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Summary record of the 1578th meeting

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

Extract from the Yearbook of the International Law Commission:-
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uated in one country which fed strictly national watercourses in another. That aspect of the problem should also receive the Commission's attention.

The meeting rose at 12.50 p.m.

1578th MEETING

Friday, 27 July 1979, at 10.5 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Barboza, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

The law of the non-navigational uses of international watercourses (concluded) (A/CN.4/320 and Corr.1)

[Item 5 of the agenda]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (concluded)

1. Sir Francis VALLAT considered, after due reflection, that the Commission had neither the time nor the means to reach any conclusions at its current session, and he would therefore reserve his comments for a future occasion. He also considered that certain elements were lacking, which were needed to enable the Special Rapporteur to pursue his work and the Commission to arrive at conclusions on certain key issues at its next session. He continued to believe that the topic was crucial, and that the Commission would be judged in the future more by its work on the non-navigational uses of international watercourses than by its work on any other topic. That was an added reason for treating the subject with some caution until the Commission had decided on the main lines of approach.

2. Mr. VEROSTA recalled that he had previously (1556th meeting) referred to the need to identify the rights and duties of States under international law, as laid down in treaties on the navigational uses of international watercourses, on the construction of power plants on international watercourses and on specific issues such as pollution. Some of the rules embodied in those treaties had already been referred to during the discussion. One was that the upper riparian State had a duty to allow a normal volume of water, appropriate to the season, to flow out of its territory, while the lower riparian State had a corresponding right to receive a normal volume of water, appropriate to the

season, from the upper riparian State. Another rule was that the water in international watercourses should not be polluted. As Mr. Barboza (1577th meeting) had said, the general principle underlying all such rules was that the non-navigational uses of an international watercourse by the upper riparian State must not damage the rights and interests of the lower riparian State.

3. It was clear that a systematic analysis of all the relevant treaties was required. That would be no easy task, but he would remind members that the Special Rapporteur for the subject of consular relations had analysed no fewer than 1,700 treaties on consular relations, on the basis of which a detailed list of consular functions had been drawn up in article 5 of the Vienna Convention on Consular Relations.¹ Two kinds of bilateral and multilateral treaty ought to be analysed in the first instance: treaties on the navigational uses of international watercourses which also laid down certain rules on non-navigational uses; and treaties on the use of international watercourses for the generation of electric power. A number of treaties concluded in Latin America had already been mentioned, and he would also draw attention to the international agreements on power plants concluded between Austria and the Federal Republic of Germany, between Yugoslavia and Romania, and between Austria and Yugoslavia. Similar rules were to be found in the agreements concluded between certain States of North America. Treaties on the administration of lakes as international watercourses might also have a bearing on non-navigational uses such as fishing and tourism.

4. If material of that type could be made available, it would greatly assist the Commission in its task.

5. Mr. THIAM said he perceived two important questions at that stage of the discussion: that of the scope of the topic and that of the object in view.

6. The Commission must define what it meant by "watercourses": whether that expression covered only rivers and streams, or also basins and tributaries, lakes and canals. He thought it necessary to avoid both too restrictive and too broad an interpretation, and believed that, even if the definition were confined to rivers and streams, it would be difficult to avoid studying at least those drainage basins that played an essential part in economic integration, which in modern times was of primary concern to all countries interested in the use of international waterways in various parts of the world, as shown by the example of the Senegal river.

7. Perhaps the same applied to lakes; for although not watercourses, they were nevertheless waterways, as was shown by the example of Lake Chad, which was more than a mere body of water between the riparian States and provided them in particular with a means of co-operation, not to say economic integration. It would seem, therefore, that the Commission would be justified in including rivers, basins, lakes and other waterways in its study.

¹ United Nations, *Treaty Series*, vol. 596, p. 268.

8. As to the object of its work, the Commission should first endeavour to draw up a code for the use of international watercourses—conceived as a code of good conduct for all users, and not only for the riparian States—in which it would try to define the respective rights and obligations of the users of international watercourses even before defining the precise content of the latter concept.

