Summary record of the 1607th meeting

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

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26. On the basis of a detailed analysis of the material he had compiled, the Special Rapporteur had developed a number of principles governing that particular class of State property: the indivisibility, or unity, of State archives; the connexion with, or essential relationship to, the place of their origin or constitution; the rights arising on succession that might require the division of archives; the reproduction of State archives or the payment of compensation on the basis of equitable principles; and the underlying but dominant theme, which was of overwhelming significance in the ordering of modern international relations, namely, the need for agreement, co-operation and consultation.

27. The Special Rapporteur’s oral introduction to the draft articles relating to archives had attested to his encyclopaedic knowledge and mastery of the subject. The contributions by members had been equally valuable, and the Commission could be confident that the draft articles would emerge, after consideration by the Drafting Committee, to adorn in a fitting manner the great work of which a first reading had been completed in 1979.

28. In his latest work, the Special Rapporteur had once again displayed his outstanding qualities: a scholar’s passionate desire to protect and ensure the proper use of archival material, which might be of the highest evidentiary value; an acute sensitivity to the cultural significance and value of archives and to the incalculable sense of deprivation that could be caused by their loss; and an honest mind, dedicated to developing rules and principles that would ensure that those with the greatest moral right should have the use or enjoyment of that kind of State property.

29. He congratulated the Special Rapporteur on the completion of the first reading of the supplementary articles on State archives and thanked him for the work he had done on behalf of the Commission and of the United Nations as a whole.

The meeting rose at 12.20 p.m.

1607th MEETING

Monday, 9 June 1980, at 3.10 p.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Barboza, Mr. Calle y Calle, Mr. Castañeda, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Quentin-Baxter, Mr. Reuter, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta, Mr. Yankov.
appreciable extent by the provisions of a system agreement that applies only to a part of the system is entitled to participate in the negotiation and conclusion of that agreement.

**Article 6. Collection and exchange of information**

System States shall undertake or make arrangements to accomplish, in light of the economic development of and the resources available to the individual system States, the systematic collection and exchange, on a regular basis, of hydrographic and other information and data pertinent to existing and planned uses of the system water.

**Article 7. A shared natural resource**

System States shall treat the water of an international watercourse system as a shared natural resource.

2. Mr. SCHWEBEL (Special Rapporteur) said that the topical summary prepared by the Secretariat (A/CN.4/L.311) of the Sixth Committee's discussion on the report of the Commission to the General Assembly at its thirty-fourth session had proved most helpful to him. He trusted that the preparation of such a resumé would be a regular feature of the Secretariat's assistance to the Commission.

3. During that discussion, the Sixth Committee had reached broad agreement on three points. First, the Commission should prepare draft articles that, when completed, would constitute an umbrella agreement setting out general principles of the law of the non-navigational uses of international watercourses. Secondly, the umbrella agreement should be formulated in such a way that it could be coupled with user or system agreements concluded between riparians of given watercourses, which would lay down obligations calibrated to the watercourse concerned. Thirdly, one of the general principles of the umbrella agreement should be that the waters of an international watercourse should be regarded as a natural resource to be shared among the riparians of that watercourse, however it was defined; that, pursuant to a second such principle, such water should be equitably utilized by the riparians; and that, pursuant to a third, no riparian should so use its share of the waters as to inflict injury upon other users. There had also been some, albeit less, emphasis on the responsibility of riparians to conclude among themselves agreements embodying both substantive and procedural principles and providing mechanisms for the governance of the watercourse, and to collect and share data on water.

4. Although, as was clear from the topical summary, a minority in the Sixth Committee had differed on some, or most, of those points, his report had been drafted in the light of the discussions held in the Sixth Committee and at the thirty-first session of the Commission. He trusted that, on that basis, the Commission would be able to make further progress at its current session. He had not, however, submitted a final text on the controversial issue of whether the international watercourse was a river which formed or traversed an international boundary or whether it comprised the drainage basin of a particular watercourse; in view of the divergence of views on the matter, he had preferred to submit a general article on the scope of the draft, which, in effect, left the matter open.

