Document:-
A/CN.4/SR.2312

Summary record of the 2312th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1993, vol. I

able'' should be replaced by the word ''significant''. Notwithstanding the analysis of the two words just given by Mr. Calero Rodrigues, the amendment would not affect the content of the article. In the light of the Commission's study of the question in the past, it was clear that ''significant'' meant ''important''. The framework convention would not necessarily affect existing international watercourse agreements unless the States parties to such agreements decided otherwise. As Mr. Calero Rodrigues had suggested, that point should be included, perhaps in article 3. The same amendment should, of course, be made in article 4.

24. The content of the principle of equitable and reasonable utilization dealt with in articles 5 and 6 would be determined by States, but article 5 should indicate model forms of utilization, concerning, for example, the division of a watercourse among States, for that would facilitate the settlement of disputes. There were already many useful agreements on the topic. Article 7 would then become redundant because it would constitute an exception to the principle of utilization of private property without harming others. Under article 7, the harm would be assessed subjectively rather than objectively and thus weaken the text.

25. The meaning of article 31[11] was unclear because the second sentence seemed to contradict the first. In any event, such vital information might be protected by national laws which would have to be observed. He agreed with the Special Rapporteur that no change was required in article 8, which had his full support.

26. He endorsed the comments made by Mr. Calero Rodrigues on the subject of confined groundwater, for groundwater appeared to have no direct connection with the topic of the draft articles. Its inclusion might cause fundamental difficulties because the issue really required a separate set of provisions.

27. Mr. CALERO RODRIGUES said that he had made a mistake in his reference to Mr. McCaffrey's proposals on dispute settlement, for they included not only conciliation, but also an obligation of recourse to arbitration.

28. Mr. ROSENSTOCK (Special Rapporteur) said that Mr. Calero Rodrigues had been right the first time. The proposals pointed in the direction of arbitration, but did not impose an obligation.

29. Mr. GÜNEY expressed his congratulations to the Special Rapporteur on his first report, which took a pragmatic approach, but displayed a spirit of accommodation. He also paid a tribute to Mr. McCaffrey for his contribution to the draft articles. The Special Rapporteur was working in a field where there were many existing international agreements containing principles which were difficult to codify in view of the different situations covered.

30. The draft articles should take the form of a framework agreement containing general recommendations which States could follow in drafting agreements adapted to their own situations. Except in the case of the United Kingdom of Great Britain and Northern Ireland, all the Governments which had commented on the topic preferred a framework agreement rather than model rules. The Commission should eventually make recommendations on the settlement of disputes, but it would be premature to do so before the draft articles themselves had been adopted.

31. He agreed with the Special Rapporteur that the definition of ''pollution'' should be moved from article 21[12] to article 2. The definition of ''watercourse'' contained in article 2, subparagraph (*b*), had been widely criticized because it extended the scope of the draft articles. The Commission would in fact be exceeding its mandate by dealing with groundwater as well as surface water. The definition in question would entail the comprehensive redrawing of maps, which at present did not indicate groundwater. That would be a burden for the developing countries and, in any event, there was insufficient data for the accurate representation of groundwater. It was also difficult to make distinctions between groundwater and surface water and disputes would arise as to whether water was confined or unconfined. Article 2, subparagraph (*b*), should therefore be redrafted to cover only surface water. There would then be no problem in deleting the words ''flowing into a common terminus''.

32. He could accept the replacement of the word ''appreciable'' by the word ''significant'' in article 3 and the other draft articles, although he would have preferred the word ''substantial''.

33. Article 5, paragraph 2, might be superfluous, since its main point—equitable and reasonable participation in the use, development and protection of an international watercourse—was already covered in paragraph 1. In his view, paragraph 2 should be deleted. He had serious doubts about the Special Rapporteur's proposal for the rewording of article 7 because the result might be to upset a precarious balance which made equitable and reasonable use a decisive element of the draft articles.

The meeting rose at 11.20 a.m.

[11] See *Yearbook... 1991*, vol. II (Part Two), p. 69.

[12] See footnote 3 above.

2312th MEETING

Friday, 25 June 1993, at 10.05 a.m.

Chairman: Mr. Julio BARBOZA

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Bennouna, Mr. Calero Rodrigues, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Kabatsi, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Robinson, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Vereshchetin, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/446, sect. E, A/CN.4/447 and Add.1-3,[1] A/CN.4/451,[2] A/CN.4/L.489)

[Agenda item 4]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. MAHIOU, referring to the Special Rapporteur's proposals on parts I and II of the draft articles adopted on first reading,[3] said that, with regard to the future form of the text, the Commission had been working since the beginning with a framework convention in mind and should, in his opinion, continue in that direction. The Commission was a codification body and not a "think tank" commissioned to produce reports on various subjects.

2. The draft text would benefit from the inclusion of provisions on dispute settlement. The previous Special Rapporteur had already drafted provisions along those lines: they could be taken up again and he was eager to hear the current Special Rapporteur's suggestions on that matter at the next session.

