Document:-
A/CN.4/SR.1787

Summary record of the 1787th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1983, vol. I

Indus Basin Development Fund Agreement[11] had been signed by representatives of Australia, Canada, the Federal Republic of Germany, New Zealand, Pakistan, the United Kingdom, the United States and the World Bank. Under the Indus Waters Treaty, India and Pakistan had declared their intention of co-operating to the fullest possible extent; meteorological and hydrological observation stations had been established; provision had been made for a full exchange of information; the Permanent Indus Commission had been appointed to settle differences and disputes; and a procedure had been established for recourse to a neutral expert for final decisions on technical questions and, in certain circumstances, to a court of arbitration. The Indus Waters Treaty 1960 must be regarded as a landmark in the law of international rivers.

28. In Pakistan the Indus waters had given rise to some problems among the provinces. In 1976 a commission headed by a judge of the Supreme Court had submitted its report, the recommendations of which, though fair, had led to complications when it came to implementation. Subsequently, a high-level tribunal had been set up, headed by the Chief Justice of Pakistan and composed of the Chief Justices of the High Courts of all the provinces. The report of that tribunal had been submitted in May 1983 and was still under consideration, but it was likely to provide material that could help in formulating principles of law governing the uses of the watercourse.

29. As a member of the International Rivers Committee of the International Law Association, which had formulated the Helsinki Rules in 1966, he appreciated that those Rules were based on the concept of the drainage basin with a hydrological background, whereas the present draft had a geographical approach based on the concepts of "system States" and the "international watercourse system". He noted that draft article 1, paragraph 1, sought to discard the concept of the international drainage basin in favour of a geographical approach, although the Special Rapporteur had stated (*ibid.*, para. 73) that the definition in draft article 1 was purely descriptive and that no legal rule or principle could be deduced from it. The Special Rapporteur had also said that the definition was a first attempt. That being so, draft article 1, paragraph 1, could be taken as the starting-point and improvements could be introduced in the light of the views expressed by members. As to paragraph 2, in view of the comments made by Mr. El Rasheed Mohamed Ahmed (1785th meeting) and Mr. Reuter, he would reserve his position.

30. Draft article 6 had been received with mixed feelings. While he recognized that a watercourse system and its waters should be regarded as a shared natural resource in which each State was entitled to a reasonable and equitable share, he trusted that the Special Rapporteur would reconsider draft article 6 in the light of the constructive comments made by Mr. El Rasheed Mohamed Ahmed and elaborated upon by Mr. Reuter.

31. In draft article 9 the Special Rapporteur had used the term "appreciable harm" in reference to the prohibition of certain activities. Although traditionally such expressions as "serious damage", "serious injury", "substantial detriment" or "serious prejudice" were used, he had an open mind and would be prepared to consider the term "appreciable harm".

32. It had been pointed out that draft articles 22 and 23 made no distinction between existing pollution and new pollution, as did the Helsinki Rules, although the American branch of the International Law Association had had reservations on that matter. For his own part, he agreed with the Special Rapporteur (A/CN.4/367, para. 171) that, in view of more recent developments, such a distinction was not acceptable.

33. Conflicting opinions had been expressed regarding draft article 28, dealing with the safety of international watercourse systems. Mr. Reuter (1785th meeting) apparently took the view that provisions relating to armed conflict were outside the Commission's competence. The previous Special Rapporteur, however, had given cogent reasons in his third report (A/CN.4/348, paras. 416–420) for appropriate provisions along the lines of the two 1977 Geneva Protocols;[12] and the present Special Rapporteur had stated (A/CN.4/367, para. 186) that he was in favour of such provisions, but hesitated to include them in his first draft until he had obtained the guidance of the Commission and the Sixth Committee of the General Assembly. Given the fact that many developing countries were dependent on dams and the possibility that those dams would be destroyed in the event of war, he was in favour of the provisions proposed by the second Special Rapporteur being incorporated in the draft.

34. Lastly, he agreed with those who favoured compulsory conciliation, especially as the report provided for in draft article 35 was of a recommendatory nature. That would be in keeping with the principle of good faith. As to adjudication, provisions along the lines of those in the 1982 Convention on the Law of the Sea relating to settlement of disputes should be given objective consideration. If the aim was a purpose-oriented convention, as advocated by the Special Rapporteur, pragmatic but productive provisions were required.