5. Turning to the proposed draft articles, he said that draft article 1 (Scope of the present articles) was similar to the article 1 proposed in his first report, which had attracted considerable support both in the Commission and in the Sixth Committee. The articles were stated to apply "to the uses of the water of international watercourse systems". Although a question had been raised regarding the need to refer to the water, rather than simply to the uses, of the international watercourse, that question had seemed material to only a very few members, and he trusted that the answer given in the report would suffice. With the virtually unanimous support of States, draft article 1 referred in paragraph 1 to such associated problems as flood control, erosion, sedimentation and salt water intrusion, and maintained paragraph 2, the substance of the earlier proposals regarding navigational uses, which had likewise received virtually unanimous support.

6. The only innovation was the expression "international watercourse systems", which seemed appropriate both as to what it did and what it did not signify. It did not define clearly the extent of the international watercourse, nor did it decide between the definition of a river as a watercourse which formed or traversed international boundaries or as a watercourse which formed an international drainage basin. It did, however, give an indication that, when dealing with the international watercourse, consideration should not be confined to the main stem of a river, thus excluding even lakes and canals. The expression was, moreover, widely accepted not only in the language of treaties but also in scientific and legal literature, and, even if it did not denote that an international watercourse was "a pipe carrying water" (A/CN.4/332 and Add.1, para. 52), it did not convey more than was generally accepted by international consensus. The adoption of that expression by the Commission would be a major step towards the fulfilment of its mandate.

7. Draft article 2 (System States) sought to take account of the criticisms of the corresponding article he had submitted in his first report, particularly in regard to the dual requirement of contribution to and use of water. Under the new article, a user State, to be termed a "system State", would be a "State through whose territory water of an international watercourse system flows". That requirement, which was simpler both to express and to apply than the dual requirement under the former article, was based on the determination of physical facts, and the main one—

\[^{1}\text{Reproduced in Yearbook ... 1979, vol. II (Part One), document A/CN.4/320, para 2.}\]

\[^{2}\text{Ibid.}\]
whether the water of an international watercourse system flowed through the territory of a State—could in most cases be determined by mere observation. Although the article might seem to incline the draft against the drainage basin concept (since ground water could rightly be said to seep under, rather than to flow through, the territory of a State), that was no more the intent of the article than it was the intent of draft article 1 to prejudice the draft in favour of the drainage basin.

8. His point was brought out still more clearly by draft article 3 (Meaning of terms), which was still incomplete. Although in accordance with the Commission’s practice a decision on definitions could be deferred, he would suggest that, in view of the need to make it clear that the definition of the extent of the international watercourse was being left open, a draft text along the lines of that proposed should be adopted.

9. Draft article 4 dealt with system agreements, and in paragraph 1 laid down a general principle that the framework treaty was to be supplemented by one or more system agreements. That principle was qualified by the phrase “as the needs of an international watercourse system may require”. Thus, if there was little likelihood of a given watercourse system being developed, there would be no need to seek to conclude a system agreement for its development. There was, however, a large body of State practice and associated jurisprudence from which it could be inferred that there was, in general, an obligation under customary international law to seek to conclude such agreements.

10. In that connexion, the second report referred, in paragraphs 74 et seq., to the North Sea Continental Shelf cases, in which the International Court of Justice had held that there was an obligation under international law to negotiate continental shelf boundaries taking the unity of resource deposits into account. It was therefore submitted that there was an equal obligation under international law to negotiate with respect to the utilization of the uses of the waters of an international watercourse.

11. Even more in point were the Fisheries Jurisdiction cases (A/CN.4/332 and Add.1, paras. 82 et seq.), in which the Court had been concerned with what could be regarded as a species of shared natural resource, namely, oceanic fish stocks. If there was an obligation to negotiate such fishing rights, it could hardly be maintained that there was no obligation to negotiate the rights of States in the uses of the waters of an international watercourse system; the movement of water through more than one State was a unique phenomenon that could be dealt with only by agreement between the States concerned.