3. He had no comment on article 1 of part I of the draft; he did, however, have serious reservations about the Special Rapporteur's proposal to delete the phrase "flowing into a common terminus" in article 2. The Special Rapporteur stated without further explanation that the phrase could lead to confusion and risked "the creation of artificial barriers to the scope of the exercise". However, its deletion might also create an artificial unity between watercourses or watercourse systems which were very different. He recalled that, in paragraph (7) of the commentary to article 2 adopted on first reading,[4] pains had been taken to explain that the simple fact that two different drainage basins were connected by a canal did not mean that they should be considered as a single watercourse or watercourse system. That was therefore a delicate issue. Nevertheless, he was not inflexible on the subject and was willing to endorse the Special Rapporteur's proposal if he could provide convincing arguments for it, but that was not the case for the moment.

4. Since the Commission had asked the Special Rapporteur to consider the problem of confined groundwater and to determine whether it should be the subject of a separate study or part of the draft articles, he would express his viewpoint after the Special Rapporteur had submitted his report on that matter.

5. In respect of article 3, he had no objection to the replacement of the word "appreciable" by the word "significant", in alternative A. However, he was not in favour of the proposed alternative B, which referred to "significant harm". In his view, that introduced a new element which limited the scope of the article. The difference between "affect to a significant extent" (alternative A) and "cause significant harm" (alternative B) was not negligible. The Special Rapporteur was proposing that a reference to "existing agreements" should be added to article 3. He was not convinced that that was necessary; it might lead to complications and inflexibility. The normal rules deriving from the law of treaties and, in particular, the provisions of the Vienna Convention on the Law of Treaties would be adequate to deal with the question of successive agreements.

6. With regard to where articles 8 and 26 should appear in the text, he saw no reason why the Drafting Committee could not make that decision, since it was a question of form rather than one of substance.

7. In respect of part II of the draft articles, the Special Rapporteur was correct in referring to a delicate problem of balance between articles 5 and 7. There was perhaps also some ambiguity with regard to the nature and scope of the responsibility of States for the implementation of those articles. However, that did not justify amending article 7 as radically as the Special Rapporteur would like. The text he was proposing might actually destroy the balance to which he had wanted to draw the Commission's attention.

8. It was also unfortunate that the Special Rapporteur had felt obliged to refer specifically to pollution in article 7. The inclusion of that concept could only give rise to a new debate, the outcome of which was unclear. Assuming, moreover, that the Special Rapporteur's proposal was accepted, the wording he was suggesting was not free of difficulties. When he stated that a use which causes significant harm in the form of pollution shall be presumed to be an inequitable and unreasonable use unless "there is the absence of any imminent threat to human health and safety", the merits of such a limitation could be questioned. One had only to imagine, for example, the significance for certain riparian States of pollution which resulted in the death of all the fish in the watercourse system. That long and substantial amendment to article 7 did not seem necessary.

9. Thus, although he endorsed some of the drafting changes proposed by the Special Rapporteur, he could not for the time being agree to some far-reaching amendments, in particular to articles 5 and 7.

10. Mr. YAMADA said he would begin with some general remarks before commenting in detail on the draft articles re-examined by the Special Rapporteur, who had submitted a "model" report that was especially concise and practical.

11. Judging from the discussions in the Sixth Committee (A/CN.4/457, sect. E) and the comments and observations received from Governments (A/CN.4/447 and Add.1-3), the text that had emerged from the first reading seemed to have been received favourably by States, and that was clearly the result of the excellent work done by the previous Special Rapporteur. The Commission must not lose its momentum and should try to complete its second reading of the draft before the end of the next session.

12. One way to expedite the work was, as pointed out by the Special Rapporteur, to resolve immediately the issue of the form of the draft text. He personally favoured a framework convention. It was, however, important to have a clear idea of what was meant by that term. In

[1] Reproduced in *Yearbook... 1993*, vol. II (Part One).

[2] Ibid.

[3] See *Yearbook... 1991*, vol. II (Part Two), pp. 66 *et seq.*

[4] For the commentaries to articles 2, 10, 26 to 29 and 32, ibid., pp. 70-78.

other words, what were the limits of freedom to which watercourse States were subject in concluding specific agreements? Article 3, paragraph 1, stated that watercourse agreements "apply and adjust the provisions of the present articles to the characteristics and uses of a particular international watercourse or part thereof". If the Commission wished to continue to work towards a framework convention, it might be necessary to clarify the meaning and scope of the word "adjust".

13. The Special Rapporteur mentioned in his report that a number of Governments had urged the Commission to consider adding dispute settlement provisions to the text. He would also recommend the inclusion of provisions on the settlement of disputes relating to the interpretation and application of the future convention. Disputes that might arise with respect to the uses of international watercourses were of a special type and called for special settlement procedures. The articles contained in part II made it clear that disputes would probably relate to the "equitable and reasonable utilization" of a particular international watercourse: special attention should thus be paid to procedures for fact-finding, assessment and evaluation. It would thus be appropriate to provide for a system of amicable third-party settlement, with the possibility of recourse to arbitration.

14. He also drew the Commission's attention to the problem of ensuring the coherence and coordination of the work it was carrying out on various topics. The articles in part IV (Protection and preservation) and part V (Harmful conditions and emergency situations)[5] were closely related to the questions of prevention being discussed in the framework of international liability for injurious consequences arising out of acts not prohibited by international law. Care should be taken to maintain consistency between the concepts and draft articles of those two topics in order to ensure the universality and uniformity of the international legal order.