9. Whatever method might be chosen, he thought that the task would be a complex one because of the extreme diversity of the aspects that would have to be considered.

10. Mr. TABIBI fully agreed that the subject was one of crucial importance, in which both upper and lower riparian States had a major interest. In view of the complexity of the task, it was the duty of all concerned to co-operate with the Special Rapporteur. He noted that there had been little response to the questionnaire circulated to Member States by the Secretary-General,² and would therefore suggest that the Secretariat again request Member States to submit their comments.

11. Mr. BARBOZA explained that he had not intended to recommend that the Commission should lay down general principles. His point had been that it was a rule of customary law that a sovereign State had the right to do as it saw fit with the waters that flowed through its territory, provided that no harm was done to its riparian neighbours. That rule was based on the general rule of international law that a State should so use its territory as not to cause damage to the territory of another State.

12. Mr. SUCHARITKUL said that the draft articles proposed by the Special Rapporteur would provide a sound basis for the Commission's future work and were in general acceptable to him. In particular, the definition of a "user State" given in draft article 2 seemed to be entirely logical. If that definition were extended to States that only contributed to the waters of an international watercourse, then, to take the Mekong basin as an example, the countries in which the northern parts of the Himalayas were situated, although not user States, would also be covered.

13. He agreed that all the uses of international watercourses should be considered, but would suggest that an order of priority be established.

14. Reference had been made to the fundamental principle of international law that every State enjoyed permanent sovereignty over its natural resources. The topic with which the Commission was concerned, however, was the uses of "international" watercourses, which meant that those uses were not confined to one State. He would therefore be inclined to go further and refer to the equally fundamental principle of good-neighbourliness, which was enshrined in the final communiqué of the Afro-Asian Conference

held in Bandung in 1955.³ In that connexion, Mr. Thiam had rightly stressed the importance of economic co-operation.

15. Lastly, he emphasized the importance of making the relevant scientific data available to assist the Special Rapporteur in his work. The material produced by the various United Nations regional expert committees on water resources, which met annually, could serve to lay the foundations for just and equitable principles of international law.

16. Mr. SCHWEBEL (Special Rapporteur), summing up the main points of the discussion, said that the difference of opinion regarding the scope of the term "international watercourse" persisted. There had been new and significant support for a definition based on the drainage basin, but there had also been renewed opposition to such a definition. In that connexion, the question had been raised whether international watercourses included lakes, glaciers and groundwater. As far as lakes were concerned, it had rightly been assumed that the General Assembly had referred to international watercourses, rather than to rivers, in order to ensure that at least lakes and canals fed by or feeding rivers would be covered by the Commission's work. Lake Léman and the river Rhône sufficed to show the sense of that. There might be no valid reason for excluding glaciers, which contributed both to overland flow and to groundwater. Characteristically, groundwater flowed, although exceptionally there could be confined aquifers; and it was a scientific fact that rivers were fed mainly by groundwater flow, not by surface flow.

17. The idea of a framework convention with a complementary role for user agreements had attracted further support, but the question had been raised of the extent to which the one—and which one—would govern the other. Other questions concerning the nexus between the framework convention and user agreements also remained to be decided.

18. Of the possible approaches to be adopted in preparing a further report, the formulation of general principles of the law of the non-navigational uses of international watercourses had received the widest support. In that connexion, the cardinal principle of using one's own so as not to harm others, and the concept of shared natural resources, had been stressed. The discussion had to be appraised, however, in conjunction with the Commission's earlier discussion (1554th to 1556th meetings), when a consideration of particular uses had received the widest support. It had also been agreed at earlier stages of the Commission's work that the Commission should deal with particular uses of water, as was clear from the questionnaire circulated to Member States and from the answers thereto.⁴ That was a matter calling for most careful reflection, and he had taken due note of Mr. Yankov's

³ See Indonesia, Ministry of Foreign Affairs, *Asian-African Conference Bulletin*, No. 9 (Jakarta, 1955), p. 2.