12. Whereas the analogy with those cases was arguable, the Lac Lanoux case (ibid., paras. 86 et seq.) was “on all fours” with that before the Commission. In that case, the obligation of the riparians to negotiate with a view to seeking agreement on the construction of works that would divert waters had been affirmed by both parties; it had been acknowledged by France, the party which had built the works in question, not only on the basis of a treaty in force between the two States, but also as a principle to be derived from the authorities. In its award, the tribunal had stressed that the only way to achieve such adjustments of interest was by concluding agreements on an increasingly comprehensive basis, and had noted that international practice reflected the conviction that States should seek to conclude such agreements. The tribunal’s view was, moreover, reflected in the “Draft principles of conduct in the field of the environment for the guidance of States in the conservation and harmonious utilization of natural resources shared by two or more States” prepared by an intergovernmental working group of experts under the auspices of the United Nations Environment Programme (ibid., para. 90).

13. As pointed out in the commentary (ibid., para. 71), however, the principle enunciated in paragraph 1 of draft article 4 did not impose an obligation on States to conclude system agreements before they could use the waters of an international watercourse, but only required them to seek to do so. Possibly, therefore, that point would be brought out more clearly if paragraph 1 were redrafted to read:

“System States shall enter into negotiations for the purpose of supplementing these articles, as the needs of an international watercourse system may require, by one or more system agreements.”

14. Paragraph 2 of draft article 4 dealt with system agreements as they applied either to the whole of a system or to part of a system, since, as noted in paragraph 102 of the report, such agreements might be either system-wide or localized, and either general or confined to a specific problem. Possibly, therefore, paragraph 2 would be clearer if it were reworded to read:

“A system agreement may be entered into with respect to an entire international watercourse system, or with respect to any part thereof or particular project, programme or use, provided that the interests of all system States are respected therein.”

He made that suggestion because certain system agreements might cover one or more uses only, without any territorial delimitation, e.g. agreements on data collection and sharing, pollution abatement, a single hydraulic undertaking, or fishing.

15. Draft article 5 dealt with the parties to the negotiation and conclusion of system agreements. Paragraph 1 had been drafted with regard to the fact that, while a system State was entitled to participate in the negotiation and conclusion of any system agreement that applied to the international watercourse system as a whole, it was not required to do so. Paragraph 2 then provided that a State whose use or enjoyment of the water of a system might be affected to an appreciable extent by an agreement which applied to only a part of the system would be entitled
to participate in the negotiation of that agreement and
to become a party to it. To exclude such a State could
result in a denial of its fundamental equality of right.
The word "appreciable" had been chosen for the
reasons stated in the report. In determining whether a
State's interests might be affected "to an appreciable
extent", presumably not only its current but also its
potential uses of the water of a given watercourse must
be considered. An informed judgement would,
however, call for specialized knowledge, and a body of
experts should therefore be set up to give advice on
such matters. The conference of the international river
commissions to be convened by the United Nations in
1981 might provide an occasion for the provision of
such advice, though not on a continuing basis.

16. In preparing draft article 6, he had tried to take
account of the main views expressed on the question of
the collection and exchange of information. The
considerations supporting that draft article were
straightforward; they were set out in paragraphs 130
to 139 of his report. The collection and exchange of
data were crucial to any rational determination of the
development potential of rivers. At the same time,
however, it was clear that the resources of different
riparian States varied. The reference in draft article 6
to the economic development of and the resources
available to the individual system States was designed
to lay the foundations for assistance by developed
countries and international organizations to developing
countries, with a view to strengthening their
capabilities for data collection and exchange. In that
connexion, he drew the Commission's attention to
paragraphs 375 to 387 of the very useful United
Nations study on the Management of International
Water Resources: Institutional and Legal Aspects.