15. Turning to the draft articles, he noted that the Special Rapporteur's first report dealt only with the articles of parts I and II, so he would refer only to those matters at present. However, that did not prevent him from commenting on the order of the articles in the draft text. In his view, the articles of part VI (Miscellaneous provisions)[6] might be moved to other parts of the draft. For example, article 31 (Data and information vital to national defence or security) could be attached to article 9 (Regular exchange of data and information) and article 32 (Non-discrimination) could be transferred to part II (General principles).

16. Furthermore, he agreed with the Special Rapporteur's proposal that article 21, paragraph 1, in which the word "pollution" was defined, should be moved to article 2 (Use of terms). The same could be done with article 25, paragraph 1, which defined the word "emergency", and with article 26, paragraph 2, which defined "management". He also agreed with the Special Rapporteur's proposal that the word "appreciable" should be replaced by the word "significant" in article 3, paragraph 2. However, so far as terminology was concerned, it was important, in his view, to be consistent with the wording used in the draft on international liability for injurious consequences arising out of acts not prohibited by international law. The scope of the word "significant" should therefore be explained in the commentary.

17. Although the Special Rapporteur seemed to prefer alternative B of article 3, paragraph 2, he felt somewhat uneasy about the expression "does not cause significant harm to the use ... of the waters". It would be more natural to say, as in alternative A, "does not adversely affect, to a significant extent, the use ... of the waters".

18. The Special Rapporteur also proposed that articles 8 and 26 should be placed before article 3. While he was not opposed to that change, careful thought should be given to where each of those articles would be transferred.

19. As to article 10, paragraph 2, which dealt with the question of a conflict between uses of an international watercourse, it would perhaps be advisable, with a view to the implementation of that provision, for the Commission to prepare some flexible system of consultation.

20. The Planning Group had recommended to the Commission that the Special Rapporteur should be requested to undertake a study in order to determine whether it would be feasible to incorporate into the topic the question of "confined underground waters" and the Special Rapporteur apparently considered that that could be done fairly easily. If that were so, he would see no difficulty in that. If, however, it were to cause difficulties and involve a considerable amount of additional work, it would be preferable to examine the question separately and to carry on with the work as scheduled.

21. Mr. BENNOUNA paid a tribute to the Special Rapporteur and also to his predecessor, whose excellent draft articles, which had already been adopted on first reading, required little change, in his view. He feared, however, that the present Special Rapporteur's proposals did not take sufficient account of the draft as a whole and might ultimately upset the balance of the text adopted on first reading.

22. Commenting on questions of a general nature, he reminded the Commission that it had already decided to work on a framework convention: it should stick to its original objective. The whole point of the work on watercourses was to harmonize certain minimal rules by laying down a basic framework which would have the support of all States. That was particularly true because part III of the draft was essentially procedural, and that was itself an indication that, in that as in other areas, procedure and substance were closely linked.

23. With regard to the settlement of disputes, the Commission, which could hardly expect to introduce innovations into the topic under consideration, could perhaps be spared the task of drafting provisions on the question, particularly since part III of the draft already provided for a system of negotiation and consultation. Reference could perhaps be made to Article 33 of the Charter of the United Nations. But it did not seem advisable, in what should be a flexible draft, to impose binding procedures on States.

24. In connection with article 3, he was not opposed to the word "appreciable" being replaced by the word

[5] See footnote 3 above.

[6] Ibid.

"significant" in alternative A, but he did not see what benefit was to be derived from proposing an alternative B, which in any event had no connection with the points of terminology raised by the Special Rapporteur. The Special Rapporteur's analysis also seemed to be somewhat confused, as was apparent from his proposal to make mention of existing agreements in article 3, paragraph 3. Perhaps he had not weighed all the consequences. What purpose would be served by a framework agreement if it were weakened in that way? Moreover, it was clear from the draft as a whole that there was no need for such a proposal, since the question was settled by article 10, which stipulated that "In the absence of agreement or custom to the contrary, no use of an international watercourse enjoys inherent priority over other uses". The best solution, in his view, would be to adhere to the general law of treaties.

25. What was most important was the relationship between articles 5 and 7, which lay at the very heart of the topic. The new wording proposed for article 7 was not clear, however, and also had the drawback of introducing the problem of pollution, which was already covered by article 21, without establishing any connection with that article. In reducing harm to cases of pollution, the Special Rapporteur was really going too far.

26. Having regard to all of those points, he believed that the draft adopted on first reading had been the best possible compromise. Perhaps it required a few drafting changes, but on the whole it should be retained.

27. Mr. YANKOV said that the report before the Commission was well suited to the requirements of a second reading in that it focused on the survey of the observations of Governments and took account of new developments which had a bearing on the draft articles.

28. Commenting on issues of a general nature and, above all, on the final form of the draft articles, he noted that the Commission, in paragraph (2) of its commentary to article 3,[7] had already expressed a preference for a framework convention "which will provide for the States parties the general principles and rules governing the non-navigational uses of international watercourses, in the absence of specific agreement among the States concerned, and provide guidelines for the negotiation of future agreements". It was true that, given the diversity of watercourses and the often conflicting interests of States, model rules embodied in a General Assembly resolution or declaration would make it possible to circumvent the problem of ratification. However that should not overshadow the legal advantages of a binding instrument which took the form of an umbrella convention, particularly since the existing draft had all the qualities and elements of a framework convention.