The meeting rose at 12.25 p.m.

[11] United Nations, *Treaty Series*, vol. 444, p. 259.

[12] See 1785th meeting, footnote 14.

1787th MEETING

Wednesday, 22 June 1983, at 10 a.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed

Mohamed Ahmed, Mr. Evensen, Mr. Flitan, Mr. Jagota, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Pirzada, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/348,[1] A/CN.4/367,[2] A/CN.4/L.352, sect. F.1., A/CN.4/L.353, ILC(XXXV)/Conf.Room Doc.8)

[Agenda item 5]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR[3] (*continued*)

1. Mr. SUCHARITKUL, congratulating the Special Rapporteur on the cautious approach displayed in his report (A/CN.4/367) on a delicate subject, said that he himself came from a country that did not have to be taught the value of watercourses. Rivers were Thailand's lifeline, a source of life not only for man but for all living things. Most of the country's inhabitants were born and lived by or on a river. They also lived off the river, from fishing, and when they died their ashes were scattered on the river.

2. In the case of international watercourses, a careful distinction first had to be drawn between navigational and non-navigational uses. In his own part of the world, for instance, such watercourses were used among other things to transport teak logs, which were pushed to the rivers by elephants and then floated down to the sawmills. Rivers also provided the means for conveying merchandise within the country or to another country. The use of a river as a natural frontier or boundary, though perhaps more political or juridical in nature, was another matter that might be taken into account or indeed considered later as an entirely separate topic.

3. The special nature of a river as compared with a lake was that it contained flowing water, and it was difficult in the present topic to speak of one State owning such water, a point he wished to mention merely in order to underscore the validity of the concept proposed by the Special Rapporteur as the core of his draft, in article 6, namely that an international watercourse system was a shared natural resource. It had rightly been said that that concept should not be confused with or incorporated into the concept of the common heritage of mankind, which was a concept of the future, even though it might already be applicable in such areas as outer space or the sea-bed beyond the limits of national jurisdiction. The concept of shared resources, on the other hand, was nothing new. Indeed, it dated back to Buddha, who had said that a man must share his wealth with his brothers. The water of a river flowing from one country to another did not belong exclusively to any one of them; it should benefit the communities that lived alongside the river banks.

4. It was perhaps easy for European countries, with their more or less comparable levels of industrialization and legal development, to permit joint management of a watercourse system; but in that regard the countries of South-East Asia simply could not afford to think in terms of national boundaries and had long had to disregard sometimes major political differences. Since water was absolutely essential for irrigation, they had been compelled to co-operate in the Committee for Co-ordination of Investigations of the Lower Mekong Basin, established in 1957. The economic development of the member countries was closely interwoven. Over the years many projects had been implemented, some of them exclusively national, as was the case with a number of dams that had been constructed in Thailand with the help of foreign loans. In upholding the modern concept of justice and equity, the Governments concerned had agreed to many sacrifices and had proved that developing countries were prepared to go far in their negotiations. Thailand was now the only member of the Mekong Committee that was not a socialist country, a fact that made no difference when the need arose for economic co-operation, without which all the members would suffer.

5. Lastly, with regard to the definition of an international watercourse system in draft article 1, he endorsed the reference in paragraph 1 to fresh water components, since one of the main factors that distinguished an international watercourse from the sea was the absence of sea water. The Special Rapporteur had been right, however, to include a reference in the same paragraph to brackish water.

6. Mr. CALERO RODRIGUES said that it was all too easy to understand why the topic was difficult. It covered a wide variety of rivers, ranging from small international rivers that formed borders to larger rivers like the Rhine and the Danube in Europe, the Mekong and the Ganges in Asia and the Amazon and the River Plate in South America. It also encompassed all kinds of uses, from domestic consumption to the watering of livestock, irrigation, fishing, timber floating, the development of hydroelectric power, and sewage and other waste disposal. Another reason for the difficulty of the topic was the inflated expectations in certain quarters regarding what could be achieved by an international convention. Some States seemed to think that it would solve all the problems involved, whereas in his view that could be done

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[1] Reproduced in *Yearbook . . . 1982*, vol. II (Part One).

[2] Reproduced in *Yearbook . . . 1983*, vol. II (Part One).

