

Document:-
A/CN.4/L.489

Draft articles on the law of the non-navigational uses of international watercourses. Titles and texts of articles adopted by the Drafting Committee on second reading: articles 1-6 and 8-10 - reproduced in document A/CN.4/SR.2322, para. 5

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

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

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

2. Mr. MIKULKA (Chairman of the Drafting Committee) said that the Committee had held a total of 37 meetings from 4 May to 13 July 1993. The membership of the Committee for consideration of the draft articles on State responsibility had been different from that for consideration of the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law and the law of the non-navigational uses of international watercourses. The Committee had held two meetings, on 12 and 13 July, on the last mentioned topic and had adopted nine articles, which were reproduced in its report.

3. He recalled that, at the current session, the Commission had referred articles 1 to 10 to the Drafting Committee for second reading. The Committee had taken note of the views expressed by the Special Rapporteur and by many members of the Commission to the effect that the articles adopted on first reading had largely been found acceptable by Governments and that the main function of the second reading should therefore be one of "fine tuning". The Committee had therefore introduced changes in the articles only when it had been found necessary for clarity. There were also two matters which concerned the articles as a whole and called for preliminary explanations.

4. First, in accordance with the Special Rapporteur's recommendation, supported by many members of the Commission, the Committee had replaced the word "appreciable" by "significant" throughout the draft articles. The Drafting Committee held the view that the word "significant" had the same meaning with regard to watercourses as in the articles on international liability for injurious consequences arising out of acts not prohibited by international law, namely, that it meant something more than "measurable", but less than "serious" or "substantial". The second matter concerned the possible inclusion of confined groundwater in the scope of the articles. The Commission had requested the Special Rapporteur, Mr. Rosenstock, to undertake a feasibility study of that question and he had indicated that he would submit such a study in 1994. Consequently, the Drafting Committee recommended the nine articles it had adopted on the understanding that, should the Commission decide at its following session to include confined groundwater in the scope of the draft articles and it thus became necessary to amend the nine articles, the Drafting Committee would reconsider them.

5. The titles and texts of articles 1 to 6 and 8 to 10, as adopted by the Drafting Committee on second reading, read:

PART I

INTRODUCTION

Article 1. Scope of the present articles

1. The present articles apply to uses of international watercourses and of their waters for purposes other than navigation and to measures of conservation and management related to the uses of those watercourses and their waters.

2. The use of international watercourses for navigation is not within the scope of the present articles except in so far as other uses affect navigation or are affected by navigation.

Article 2. Use of terms

For the purposes of the present articles:

(a) "international watercourse" means a watercourse, parts of which are situated in different States;

(b) "watercourse" means a system of surface and underground waters constituting by virtue of their physical relationship a unitary whole and flowing into a common terminus;

(c) "watercourse State" means a State in whose territory part of an international watercourse is situated.

Article 3. Watercourse agreements

1. Watercourse States may enter into one or more agreements, hereinafter referred to as "watercourse agreements", which apply and adjust the provisions of the present articles to the characteristics and uses of a particular international watercourse or part thereof.

2. Where a watercourse agreement is concluded between two or more watercourse States, it shall define the waters to which it applies. Such an agreement may be entered into with respect to an entire international watercourse or with respect to any part thereof or a particular project, programme or use, provided that the agreement does not adversely affect, to a significant extent, the use by one or more other watercourse States of the waters of the watercourse.

3. Where a watercourse State considers that adjustment or application of the provisions of the present articles is required because of the characteristics and uses of a particular international watercourse, watercourse States shall consult with a view to negotiating in good faith for the purpose of concluding a watercourse agreement or agreements.

Article 4. Parties to watercourse agreements

1. Every watercourse State is entitled to participate in the negotiation of and to become a party to any watercourse agreement that applies to the entire international watercourse, as well as to participate in any relevant consultations.

2. A watercourse State whose use of an international watercourse may be affected to a significant extent by the implementation of a proposed watercourse agreement that applies only to a part of the watercourse or to a particular project, programme or use is entitled to participate in consultations on, and in the negotiation of, such an agreement, to the extent that its use is thereby affected, and to become a party thereto.

PART II

GENERAL PRINCIPLES

Article 5. Equitable and reasonable utilization and participation

1. Watercourse States shall in their respective territories utilize an international watercourse in an equitable and reasonable manner. In particular, an international watercourse shall be used and developed by watercourse States with a view to attaining optimal utilization thereof and benefits therefrom consistent with adequate protection of the watercourse.

2. Watercourse States shall participate in the use, development and protection of an international watercourse in an equitable and reasonable manner. Such participation includes both the right to utilize the watercourse and the duty to cooperate in the protection and development thereof, as provided in the present articles.