29. Another general issue dealt with in the report was dispute settlement. He agreed in principle with the Special Rapporteur's proposal that the draft should contain general rules on the question, laying down standard dispute settlement procedures and providing in particular for recourse to special mechanisms in the case of specific agreements, with, where appropriate, the assistance of technical expert bodies. He agreed with Mr. Bennouna, however, that it was important not to expect too much of a chapter on the settlement of disputes in a convention of that kind, which differed in that respect from, for example, the United Nations Convention on the Law of the Sea.

30. The establishment of river-basin committees or other similar bodies could, however, be envisaged under a general rule, which would be in accordance with a fairly widespread practice. The United Nations Conference on the Human Environment had recommended that the "Governments concerned consider the creation of river-basin commissions or other appropriate machinery for cooperation between interested States for water resources common to more than one jurisdiction"[8] and the experience of those technical commissions was very encouraging. That was true of the Niger Basin Authority, the Gambia River Basin Development Organization and the International Commission for the Protection of the Rhine against Pollution. That kind of machinery was also envisaged for the protection of the environment in the Danube basin and for other rivers which contributed to the contamination of the Black Sea, such as the Dnieper and the Dniester, as well as for the Don and the Kuban, which flowed into the Sea of Azov, which was itself connected to the Black Sea. It would therefore be advisable, in his view, for the draft to contain a few general rules on systems of regional cooperation.

31. The draft should also reflect the relevant concepts and principles formulated at the United Nations Conference on Environment and Development, particularly in Agenda 21[9] and in the Rio Declaration on Environment and Development.[10] He had in mind, in particular, the concept of sustainable development and the so-called holistic approach to the protection of the environment, in which economic and social considerations were integrated with environmental issues. Principle 4 of the Rio Declaration stated, for example:

> In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.

That idea was also embodied in chapter 18 of Agenda 21 relating to protection of the quality and supply of freshwater resources and the application of integrated approaches to the development, management and use of water resources, which stipulated in paragraph 18.5 that:

> The following programme areas are proposed for the freshwater sector:
>
> (*a*) integrated water resources development and management;
>
> (*b*) water resources assessment;
>
> ...

and which also dealt with other fields of environmental protection and management that might be relevant to the non-navigational uses of international watercourses.

32. It would be unfortunate if the draft did not reflect those elements, among others, for they were extremely

[7] Initially adopted as article 4. For the commentary, see *Yearbook... 1987*, vol. II (Part Two), pp. 27-30.

[8] See *Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972* (United Nations publication, Sales No. E.73.II.A.14 and corrigendum), p. 17, Recommendation 51.

[9] A/CONF.151/26/Rev.1 (Vol. I) (United Nations publication, Sales No. E.93.I.8 and corrigendum), pp. 9 *et seq.*

[10] Ibid., pp. 3-8.

relevant, such as, for instance, the principle laid down in paragraph 18.8 of Agenda 21 whereby:

> Integrated water resources management is based on the perception of water as an integral part of the ecosystem, a natural resource and a social and economic good, whose quantity and quality determine the nature of its utilization.

Furthermore, paragraph 18.9 stressed that:

> Integrated water resources management, including the integration of land- and water-related aspects, should be carried out at the level of the catchment basin or sub-basin. . . .

that principle also deserved to have a place in the draft, which it would make more up-to-date.

33. Special attention should likewise be paid to the requirement of an environmental impact assessment, as laid down in principle 17 of the Rio Declaration, which read:

> Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.

That general rule on environmental impact assessment had already been incorporated in a number of instruments, such as the Convention on Environmental Impact Assessment in a Transboundary Context or the Convention on the Protection and Use of Transboundary Watercourses and International Lakes.

34. Those concepts could perhaps have a place in part II of the draft, which dealt with general principles, and could then be elaborated in part III, particularly in relation to management issues, and in part IV, in relation to the holistic approach to the protection and preservation of the environment of watercourses.

35. As to the draft articles, the concept of integrated water resources management, as emphasized in paragraphs 18.8 and 18.9 of Agenda 21, should, in his view, be incorporated in article 1, paragraph 1. The Drafting Committee might therefore wish to add the word "management" before the word "conservation".

36. He did not agree with the Special Rapporteur's proposal that the phrase "flowing into a common terminus" should be deleted in article 2 for, as noted in paragraph (7) of the commentary to the article,[11] a common point of arrival was an important component in the definition of watercourse systems. As to the possible incorporation in the draft of "confined groundwater" he noted that, in the Special Rapporteur's view, it did not seem that such a change would require much change. He was not convinced that it would be such an easy matter nor that a simple drafting amendment would suffice to solve a problem which amounted to a topic in itself. In paragraph (5) of its commentary to article 2, the Commission had suggested that it might be appropriate to study confined groundwater separately. He agreed, however, with the suggestion that the definition of pollution in article 21[12] should be moved to article 2. He also trusted that the Drafting Committee would review the definition of pollution to bring it more into line with reality.