17. Although the general principle embodied in draft
article 7 might seem unduly basic or novel, he thought
it was indubitably sound, and hoped the Commission
would accept it as self-evident, thus paving the way for
the formulation of more refined general principles,
which, if the Commission so agreed, he would submit
at the next session. Two of the principles he had in
mind were: that system States should share equitably
in the uses of the water of international watercourse
systems, and that system States should ensure that
conduct subject to their jurisdiction did not change
appreciably the volume, flow or levels of any system
waters so as adversely to affect another system State in
its use of its equitable share of those waters. Other
procedural principles might relate to prior notification
of intent to effect changes in a watercourse, to the
establishment and maintenance of river commissions,
and modes for the settlement of disputes. Substantive
principles might deal with matters such as pollution
and State responsibility.

18. At present, however, he was merely suggesting
that the Commission should take the preliminary step
of adopting a draft article affirming that the water of
an international watercourse should be treated as a
shared natural resource. As stated in the commentary
to draft article 7, the concept of shared natural
resources must embrace the waters of international
That concept had considerable support in the United
Nations. In that connexion, he noted that many
members of the Commission seemed to attach con-
siderable importance to the Charter of Economic
Rights and Duties of States, and he hoped that they
would continue to do so in discussing draft article 7.
He also hoped that they would give appropriate weight
to the conclusions of the United Nations Water
Conference and the draft principles on shared natural
resources prepared by UNEP (A/CN.4/322 and
Add.1, paras. 149 and 90).

19. It was, moreover, clear from State practice and
jurisprudence that States had, for many years, treated
the waters of international watercourses as a shared
natural resource. The Judgment of the Permanent
Court of International Justice in the Territorial
Jurisdiction of the International Commission of the
River Oder case (ibid., paras. 187 et seq.), in stating
that the waters of navigable international rivers were
waters in which and to which both upper and lower
riparians had a "community of interest" and a
"common legal right", had assumed and implied that
the waters of an international watercourse constituted
a shared natural resource. Similarly, it was suggestive
of the assumptions and outlook of States that treaty
after treaty relating to navigation treated the waters of
international watercourses as a shared natural
resource. Treaties relating to boundary rivers also
demonstrated that States regarded the waters of
international watercourses in that way. It therefore
seemed quite natural to him that the Commission
should accept the principle that system States should
treat the water of an international watercourse system
as a shared natural resource.

20. He noted that when treaties were relied upon in
the Commission to demonstrate the existence of a rule
of customary international law there was always room
for the contrary conclusion, namely, that such treaties
were not written in consonance with and in construc-
tion of international law, but rather in specialized
derogation from it. It was not argued that the many
treaties between States providing for extradition gave
rise to a customary law of extradition. Rather, such
treaties were cited to show that, in their absence, there
was no applicable international law. Why then should
the case be different in respect of watercourse treaties,
if indeed it was different?

21. He believed that the case was different for two
reasons. The first was that international tribunals and

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3 Management of international water resources: institutional
and legal aspects—Report of the Panel of Experts on the legal
and institutional aspects of international water resources
development, Natural Resources/Water Series, No. 1 (United
Nations publication, Sales No. E.75.II.A.2).

4 General Assembly resolution 3281 (XXIX).
States had found in watercourse treaties that the Permanent Court of International Justice had referred to as “international fluvial law”, as was strikingly illustrated by the River Oder case and the following quotation from an official document of the Government of the United States of America:

It is accepted legal doctrine that the existence of customary rules of international law, i.e., of practices accepted as law, may be inferred from similar provisions in a number of treaties.

Well over 100 treaties which have governed or today govern systems of international waters have been entered into all over the world. These treaties indicate that there are principles limiting the power of states to use systems of international waters without regard to injurious effects on neighbouring states. These treaties restrict the freedom of action of at least one, and usually both or all, of the signatories with regard to waters within their respective jurisdictions. The number of states parties to these treaties, their spread over time and geography, and the fact that in these treaties similar problems are resolved in similar ways, make of these treaties persuasive evidence of law-creating international customs.5

22. The second reason why treaties on international watercourses could reasonably be read as giving rise to rules of customary international law was the function such treaties served. In his lectures to the Hague Academy of International Law, then Professor R. R. Baxter, had put that point in the following way:

Often the function of the bilateral treaty is to spell out the details of a general principle, to provide for its application in a particular case, or to give content to an imperfect rule of international law. If, for example, there is a rule of international law requiring the apportionment of the use of the waters of an international river according to the principle of "equitable utilization," it is still necessary for the parties to specify such details as how many acre-feet each riparian is to have for irrigation purposes, at what time the water is to be delivered, and how the delivery of the right quantity of water is to be verified.

