragraph 1. If it was too late and the appreciable harm had already occurred, the injured State could invoke the international responsibility of the author State in respect of what constituted an internationally wrongful act.

23. The problem of countermeasures, though not frequent, was very real. The State which considered itself harmed by the author State's new use sometimes took retaliatory action, possibly by erecting waterworks. In a case of that kind, if appreciable harm ensued, draft articles 11 to 15 would also apply.

24. Mr. BENNOUNA said that the situation mentioned by Mr. Koroma and the Special Rapporteur involved another field, namely the law of treaties, and the relevant rules would then be the rules applicable to failure to observe treaty obligations.

25. It was perhaps regrettable that the Commission had decided to consider article 10 separately from articles 11 to 15, for the procedural rules contained in articles 11 to 15 took on a slightly different meaning when they were tied in with the provisions of article 10, which related to co-operation. From the examples used by the Special Rapporteur in drafting articles 11 to 15, it was plain that co-operation between the States concerned had existed, even in an institutionalized form, such as joint commissions and other administrative mechanisms, as mentioned in the third report (A/CN.4/406 and Add.1 and 2, para. 75). Where there was a will to co-operate, to act together in developing a watercourse, as in the examples cited, it was of course possible to lay down binding procedures such as those set out in articles 11 to 15. Such readiness to co-operate did not always exist, however. Consequently, he was somewhat disturbed by the contrast between chapter II of the draft, which set out general principles but none the less allowed States some room for manœuvre, and articles 11 to 15, which established an extremely rigid and binding procedure. In particular, the standstill clause in article 12 went too far and placed too many limitations on the State's jurisdiction over its territory. He wondered whether it might not have been preferable to retain in the rules on procedure the same flexibility as was to be found in the substantive rules.

26. Mr. McCAFFREY (Special Rapporteur) said that it was difficult for a State to determine whether it was complying with general provisions such as the rules on equitable utilization and the prevention of appreciable harm. The procedural rules enabled a State contemplating a new project to notify the other States concerned and, in the absence of a response, to go ahead with its project.

27. It would have to be seen whether States would accept general obligations of that kind. Actually, a large number of States had accepted them in agreements on international watercourses. The list in annex II to his third report (A/CN.4/406 and Add.1 and 2) cited a great many international agreements containing provisions concerning notification and consultation. The agreements, which related to Africa, America, Asia and Europe, were only a sample of the far more numerous international instruments embodying provisions of that type. Additional agreements appeared in the 1963 report by the Secretary-General, which had been brought up to date in 1974.[5] The problem was whether the existence of a rule of general international law could be inferred from that impressive body of treaty practice. Some would argue that the inclusion of a rule on notification and consultation in nearly all watercourse treaties showed that a customary rule of international law on the subject did exist. Others, however, would hold that the very need to include such a provision in treaties proved that customary international law did not impose a duty to notify and consult.

[5] "Legal problems relating to the utilization and use of international rivers", report by the Secretary-General (A/5409), and "Legal problems relating to the non-navigational uses of international watercourses", supplementary report by the Secretary-General (A/CN.4/274), reproduced in *Yearbook . . . 1974*, vol. II (Part Two).

28. He preferred to take a less theoretical approach. The plain fact was that States had accepted provisions on notification and consultation in numerous watercourse treaties. The problem facing the Commission was to decide whether that duty could be generalized. As he saw it, recognition of the duty to notify and consult was necessary in order to give effect to the rules on equitable utilization and prevention of appreciable harm. Rules on notification and consultation would make it possible for a State to ascertain whether it was exceeding its equitable share of a watercourse. Otherwise, it would have to wait until the other State or States concerned made representations, by which time it might be too late: a dam or a new factory might already have been built.

29. Mr. FRANCIS said that, further to Mr. Bennouna's comments, it was pertinent to determine the nature of the draft convention the Commission was preparing. Was it a set of residuary rules? Secondly, it was necessary to take account of the greatly accelerated pace of progress in all fields, including technology, for the Commission's draft would have to stand the test of time. Allowance would have to be made for the fact that the principles embodied in it would be applied largely through bilateral treaties or restricted multilateral treaties, depending on the number of riparian States involved.

30. Lastly, it should be emphasized that the Commission was engaged in the task of both developing and codifying international law. Where it developed the law, it would have to ensure that the new rules were made effective.

31. The CHAIRMAN said that the meeting would rise to enable the Drafting Committee to meet.

The meeting rose at 11.15 a.m.

2010th MEETING

Friday, 5 June 1987, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Present: Mr. Al-Baharna, 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.

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. CALERO RODRIGUES said that the importance of draft articles 11 to 15 went far beyond procedural considerations. As the Special Rapporteur pointed out in his third report, the "set of draft articles on procedural requirements" constituted the "centrepiece" of the report (A/CN.4/406 and Add.1 and 2, para. 7). In his second report, too, the Special Rapporteur had referred to "procedural requirements that are an indispensable adjunct to the general principle of equitable utilization" (A/CN.4/399 and Add.1 and 2, para. 188).

2. The procedural rules were intended to apply to the situation in which a State "contemplates a new use of an international watercourse which may cause appreciable harm to other States". Like the corresponding provisions submitted by the previous Special Rapporteur, Mr. Evensen, the draft articles under consideration provided for a scheme comprising notification, reply, time for reply, consultations, negotiations and, finally, settlement of disputes. Draft articles 11 to 15, however, also dealt with the consequences of objections raised in reply, with the consequences of failure to comply with the rules, and with the rights of States in cases of "utmost urgency". At the present stage, he proposed to deal with only three questions: first, the scope or nature of the situation to which the rules applied; secondly, the consequences of non-compliance with the rules; and, thirdly, the suspensive effects of the application of the procedural provisions, in other words the "standstill clause".

3. On the first question, the draft articles required "timely notice" to be given when a State contemplated a new use of an international watercourse that could cause "appreciable harm" to other States. The term "new use" had to be construed *lato sensu*, so as to cover modification of an existing use and uses by private persons in the State concerned.

4. Under draft article 9, which was before the Drafting Committee, uses or activities that might cause appreciable harm to the rights or interests of other watercourse States were prohibited, unless otherwise provided for in an agreement between the States concerned. Certain undesirable restrictions on uses then appeared

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[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.