[3] For the texts, see 1785th meeting, para. 5. The texts of articles 1 to 5 and X and the commentaries thereto, adopted provisionally by the Commission at its thirty-second session, appear in *Yearbook . . . 1980*, vol. II (Part Two), pp. 110 *et seq.*

only through co-operation among the countries concerned. All a convention could do was to lay down very general rules, and he therefore urged the Commission to display caution and pragmatism. Otherwise, the draft articles would be of little practical effect—for instance, if the convention was accepted only by the downstream States or the upstream States, or by the States in one particular region.

7. He was grateful to the Special Rapporteur for his comprehensive report (A/CN.4/367), but wondered whether it would not have been better, rather than to present the Commission with a complete set of articles dealing with many different subjects, to provide it with an outline on the basis of which the articles in their entirety could be developed once the outline was approved.

8. He was also somewhat disappointed at the lack of a fresh approach. The Special Rapporteur had relied fully on arguments presented in earlier reports and had taken it for granted that the Commission and the General Assembly had accepted those arguments, something which was only partly true. Hence, it was essential for the Commission to take a new look at all of the basic concepts involved. Also, the frequent references to earlier reports necessitated perusal of them, and particularly the previous Special Rapporteur's second and third reports.

9. In respect of the structure of the draft articles, the Special Rapporteur proposed that they should be grouped under six chapter headings of his report. The sequence of the subjects covered in the draft articles was acceptable in principle, but it was somewhat disturbing that the draft made no reference to contiguous and successive rivers. Admittedly, it was not fashionable to believe that such a distinction could still play a useful role, but he wondered whether it could really be ignored in a set of articles that was intended to codify the law of the non-navigational uses of international watercourses. Were the rights and obligations of States always to be treated as the same, irrespective of the uses envisaged in the two very different situations involved?

10. The essence of chapter I of the draft (Introductory articles) lay in draft article 2, entitled "Scope of the present Convention", which set an ambitious goal. Again, it was questionable whether so much emphasis should be placed from the outset on matters pertaining to administration, management and conservation. To place them on the same level as uses in an introductory article could only justify the inclusion of non-essential provisions that might lead to further difficulties. The uses referred to were not only the uses of international watercourses but of "international watercourse systems", as defined in the opening sentence of draft article 1, paragraph 1—a definition that was qualified, however, by paragraph 2 of that article.

11. The expression "international watercourse system" had been employed by the previous Special Rapporteur in his second report,[4] in which connection certain international instruments and multilateral treaties containing the expression had been cited. The second Special Rapporteur had also noted that the expression was widely used in scientific and technical writings and in hydrographic descriptions and analysis; and therein lay the problem. The expression could be considered, in hydrographic terms, as synonymous with "drainage basin". The concept was the same in that it expressed the unitary physical nature of watercourses. The word "basin", in general, referred to the whole geographical area encompassing the waters; "system" was simply a refinement that placed the accent on the hydrological part of the basin. The Helsinki Rules (art. II)[5] defined an international drainage basin as "a geographical area extending over two or more States determined by the watershed limits of the system of waters, including surface and underground waters, flowing into a common terminus". While both "drainage basin" and "river system" were perfectly suitable for scientific and technical studies, it was doubtful whether either concept could or should be used for the formulation of rules of international law governing the non-navigational uses of international watercourses. It should have been clear from the start that the drainage basin concept would not recommend itself as the point of departure for a draft convention, and that was indeed the opinion of the Special Rapporteur (*ibid.*, para. 13).

12. The previous Special Rapporteur, in his first report,[6] had in fact come virtually to that conclusion by combining articles 1 and 2 and, in his second report, had introduced the expression "international watercourse system", which now appeared in draft article 1. When the Commission had considered the second report, it had apparently been aware of the difficulties of basing its work on a concept so similar to that of the drainage basin; the only difference seemed to be that the "system" focused on the waters, their uses and their interdependence. The Commission had therefore decided to admit a limitation that had now been embodied in paragraph 2 of draft article 1, a limitation that made sense because, for the purposes of the application of the rules of international law, it was not possible to cover each and every part of a basin or system. Since the rules related to uses, only the part or parts "used" that affected other uses would fall within the scope of the draft articles. The limitation was obviously necessary, and hence there was no point in retaining the concept of "system", which must necessarily be unitary in character if the concept was to have any proper meaning. If it was recognized, for legal purposes, that that unity could not be maintained, it followed that the expression "watercourse system" was inadequate. In the note which it had prepared at its thirty-second session, the Commission had attempted a very awkward accommodation by stating that

> . . . to the extent that the uses of the waters of the system have an effect on one another, to that extent the system is international, but only

[4] *Yearbook . . . 1980*, vol. II (Part One), pp. 167–168, document A/CN.4/332 and Add.1, paras. 53–58.