... a certain amount of guidance about the state of general international law may be derived from an examination of bilateral treaties in their context in international law. In some cases, it may then be possible to rely directly on the bilateral agreements as evidence of the state of the law.

A bilateral treaty can be understood to be in derogation of the law if the state of customary international law is such that the activity dealt with lies within the sovereign domain of State A and that State B has no legal claim to participate in that activity or to benefit from it. A State has no obligation to establish postal, telephone, radio or television relations with another State ... There is no general duty to extradite ... The multiplicity of treaties of extradition or of air transport agreements does nothing to prove a rule of customary international law.

On the other hand, there are areas of inter-State activity in which international law is silent, ambiguous or lacking in a clear rule—or at least does not recognize that matters lie within the sovereign power and discretion of States. When the law is in this state, it may be necessary to look to the whole range of instances of international dealings on the particular matter. It may then be discovered that controversies arising out of a certain area of activity are usually or always solved by a sharing of the activity or of the benefits of the activity ...

Examples drawn from several areas of international law may clarify this role of bilateral agreements as evidence of the law.

It is generally recognized that the riparians of an international river have a right to navigate the full course of the river. As put in the Case relating to the Territorial Jurisdiction of the International Commission of the River Oder, the essential features of this rule are "the perfect equality of all riparian States in the use of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others". The Permanent Court relied on the Final Act of the Congress of Vienna, provisions relating to other rivers in the Treaty of Versailles, and what it referred to as the "treaty law which applied and developed the principles" of the Final Act of the Congress of Vienna. It is important that no conflicting international agreements or norm of international law operative in the absence of treaty points in the opposite direction. It would seem that there had been an examination of the antecedent treaties and an assumption that the same principle was being applied in the Treaty of Versailles as in the prior instances, in the absence of any indication of change. The right recognized by the Court extended only to the riparians, and international law generally demands that there must be a dedication to free use by the ships of all nations before ships of non-riparians may use an international river. The latter rule seems firmly understood, and a treaty granting a right of free passage to the ships of non-riparians must therefore be understood as a departure from the general rule of international law.

A second example may also be drawn from the law of international rivers. Here there is growing support for the view that the requirement of international law is that there be an equitable apportionment of the uses of waters of an international river. The detailed content of this very general principle is far from clear. Virtually all authorities seem today to deny the Harmon Doctrine, according to which the upper riparian has complete sovereignty over the waters of such a river and may control them or cut them off as it sees fit. The firm rejection of this outmoded view disposes of the possibility that a treaty that does provide for the apportionment of the waters of an international river constitutes a contractual renunciation of the sovereign rights of the upper riparians. There is not full agreement on the law-making function of the treaty there is a sharing of the uses of international rivers ... But the firm fact remains that all who write on this subject feel impelled to take account of the treaties as a source of law on the uses of waters of international rivers.

Fear of this very phenomenon of the influence of the treaty on customary international law possibly lay behind the provision of the Indus Waters Treaty, which stipulated that "Nothing in this Treaty shall be construed by the Parties as in any way establishing any general principle of law or any precedent".4 The precaution was a natural one to take, but the quoted provision certainly does not limit the ability of others to rely on the law of the treaty.5

23. Mr. REUTER congratulated the Special Rapporteur on his presentation of an important and difficult topic. One of the principal ideas he had put forward was that the difficulties raised by the topic related to the problem of shared natural resources. It would be better to refer to them as common natural resources,
since one of their special characteristics was, precisely, that they were not shared, but should be shared. As the Special Rapporteur had shown, the work done by the United Nations on shared natural resources, as embodied in resolutions, was encouraging. In relating the topic to shared natural resources, the Special Rapporteur was adopting an approach which had already yielded concrete results.