⁴ See *Yearbook... 1976*, vol. II (Part One), pp. 147 *et seq.*, document A/CN.4/294 and Add.1, and *Yearbook... 1978*, vol. II (Part One), document A/CN.4/314.

² *Yearbook... 1976*, vol. II (Part One), p. 150, document A/CN.4/294 and Add.1, para. 6.

point that all aspects of the subject would have to be considered at some stage, including uses, abuses and effects, competing priorities among uses, general principles, co-operative institutions and measures for the peaceful settlement of disputes.

19. The question had been raised whether the draft articles should deal not only with the uses of international watercourses but also with the uses of the water of international watercourses—a distinction which he had not thought to be profound. Reference had likewise been made to related problems such as flood control, erosion, sedimentation, salt-water intrusion and estuaries. In view of the approach adopted by the Commission so far, and of the response of States to the questionnaire, there was every expectation that the Commission would deal with such related problems, the importance of which must not be minimized. As far as any distinction between the uses of international watercourses and the uses of the water of international watercourses was concerned, the latter expression had been used in his report solely for purposes of clarification. It had been taken for granted, however, that the Commission was meant to deal, and was dealing, with the uses of the water of international watercourses. Of the uses referred to in question D of the questionnaire, some, such as swimming, fishing and timber floating, were clearly direct uses of the watercourse, but most were not. For example, water used for irrigation was water diverted from watercourses, and the use of water for the production of nuclear energy, or for building or manufacturing, was a use of the water of a watercourse, not a direct use of the watercourse itself.

20. In view of the terms of the questionnaire and the answers to it, he believed that the contention that the Commission should confine itself to uses of the watercourse as such could not be upheld. Moreover, the possibility of excluding the uses of the water of international watercourses from the scope of the Commission's work had not been entertained earlier, and he saw no reason for now allowing such an exclusion.

21. Another point stressed during the discussion had been the problem of pollution, and it had been noted that pollution could not be dealt with effectively if measures were confined to riparian States. The need to analyse the provisions of the relevant treaties had rightly been emphasized. It had also been observed that the draft articles should provide for the responsibility of States which caused injury, and for technical assistance to developing countries.

22. The need to take account of the physical characteristics of water, and to obtain the necessary technical and scientific advice, had been generally recognized, and the Commission appeared to be largely in favour of dealing with the navigational uses of international watercourses when they affected, or were affected by, other uses. The majority also apparently took the view that the subject was ripe for codification.

23. He trusted that at its next session the Commission would be able to crystallize the measure of agreement achieved, so that it would be possible to deal constructively with the various elements of the law of

the non-navigational uses of international watercourses. He agreed that it would be desirable for the questionnaire to be circulated again to those member States that had not yet responded to it.

24. Lastly, he trusted that the Commission's report to the General Assembly would contain a detailed account of the discussion, especially as no articles had been adopted for the Assembly's consideration.

25. The CHAIRMAN thanked the Special Rapporteur and congratulated him on his work on a complex subject which touched simultaneously on legal, political, technical and economic questions.

26. He explained that the Commission's report to the General Assembly would give an account of the discussions and would mention the need to draw the attention of certain States to the questionnaire adopted by the Commission at its twenty-sixth session.⁵

27. He noted that the Commission had thus completed its consideration of item 5 of its agenda.

The meeting rose at 10.55 a.m.

⁵ See foot-note 2 above.

1579th MEETING

Monday, 30 July 1979, at 3.10 p.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Barboza, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

Also present: Mr. Ago.

State responsibility (concluded)*
(A/CN.4/318 and Add.1-4, A/CN.4/L.297/Add.1)
[Item 2 of the agenda]

DRAFT ARTICLES PROPOSED BY THE
DRAFTING COMMITTEE (concluded)**

ARTICLES 31 AND 32

1. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce articles 31 and 32 as adopted by the Drafting Committee (A/CN.4/L.297, Add.1), which read:

* Resumed from the 1573rd meeting.

** Resumed from the 1567th meeting.