37. The main problem with regard to article 3 (Watercourse agreements) concerned the possible replacement of the word "appreciable" by the word "significant". Although that might seem to be a wise suggestion and it had received a measure of support, he was not convinced that it was necessary. Admittedly, the word "significant" implied a threshold, which was an advantage, but that threshold was not defined by reference to objective parameters. The disadvantage of that word was therefore that its interpretation would depend on subjective criteria. As to the word "appreciable", it denoted something that could be established by objective evidence and also conveyed the notion of "significant" and "substantial". There were instances in the articles, however, where it was not the extent of the harm that was decisive for the interests of the watercourse States. That was why the word "appreciable" was often used in treaties, though the word "significant" occurred twice in the Rio Declaration, in principles 17 and 19, respectively. Consequently, the matter was not as clear-cut as it might appear to be. Furthermore, the adoption of the word "significant" could have certain repercussions on the topic of international liability for injurious consequences arising out of acts not prohibited by international law. In his view, therefore, the Commission should consider once again the relative merits of the two words before taking a final decision. It had in fact already had an opportunity to deal with the matter in its commentary to article 3,[13] in particular in paragraphs (7) and (14).

38. In his view, article 26 should not be moved to part II (General principles), but the Drafting Committee might wish to consider the possibility of elaborating a general principle on the integrated approach, on the basis of principle 4 of the Rio Declaration, leaving the part on management in article 26 as drafted.

39. With regard to article 6, he pointed out that the list of factors in paragraph 1 was not exhaustive, but all six categories were very pertinent. The article should therefore be maintained in the proposed form.

40. Commenting on article 7, relating to the obligation not to cause appreciable (or significant) harm, he stressed that the revised text proposed by the Special Rapporteur was unnecessarily cumbersome for the statement of a general principle. The reference to "due diligence" was acceptable, but he feared that it might be insufficient because that concept did not cover all aspects of the principle of precaution embodied in the most recent instruments. The remainder of the proposed text, namely, the mention of the agreement of other States by way of exception, as well as the presumption relating to pollution and the modalities and limits of that presumption, would not contribute to the general improvement of that article. If the text submitted by the Special Rapporteur were to be accepted, however, he would propose that subparagraph (*b*) should contain an explicit reference to the environment, since he considered the reference to "human health and safety" was far too restrictive and did not tally with the exact definition of pollution, which also included, in particular, damage caused to living resources. For the article as a whole, he would, however, prefer a shorter wording keeping only the reference to "due diligence", but also aiming at the principle of precaution.

[11] See footnote 4 above.

[12] See footnote 3 above.

[13] See footnote 4 above.

41. In conclusion, he urged the Commission to be cautious and not change the draft too much.

42. Mr. SHI said that, like the Special Rapporteur, he believed, in general, that the Commission should not wait until the work on a topic was completed before it decided on the question of the final form of draft articles. However, in the present case, it might be advisable for the Commission to postpone its final decision in the matter to a later date for two main reasons. First, the views of the few Governments which had commented on the draft articles were divided on the issue and some Governments were in favour of a framework convention, while others preferred model rules, recommendations or guidelines. Secondly, and above all, a great many States which had transboundary watercourses in their territories had not sent in their comments. One of them was China, which had 14 international watercourses in its territory, 2 of which were boundary waters, while in the case of the other 12, it was either the upstream or the downstream riparian. The Governments of States with watercourses in their territories might well have some difficulty in responding quickly to the request for comments on the draft articles and that suggested that there would be more Governments which would react to the draft articles at a later date. However, it would be better for the success of the draft articles, as well as for the Commission's prestige, if the recommendation it made to the General Assembly took account of the views of as many Governments as possible. That would not prevent the Commission from using a draft framework convention as a basis for its work.

43. With regard to the settlement of disputes, the Governments which had made comments, were, generally speaking, in favour of the provisions contained in the draft articles. He could agree that the Special Rapporteur should make proposals on the subject, although he usually preferred settlement provisions to be decided and formulated by the diplomatic conference in case the General Assembly decided that the draft articles should take the form of an international convention. The inclusion of articles on dispute settlement would, however, not harm the draft even if the Commission should finally decide that it would take the form of model rules, recommendations or guidelines.

44. Turning to the draft articles, he noted that, in general, Governments preferred the term "watercourses" to the term "drainage basin". He therefore believed that article 1 should stand as it was. As to the choice between "international watercourses" and "transboundary waters", he could go along with either term, though the term "transboundary" was less likely to create misunderstandings.

45. Governments appeared to be divided on the key issue of article 2, namely whether the words "flowing into a common terminus" should be deleted. The term "common terminus" had been added in order to exclude "confined groundwater" from the scope of the articles, thereby avoiding related problems. However, in view of the growing importance of confined groundwater intersected by State boundaries, some members had proposed that they should be dealt with as a separate topic whose inclusion in the Commission's long-term programme of work should be studied. As a matter of fact, the inclusion of the "common terminus" concept in the definition of "watercourses" had been inspired by ILA's Helsinki Rules,[14] and the ILA now seemed to agree with the Special Rapporteur about the deletion of the concept in the definition. If the Special Rapporteur could, within the period set by the Commission for the completion of work on the topic, actually prepare draft articles on "confined waters" without affecting the other draft articles, he could agree that the words "common terminus" should be placed in square brackets. If the Special Rapporteur failed to find a solution, however, the words "flowing into a common terminus" should remain intact in the definition. If the members of the Commission agreed that the definition of the term "pollution" should be placed elsewhere than in article 21, notwithstanding the Special Rapporteur's ideas on article 7, he would not object to its being transferred to article 2.