24. The question of the method to be followed in dealing with the topic had already arisen at the previous session. The Commission had reached a turning point in its history. So far, it had considered reports and prepared draft articles relating to traditional topics. It now found itself faced with a topic the legal regulation of which called for a new approach, new methods and new concepts. While the Special Rapporteur had shown himself capable of innovation, the same might not be true of all members of the Commission. Personally, he still felt somewhat intimidated by certain technical aspects of the problem.

25. With regard to method, the Special Rapporteur proposed to adopt the broadest possible approach, beginning with general principles and then proceeding from the general to the particular. In view of the mass of work done by the Special Rapporteur, he himself was prepared to trust his judgement and accept the method he proposed, albeit as an act of faith, until it could be seen where that method was leading.

26. Although he had no objection to the use of the word “systems” in article 1, he would like to know exactly what the Special Rapporteur intended. Such a term could, of course, be adopted and used without any immediate attempt being made to define its content; while aware that that was open to discussion, it was possible to go straight to the heart of the subject and not take a position until later. It was also possible to proceed from the assumption that the three concepts of river, river basin and drainage basin were sufficiently familiar, and to refrain from making any choice for the time being. Hence the term used was “international watercourse system”, which could be regarded as covering those three concepts. That seemed to be the attitude adopted by the Special Rapporteur.

27. The reason why some members of the Commission wished to adhere to the conventional definition of an international watercourse, which excluded drainage basins, was perhaps that they had a specific problem in mind and did not wish the regime of international watercourses to be applied merely because part of the waters feeding a river situated entirely within the territory of one State—in other words the waters of a drainage basin—came from outside that State. Whether that point of view was accepted or rejected, the concept of the drainage basin must nevertheless be accepted for certain specific problems, even though it were rejected for others.

28. The Commission had decided initially to deal with all the questions raised, and perhaps subsequently to eliminate some of them. Thus it included pollution in its study. One example would be the case of a State whose chemical wastes seeped into ground water and poisoned a river which did not flow on the surface in its territory. It was obvious that such a State could not disclaim responsibility for such pollution. Consequently, the concept of the drainage basin could not be excluded from a legal text regulating the whole of the subject under consideration. When looked at in that light, the concept of international watercourse systems could have a variable content, depending on the circumstances. In his view, it would be preferable to ascribe a variable content to that concept, rather than regard it as a vague concept which was taken to be constant. Otherwise, the Commission would be compelled, on taking up the first articles of the draft, to stipulate the content it intended to ascribe to that concept in each individual case.

29. In his report, the Special Rapporteur had introduced a number of familiar but difficult concepts, such as the obligation to negotiate. In addition, he had revived a concept which had previously provoked lively debate in the Commission: that of the right to participate in negotiations. General multilateral treaties were treaties in the negotiation of which all States had the right to participate. In article 5, however, the Special Rapporteur had gone so far as to provide—a very serious step—that system States were not entitled to conclude a system agreement among themselves without opening its negotiation to participation by the other system States. While not excluding the possibility of a provision of that kind, he was afraid it might raise very difficult problems. Admittedly, in terms of international responsibility, if two system States negotiated a system agreement at the expense of a third system State, their responsibility would be engaged. It remained to be seen whether the Commission wished to go so far as to institute a procedure whereby, by such means as notification, such machinery could be set in motion.

30. In conclusion, he stressed that the topic under consideration was an example of the new topics to which the Commission would have to turn its attention once it had exhausted the traditional topics.

31. Mr. ŠAHOVIĆ said that the report before the Commission showed that considerable progress had been made since the previous report, which had only been of an exploratory nature. He welcomed the fact that the Special Rapporteur had taken due account of the observations made by members of the Sixth Committee; they considered the question of the use of international watercourses to be of major importance, and their observations on the work of the Special Rapporteur and the Commission were most encouraging.