[5] See 1785th meeting, footnote 13.

[6] *Yearbook . . . 1979*, vol. II (Part One), p. 143, document A/CN.4/320.

to that extent; accordingly, there is not an absolute, but a relative, international character of the watercourse.[7]

That accommodation would give rise to further complications and the Commission, having already recognized that the unitary concept inherent in the idea of a "watercourse system" was not a sound basis for the rules it was drafting, should not insist on maintaining the expression "watercourse system".

13. Much thought would be required in order to arrive at a proper definition of the term "international watercourse" and he agreed with Sir Francis Vallat, who had said that the Commission should concentrate on the uses of international watercourses and that to try to formulate a definition would only hamper its work.[8] In his view, that opinion was still as valid as it had been in 1976. Only after the Commission had agreed on legal rules for the uses of watercourses should it seek to define the watercourses to which those rules would apply. The task might well be less difficult, and it might even prove necessary to consider the idea of an optional clause, which had been suggested in the Sixth Committee.

14. With regard to general principles, the basic rule was set forth in draft article 9, in which connection he noted two corollaries. The first, to be found in draft article 7, was that international watercourse systems and their waters should be developed, used and shared by system States in a reasonable and equitable manner with a view to attaining optimum utilization thereof. The article contained too many ideas and he would suggest that it should be amended to read: "Waters shall be used by States in a reasonable and equitable manner." As he saw it, the article should deal with waters only, there being no need to refer to international watercourses, and with uses only, there being no need to refer to development and sharing. Again, since the purpose was to avoid causing harm to other States, the reference to optimum utilization was not necessary.

15. The second corollary, to be found in draft article 8, was that there should be a determination of whether the use was reasonable and equitable. It should be a negotiated determination requiring, in the event of failure to reach agreement, resort to peaceful settlement procedures. Such a determination should have one single purpose, namely to ascertain whether the use caused or might cause appreciable harm to another State. Only on that basis could it be admitted that a joint determination was necessary, in which case it would also be necessary to explain what was meant by joint determination. In the first of the two corollaries, the drift was away from the main element—in other words, possible or actual appreciable harm—towards development and sharing, while in the second corollary, the notion of harm, which should be a guiding principle, receded still further into the background.

16. The basic principle—not causing any appreciable harm to another State—was preceded by another principle in draft article 6, that of shared natural resources. In fact the articles, and hence the rights and obligations of States, should be developed from the real basic principle, and not from the principle of shared natural resources. The principle of not causing appreciable harm had a logical, practical foundation, whereas the shared natural resources principle was, legally speaking, theoretical and controversial. Its formulation was not clear; its consequences even less so. It therefore seemed unnecessary to include it in the draft. It added nothing and would only give rise to the difficulties that had accompanied it from the outset. In that connection, the Special Rapporteur considered that the matter had been dealt with "in an elucidating manner" (A/CN.4/367, para. 33) by the previous Special Rapporteur, who had taken the view that the concept had been "widely accepted", but the only additional support found for the concept lay in the conclusions of the Mar del Plata Action Plan.[9]

17. The Special Rapporteur stated (*ibid.*, para. 81) that the basic principle laid down in draft article 6 was a codification of prevailing principles of international law following from customary international law as evidenced by comprehensive State practice, general principles of law, including those laid down in Articles 1 and 2 of the United Nations Charter, and also following from the very nature of things.