46. As to article 3, the proposal to replace the word "appreciable" by the word "significant", in support of which the Special Rapporteur had put forward two arguments, might do more than just eliminate an ambiguity of meaning. It might involve a standard of threshold beyond which harm could not be tolerated. According to the commentary to article 7,[15] the term "appreciable" provided the most factual and objective standard and, in the framework of article 3, it should be understood to mean "significant". For one Government at least, however, the criterion of "significant" differed from that of "appreciable". It should be noted that the Commission had to deal with the same problem in its consideration of the topic of international liability for injurious consequences arising out of acts not prohibited by international law. Since the Commission was now at the stage of the second reading of the draft articles, changes could still be made, but only after a full discussion of the issue and taking into account the views of the Special Rapporteur and the comments of Governments. If the change proposed for article 3 was accepted, changes would also have to be made in other articles.

47. With regard to the relationship between the draft articles and existing watercourse agreements, he held the same views as those expressed by the Special Rapporteur and accepted the amendment proposed by the Special Rapporteur to article 3, paragraph 3. Contrary to the views of the Special Rapporteur, however, he thought that the suggestion that articles 8 and 26 should be moved ahead of article 3 would affect the logic of the order of the draft articles. Those two articles, which dealt with cooperation and management, did not fit into part I (Introduction), which dealt essentially with the scope of the draft.

48. In chapter III of his report, the Special Rapporteur drew attention to the ambiguity of the present wording of articles 5 and 7, which had already given rise to comments by a number of Governments. He agreed with those Governments that had stressed that a proper balance should be struck between utilization and environ-

[14] The Helsinki Rules on the Uses of the Waters of International Rivers, adopted by ILA in 1966; see ILA, *Report of the Fifty-second Conference, Helsinki, 1966* (London, 1967), pp. 484 *et seq.*; reproduced in part in *Yearbook... 1974*, vol. II (Part Two), pp. 357 *et seq.*, document A/CN.4/274, para. 405.

[15] Initially adopted as article 8. For the commentary, see *Yearbook... 1988*, vol. II (Part Two), pp. 35-41.

mental protection and utilization in the context of sustainable development. In order to clarify the issue, the Special Rapporteur proposed that article 7 should be revised to establish a regime in which equitable and reasonable use would be the determining criterion, except in cases of pollution in which article 5 would be subordinated to article 7. The general thrust of that amendment seemed to be acceptable, but it would have to be studied in detail.

49. Mr. FOMBA said that the general issues raised by the Special Rapporteur in his first report were the following: should there be a draft convention or model rules? Should that issue be settled at present? Should provisions on the settlement of disputes be included in the draft? The one basic principle in a topic such as the law of the non-navigational uses of international watercourses was that of specialization and the whole problem was thus to formulate a *jus generalis* on the basis of an accumulation of *jus specialis*. Bearing in mind the Commission's practice in respect of model rules and the example of the rules formulated by UNCITRAL, a framework convention seemed to be the logical solution. In addition, since it was essential to know in advance what the legal nature of the final product of the Commission's work would be in order to delimit its conceptual framework, that choice had to be made without delay and the Commission had wisely settled the issue, as a number of speakers had recalled. The Special Rapporteur had also been right to say that the draft articles must include provisions relating to fact-finding and dispute settlement, since those were essential aspects in view of the nature of the questions which arose in connection with watercourses.

50. Turning to part I (Introduction) of the draft, he agreed with the Special Rapporteur, who had said, with regard to article 1, that there was no substantive difference between the terms "watercourse", "drainage basin" and "transboundary waters", even though the term "basin" seemed to predominate in African treaty practice. He was opposed to the deletion of the words "and flowing into a common terminus" in article 2, subparagraph (*b*), because the definition of a "watercourse" had to be based on a "linear" approach. He was also opposed to the idea of extending the draft to cover confined groundwater, which was explicitly stated to be unrelated to the watercourse. He did, however, agree with the Special Rapporteur's two other proposals to take the present text of article 2 as a basis for considering the draft articles on second reading and to move the definition of the term "pollution" from article 21 to article 2.

51. As to the substance of article 3, he was of the opinion that the terms "appreciable" and "significant" were interchangeable and that there was no real difference between the words "does not adversely affect to a significant extent" and the words "does not cause significant harm". As to the form, he agreed that it seemed unnecessary to refer each time to the "waters" of the watercourse. The problem of the relationship between the draft articles and existing agreements gave rise to very interesting discussions, but there did not seem to be any real problem of intertemporal law. It was also unnecessary to add the idea of agreements to "characteristics" and "uses" in paragraph 3, since pre-existing agreements would apply as a matter of priority and corresponded to the characteristics and uses of the watercourse in question. As to the idea of moving articles 8 and 26 to part I of the draft, the Drafting Committee should accept that idea if it meant that the articles would be in a more logical order. In connection with article 26, however, there might be some question about the exact scope of the terms "equitable and reasonable", "rational and optimal" and "sustainable development".