32. Like Mr. Reuter, he regarded the subject under study as both important and difficult. It was important to adopt an approach that would enable the Commis-
sion to achieve concrete results; it should no longer confine itself to general discussions.

33. As to the method to be adopted, he was not entirely convinced by the approach, or by some of the solutions, proposed by the Special Rapporteur, who was inclined to stress the technical aspects of the subject. The reason why so many terminological problems arose was that the Special Rapporteur started out from certain technical aspects, which led him to legal solutions not entirely suited either to the needs and interests of the international community, or to the stage of development of applicable international law. The topic was not new. Positive international law provided many examples of bilateral and multilateral conventions embodying legal solutions from which it was possible to derive general principles that took account, first and foremost, of the interests of States.

34. From the purely legal point of view, the ultimate aim was the codification and progressive development of international law on the topic, in other words, to regulate the relations between the rights and duties of riparian States that used the waters of an international watercourse as they could be used with existing technical possibilities. It was necessary, therefore, to reconcile respect for the rights of States with the requirements of legal regulation of international cooperation, and in particular the respect for the principle of good neighbourliness, which had underlain all solutions of such problems adopted for decades. The Commission should therefore take positive law as the starting point, and, as the Special Rapporteur proposed, seek solutions by which the principles derived from positive law could be adapted to modern situations.

35. In conclusion, he said he was prepared to consider the Special Rapporteur’s draft articles individually in succession, but from a standpoint other than that of the application of a clearly defined conception of solutions linked to the technical aspects of the topic.

36. Mr. EVENSEN, referring to draft article 1, paragraph 1, said that he welcomed the introduction by the Special Rapporteur of the term “international watercourse systems”: it was quite flexible and could be properly defined at a later stage in a draft article on the meaning of terms. He nevertheless suggested that the word “non-navigational” might be added before the word “uses” in the first line of that paragraph. The Special Rapporteur might also consider including a reference to pollution in the second part of the paragraph, because pollution was one of the most important issues now under discussion by the Third United Nations Conference on the Law of the Sea and in connexion with matters relating to international watercourses.

37. With regard to draft article 2, he had some doubts about the term “system State” and hoped that the Special Rapporteur would give it closer consideration.

38. Lastly, he suggested that, in draft article 3, reference might be made to “canals or channels” forming part of international watercourse systems. Those two terms would, of course, have to be clearly defined.

39. Mr. USHAKOV said that the Commission was only at the preliminary stage of its work on the topic, and the problems to be dealt with were of a general nature.

40. For example, while it seemed legitimate, in draft article 7, to describe international watercourses as shared natural resources, since that was obviously what they were, the use of such a concept was admissible only if its legal consequences for the use of the resource were specified, so that the scope of the provision was clearly defined.

41. In the case of draft article 6, difficulties of translation were added to the legal difficulties, and in his view the French text was not sufficiently clear. He also noted that the provision had no direct consequences for the use of an international watercourse.

42. Draft articles 4 and 5 regulated relations between the future draft articles and possible agreements between riparian or system States. It might seem premature to take up questions of that kind, when the Commission did not yet have a complete text and could not know whether its draft articles would become a draft convention.

43. Like the Special Rapporteur, he believed that the Commission should first establish the basic principles applicable to all international watercourses, and then supplement them by a set of rules on the specific uses of such watercourses.

44. He was not opposed to the use of the “systems” concept which appeared in article 1, provided that the meaning of the term was clearly defined. As he had already had occasion to point out at previous sessions, the Commission should confine its work to international rivers and possibly to lakes through which they flowed, and should exclude lakes as such. The French equivalent of the English term “watercourse” would seem to be “cours d’eau”, as the concept of a “voie d’eau” could include lakes, or even sounds. It also seemed necessary to specify that the Commission was considering international watercourses, that was to say, rivers which traversed or separated States. If it decided to include lakes within the scope of the draft, it would have to define the lakes involved, since it was possible to imagine the case of a lake forming the boundary between two States, although no river flowed through it.