Article 6. Factors relevant to equitable and reasonable utilization

1. Utilization of an international watercourse in an equitable and reasonable manner within the meaning of article 5 requires taking into account all relevant factors and circumstances, including:

- (a) geographic, hydrographic, hydrological, climatic, ecological and other factors of a natural character;
- (b) the social and economic needs of the watercourse States concerned;
- (c) the effects of the use or uses of the watercourse in one watercourse State on other watercourse States;
- (d) existing and potential uses of the watercourse;
- (e) conservation, protection, development and economy of use of the water resources of the watercourse and the costs of measures taken to that effect;
- (f) the availability of alternatives, of corresponding value, to a particular planned or existing use.
2. In the application of article 5 or paragraph 1 of this article, watercourse States concerned shall, when the need arises, enter into consultations in a spirit of cooperation.

...
Article 8. General obligation to cooperate

Watercourse States shall cooperate on the basis of sovereign equality, territorial integrity and mutual benefit in order to attain optimal utilization and adequate protection of an international watercourse.

Article 9. Regular exchange of data and information

1. Pursuant to article 8, watercourse States shall on a regular basis exchange readily available data and information on the condition of the watercourse, in particular that of a hydrological, meteorological, hydrogeological and ecological nature, as well as related forecasts.
2. If a watercourse State is requested by another watercourse State to provide data or information that is not readily available, it shall employ its best efforts to comply with the request but may condition its compliance upon payment by the requesting State of the reasonable costs of collecting and, where appropriate, processing such data or information.
3. Watercourse States shall employ their best efforts to collect and, where appropriate, to process data and information in a manner which facilitates its utilization by the other watercourse States to which it is communicated.

Article 10. Relationship between different kinds of uses

1. In the absence of agreement or custom to the contrary, no use of an international watercourse enjoys inherent priority over other uses.
2. In the event of a conflict between uses of an international watercourse, it shall be resolved with reference to the principles and factors set out in articles 5 to 7, with special regard being given to the requirements of vital human needs.
6. Article 1 (Scope of the present articles) had been found acceptable both by Governments and by the Commission, and the only comment made in plenary had been that the concept of "management" developed in chapter 18 of Agenda 21,⁴ dealing with the protection of the quality and supply of freshwater resources, should be incorporated in the article. The Drafting Committee had felt that the inclusion of that concept in article 1 was useful, particularly as the question of management was dealt with in article 26.⁵ Its inclusion did not affect the scope of the articles, but defined it more clearly and

comprehensively. Accordingly, the only change made to article 1 was that the words "and management" had been added after the word "conservation" in paragraph 1.

7. With regard to article 2 (Use of terms) the Drafting Committee had felt that no changes were necessary. It had taken note of the fact that the definition of "pollution" currently contained in article 21, paragraph 2,⁶ would be moved to article 2, but had found it unnecessary to make that change in the immediate future, as article 21 had not yet been referred to the Committee.

8. In article 3 (Watercourse agreements), the Drafting Committee had replaced the word "appreciable" by "significant" in the English text, but had made no other change, as some members of the Commission had indicated that they preferred the existing text of paragraph 2 to the wording proposed by the Special Rapporteur in his first report (A/CN.4/451).

9. As no changes to article 4 (Parties to watercourse agreements) had been recommended in plenary, the Committee had again simply replaced "appreciable" by "significant" in paragraph 2 of the English text. As no changes had been suggested to the first two articles of part II, "General Principles", of the draft, namely, article 5 (Equitable and reasonable utilization and participation) and article 6 (Factors relevant to equitable and reasonable utilization), the Drafting Committee had left them as they stood.

10. The Committee had deferred consideration of article 7 to the following session. It was one of the most important articles of the draft and had been the subject of considerable discussion in plenary, with the Special Rapporteur raising four issues with respect to it. He had wondered, first, whether it would be appropriate to include an explicit reference to the concept of due diligence; secondly, whether it was justifiable to treat the problem of harm caused by pollution separately from harm resulting from other causes; thirdly, if it was decided to treat the problem of harm caused by pollution separately, whether there were any special circumstances which might allow for continued utilization, even though it caused pollution; and, fourthly, whether article 7 as it stood undermined the effective implementation of article 5. The Drafting Committee had discussed some of those issues, but, given the lack of time and considering the importance of article 7, it had decided to defer consideration of the article to the following session.

11. With regard to article 8 (General obligation to cooperate) the Drafting Committee had recommended no changes, since both Governments and members of the Commission had indicated that they approved of the wording.

12. Article 9 (Regular exchange of data and information) had also been favourably received by Governments and members of the Commission. However, during the Committee's consideration of the various language versions of the text of the article, it had become clear that the translation of the words "reasonably available", which had been taken from article 29, paragraph 1, of

⁴ A/CONF.151/26/Rev.1 (Vol. I) (United Nations publication, Sales No. E.93.I.8 and corrigendum), pp. 9 *et seq.*

⁵ See footnote 3 above.

⁶ *Ibid.*