52. The questions that arose with regard to the general principles related mainly to articles 5 and 7 and to the connection between those two provisions. In his view, third-party determination was very important in the event that the States concerned were unable to arrive at a mutually acceptable solution and article 6, paragraph 2, could, as the Special Rapporteur had said, serve as a good basis for that purpose. The Special Rapporteur had also proposed a new text for article 7 that would change the title and make the text much longer, but that solution raised delicate problems of definitions and delimitations, so that it might be better to retain the present wording, which was more general, but expressive enough.

53. With regard to article 8, he agreed with the Commission's conclusion that it was better to adopt a general formulation for the objectives of cooperation and he could not understand the Special Rapporteur's prejudices with regard to the principles of good faith and good neighbourliness.

54. An analysis of some aspects of African treaty practice showed that many watercourse agreements used terms that were very close to the words "equitable and reasonable use", with some texts also specifying that the obligations of States in that regard had to be defined taking into account all hydrological, ecological, economic and social considerations; the expected impact of the development projects; the areas involved; direct or indirect access to the main watercourse; and other considerations. Those texts also used the terms "appreciable" as well as "significant", and even the term "substantial".

55. The question of groundwater was handled in various ways. Sometimes the agreement applied to groundwater only if its use might cause appreciable harm in one or several other States. In other cases, the agreement stipulated consultations in the event of a problem arising from the common use of such resources. And sometimes the agreement referred to groundwater without any further specification. Two agreements addressed the question of the relation between different uses: the Convention establishing the Organization for the Development of the Senegal River, article 20 of which gave the Permanent Water Commission the mandate to define the principles and modalities for the sharing of waters of the Senegal River between States and between sectors; and the Convention creating the Niger Basin Authority, of which article 4, paragraph 2 (v) mentioned the priorities among alternative uses, projects and sectors. Lastly, all the agreements provided almost identical dispute settlement procedures. Briefly, negotiation was stipulated in all the agreements, recourse to the Commission for Mediation, Conciliation and Arbitration of the Organization of African Unity in 9 out of 10 cases and recourse to ICJ in half the cases.

Cooperation with other bodies (*continued*)*

[Agenda item 7]

STATEMENT BY THE OBSERVER FOR THE EUROPEAN COMMITTEE ON LEGAL COOPERATION

56. The CHAIRMAN extended a warm welcome to Mr. de Sola, Observer for the European Committee on Legal Cooperation, and invited him to address the Commission.

57. Mr. de SOLA (Observer for the European Committee on Legal Cooperation) said that for international public law the competent body of the Council of Europe was the Committee of Legal Advisers on International Public Law, which counted among its members Mr. Eiriksson, who kept the Committee informed about the Commission's work. The Committee was a body in which the members of the Council exchanged views on current issues. The two main issues which it had taken up in recent times were State succession and the establishment of an international war crimes tribunal. The Committee had also set up a working group which had just concluded its work on a model documentation plan concerning State practice with respect to State succession and questions of recognition. The working group was to submit the plan to the Committee of Legal Advisers for adoption; it envisaged data collection and processing at the national level and in the Council of Europe for dissemination and probably publication.

58. As to human rights and the rights of minorities, the European Convention on Human Rights seemed at present to be a victim of its own success: very many requests were submitted every year and it was becoming increasingly difficult to deal with them within a reasonable time. The system had two bodies, the Commission and the Court, which corresponded roughly to two levels of jurisdiction, an arrangement which slowed the work down considerably. With a view to simplifying the system while retaining its effectiveness, a working group was working on a draft proposal which would be submitted to the summit meeting of Heads of State or Government of the countries members of the Council of Europe, to be held in Vienna in October 1993.

59. With regard more specifically to minorities—a question connected with the doctrine of democratic security which was being developed in the Council of Europe—the Council thought that their protection was a precondition of peace in Europe and that it was therefore essential to guarantee their rights. The Chairman of the Committee of Ministers of the Council of Europe had expressed the wish that the summit meeting of Heads of State or Government referred to earlier would call on the Council to devise legal instruments for the protection of minorities.

60. In civil law, the Council of Europe had adopted the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment. That Convention, which was based on principle 13 of the Rio Declaration on Environment and Development,[16] was not very original in all respects, for it borrowed a number of concepts from existing conventions, in particular the Convention on Civil Liability for Damage Caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels, but it was the first convention of a general scope. It was based on the notion of strict liability and covered a vast range of activities which it classified as dangerous. The difficulty was to set forth sufficiently general concepts to cover all dangerous activities while ensuring a degree of legal certainty. The Convention therefore contained a general definition, but also a number of annexes listing hundreds of substances defined as dangerous. The list was not of course exhaustive and the Convention might possibly be applied to new substances or new mixes of substances. The Convention also applied to genetically modified organisms and to wastes.

61. Liability was assigned to the person controlling the dangerous activity. The issue had been discussed at length, especially with respect to wastes, but, in the end, for both theoretical and practical reasons, it had been concluded that the injured party must be able to easily identify the party responsible for the harm.

62. The kinds of harm covered were harm to persons, property and the environment itself, as well as any economic loss arising from the degradation of the environment. Special thought had been given to the tourism industry, agriculture and fisheries.