45. As before, he wished to emphasize the difference between the use of water and the use of a river. The inhabitants of a region who obtained water for their consumption used the water, not the river. Conversely, a hydroelectric power station used the energy acquired by the water in descending; that was to say, it used the river and not the water, just as the watercourse rather
than the water was used for floating timber. He saw no reason why the Commission should not regulate both the use of a watercourse and the use of its water, provided that it clearly established the necessary physical and legal distinction. In that connexion, he stressed that a lake was not a watercourse, since its water did not flow.

46. With regard to the wording of draft article 1, he did not think that flood control was a problem related to the use of a watercourse or its water. The problem of floods was independent of the use of a river as such. The same was true of erosion, sedimentation and salt water intrusion, which was a more general case of pollution. In principle, those problems did not derive from the use of the water or the watercourse as such.

47. In addition to the system concept, consideration should be given to the concept of an international river basin, which might give rise to considerable difficulties if it was broadly defined and included groundwater and perhaps even the glaciers feeding a river. Under such a definition an entirely national river, flowing in the territory of a single State, might become an international river. In reality, the concept of an international watercourse presupposed that its water flowed through the territory of a number of States. It was essential that the Commission should define the concept of an international watercourse as the basis for its work.

The meeting rose at 5.55 p.m.

1608th MEETING

Tuesday, 10 June 1980, at 10.10 a.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Barboza, Mr. Calle y Calle, Mr. Castañeda, Mr. Diaz González, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Quintin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta, Mr. Yankov.

The law of the non-navigational uses of international watercourses (continued) (A/CN.4/332 and Add.1) [Item 4 of the agenda]

Draft articles submitted by the Special Rapporteur (continued)

1. Mr. SUCHARITKUL said that he was cautiously optimistic about the law of the non-navigational uses of international watercourses, because constant progress was being made on its codification and progressive development. In pursuing that objective, the Commission would have to take account of a number of important scientific, technical and geographical factors and of the need for a workable definition of the scope of the topic. The Special Rapporteur could take heart from the fact that work on the progressive development of the law of the sea was also proceeding quite slowly.

2. In attempting to delimit the scope of the topic, the Commission would have to come to grips with the difficulty of choosing between broad and narrow definitions of basic concepts, such as water itself (which could be taken as a single unit or seen in terms of its many characteristics) and international watercourses (which could be seen either as pipelines or in terms of their content). It would also be necessary to take account of other, intermediate concepts, such as that of drainage basins (which included all surface and underground water within the geographical limits of a watershed and involved problems of pollution control and environmental protection) and of valleys (like the Tennessee Valley). Attention should also be given to the concept of river systems—which had been introduced in draft article 1 and would provide a good starting point for the Commission’s discussions—and further thought would have to be given to the use of the word “réseau” in the French text, because its meaning was broader than that of the word “system”; it might be rendered in English by the word “network”.

3. He agreed with Mr. Evensen (1607th meeting) that paragraph 1 of draft article 1 should be expanded to include references to irrigation, energy, fisheries, pollution, conservation, agriculture and industry. Further historical and geographical details might also be included in the commentary to explain more clearly some of the problems associated with international watercourse systems, in particular, erosion and salt water intrusion.

4. Although he had no objection to draft article 2, he thought it might take some time to become accustomed to the term “system State”, which he hoped the Special Rapporteur would define more clearly.

5. In draft article 4, paragraph 1, the Special Rapporteur had provided that the future articles could be supplemented by system agreements designed to fill gaps in the main framework agreement. Paragraph 2 provided that such system agreements could be entered into with respect to an entire international watercourse system or with respect to any part thereof. In his opinion, that paragraph should also take account of the needs of countries such as those in the region of the Mekong Basin. In 1957, four lower riparian countries of that region, namely, Thailand, the Lao People’s Democratic Republic, Democratic Kampuchea and the Socialist Republic of Viet Nam, had established the Committee for co-ordination of investi-