63. The question had arisen as to whether compulsory liability insurance should be envisaged: however, the Convention left it to States to determine the modalities of such protection and the activities which it should embrace.

64. The Convention was designed not only to provide theoretical definitions, but also to be a practical tool; that was why it had borrowed a number of existing notions from Community law or national legislations. First, it stipulated a right of access to information about the environment held by the public authorities: anyone, not only the injured party, could obtain such information. Secondly, an injured party might apply to a judge to compel an industrial concern to supply information which the injured party could use in an action against the concern. That was a provision of German environmental law which was being made universally applicable to the whole of Europe through the Convention. It had been thought necessary because, very often, the only person holding the information necessary for establishing liability was the perpetrator of the harm himself. Thirdly, environmental protection organizations could apply to a judge to compel an industrial concern to take measures to prevent damage to the environment or to make good any damage caused. Since the environment was common property, it had been thought that it was not the responsibility of the authorities alone to ensure its protection, but that the public ought also to be able to play an active role through environmental organizations.

65. The Convention had been opened for signature in Lugano and had already been signed by eight countries. Others had stated their intention of signing and the EC Environment Commissioner had recommended that the States members of the Community should do so.

66. In another area, a committee on family law was preparing a draft convention on children's exercise of

* Resumed from the 2304th meeting.

[16] See footnote 10 above.

their rights. It did not seek to define any new rights not found in the Convention on the Rights of the Child, but to establish the modalities for the exercise of the rights set forth therein.

67. The European Committee on Legal Cooperation had also decided to begin work on a convention on questions of nationality. The Convention on the Reduction of Cases of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality, adopted by the Council of Europe, was in fact out of date in some respects. The demographic situation in Europe had changed, especially as a result of immigration, and a considerable number of persons had dual nationality and the problems that went with it. The Committee considered that the future convention should be flexible and take into account the interests of both States and individuals and that it should not place obstacles in the way of, or require States to accept, multiple nationality. The work was to begin during the second half of 1993.

68. Following the political upheavals in Europe, the Council had established a threefold programme of cooperation with the countries of Central and Eastern Europe. In constitutional matters, the European Commission for Democracy through Law, the so-called Venice Commission, was collaborating with those countries in the drafting of fundamental rules compatible with democratic principles. Japan had requested to attend the Venice Commission as an observer and South Africa had also asked to participate in its work. Where legislation was concerned, an ambitious programme of cooperation, Demo-Droit, which had been operating for several years, was designed to help national authorities formulate new rules compatible with democratic principles. The third part of the programme, Themis, was concerned with training for the legal professions: it was not enough to devise rules; it must also be possible to apply them.

69. Mr. EIRIKSSON thanked Mr. de Sola and noted that he himself had had the honour of representing the Commission at the fifty-eighth session of the European Committee on Legal Cooperation in Strasbourg in December 1992. On that occasion, he had submitted a document on the work of the Commission at its forty-fourth session and had seen that the members of the European Committee followed the Commission's work with close interest. He had been most impressed by the range of legal topics discussed within the framework of the Council of Europe and he had been particularly interested in the results of the work on the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment. He had been invited to participate in the final negotiating session on the Convention and had thus been able to supply first-hand information to the Commission's Special Rapporteur on the topic of international liability for injurious consequences arising out of acts not prohibited by international law.

70. Since the Commission's Planning Group had recommended the inclusion in the Commission's programme of work of the question of State succession and questions of nationality, it might be possible to establish cooperation in those fields with the European Committee on Legal Cooperation, for the Committee had decided to prepare a draft convention on questions of nationality.

71. As legal adviser to his Government, he participated regularly in the meetings of the Committee of Legal Advisers on Public International Law of the Council of Europe and, at the meetings held in late 1992, he had presented a document on the Commission's work, which was traditionally discussed at length during those meetings.

72. He was pleased that the discussion of legal questions under the auspices of the Council of Europe was indeed becoming pan-European with the attendance of lawyers from the countries of Central and Eastern Europe, whose contributions he had appreciated in recent years. Lastly, he thanked Mr. de Sola and, through him, his colleagues in the legal sections of the Council of Europe for their hospitality and the professional assistance which they had given him and the Commission's previous observers in Strasbourg.

73. The CHAIRMAN said that the members of the Commission did indeed follow with very great interest the work of the European Committee on Legal Cooperation and appreciated its quality and diversity. On more than one occasion, that work had been a source of inspiration for the Commission, as was the case today with the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, which had much in common with the topic of international liability for injurious consequences arising out of acts not prohibited by international law. The adoption of the Convention by the Council of Europe augured well for a possible instrument creating a regime of liability applicable not to individual activities, but to the whole array of activities which constituted a danger.

74. He hoped that the cooperation and exchanges of information between the Commission and the European Committee on Legal Cooperation would continue.

The meeting rose at 1.05 p.m.

2313th MEETING

Tuesday, 29 June 1993, at 10.10 a.m.

Chairman: Mr. Julio BARBOZA
later: Mr. Gudmundur EIRIKSSON

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Bennouna, Mr. Calero Rodrigues, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Kabatsi, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Robinson, Mr. Shi, Mr. Szekely, Mr. Thiam, Mr. Tomuschat, Mr. Vereshchetin, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.