18. To deduce the principle that the waters of international watercourses constituted a shared natural resource from "the very nature of things" was to imply acceptance of the concept of natural law and he was not sure that that was, at present, a reasonable basis for codification. To deduce the principle from Articles 1 and 2 of the Charter seemed, at the very least, hazardous. One of the principles embodied in Article 2 of the Charter was the sovereign equality of States. Moreover, Article 2, paragraph 7, recognized that there were matters which were essentially within the domestic jurisdiction of States. Another principle that was often forcefully affirmed was that of permanent sovereignty over natural resources. In the present instance, to deduce the shared resource principle from "customary international law as evidenced by comprehensive State practice", supporting materials would have to be furnished, but none had been provided by the Special Rapporteur, who had instead referred to the Helsinki Rules. Though he did not wish to be too critical of his approach in that respect, he thought that the Special Rapporteur had made a mistake often made by jurists, particularly by progressive jurists who wished to develop new international law but failed to distinguish between aspirations and genuinely recognized rules of

[7] *Yearbook . . . 1980*, vol. II (Part Two), p. 108, para. 90.

[8] *Yearbook . . . 1976*, vol. I, p. 275, 1407th meeting, para. 19.

[9] See *Report of the United Nations Water Conference, Mar del Plata, 14-25 March 1977* (United Nations publication, Sales No. E.77.II.A.12), chap. I.

international law. It was a common error, as had been stressed by Philip Jessup in *A Modern Law of Nations*.[10]

19. Mr. Stavropoulos was to be commended for his initiative in circulating a note (A/CN.4/L.353) containing the UNEP 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. Although, as indicated in paragraph 6 of the note, the General Assembly had decided not to adopt the draft principles and had preferred simply to take note of them,[11] even more important was the fact that the draft principles did not claim to contain legal definitions. The explanatory note by UNEP (*ibid.*) stated:

> . . . An attempt has been made to avoid language which might create the impression of intending to refer, as the case may be, either to a specific legal obligation under international law or to the absence of such obligation. The language used throughout does not seek to prejudge whether or to what extent the conduct envisaged in the principles is already prescribed by existing rules of general international law.

20. In order to develop sound rules that would command general acceptance, it was neither necessary nor useful for the Commission to introduce the principle of a shared natural resource in the draft articles. From the legal point of view, it was a general principle that would add nothing to the draft and might give rise to controversy. Rather, the Commission should study the rules applicable to the uses of international watercourses on their own merits and leave aside an extraneous concept which had not been adequately defined.

21. Chapter II of the draft related to general principles, yet chapter III, entitled "Co-operation and management in regard to international watercourse systems", began with draft article 10 which was itself entitled "General principles of co-operation and management" and should have its proper place in chapter II; the developments or consequences could be dealt with in chapter III. Undeniably, international co-operation was a desirable thing. Indeed, the achievement of international co-operation was one of the purposes of the United Nations. However, although States did agree to co-operate in various fields, co-operation in general terms was not strictly speaking an obligation for States under existing international law.

22. Co-operation was being expanded in respect of the many uses of international watercourses. In Brazil, for example, the River Plate and the Amazon were covered by general co-operation agreements which went beyond questions of navigation and also applied to technical and economic uses. Nevertheless, in the draft articles co-operation should not be viewed from a legalistic angle: it should not take the form of a set of mandatory rules imposing strict norms of conduct that were precisely defined. Such an approach should be avoided, primarily because it would be impossible to foresee the different types of conduct that would be required in every instance; moreover, when States were compelled to co-operate, they were not likely to accept strict norms.

23. The Special Rapporteur dealt with the general aspects of co-operation in draft articles 10 and 15–19. Under article 10, co-operation would be established between States "to the extent practicable . . . with regard to uses, projects and programmes" related to a watercourse system "in order to attain optimum utilization, protection and control of the watercourse system". To that end, States should engage in consultations (negotiations) and exchange of information and data and, when necessary, establish joint commissions. The reference to joint commissions in draft article 10, paragraph 3, was expanded on in draft article 15, which mentioned the establishment of "permanent institutional machinery" and "a system of regular meetings and consultations". Details on the collection and exchange of information and data were given in articles 16–18.

24. The Special Rapporteur seemed to be aware that co-operation could not be imposed and that it should emerge from agreement between the States concerned and not involve any constraints. In some places, the draft said that States "should" do something and, in others, that they "shall" do something, with the qualifying expressions "to the extent practicable" in article 10, paragraph 1, "to the extent practicable and reasonable" in article 16, paragraph 3, "to the extent possible" in article 16, paragraphs 1 and 2, "when necessary" in article 10, paragraph 3, "where it is deemed advisable" in article 15, paragraph 1, and "where practical" in article 15, paragraph 2. Fortunately, it was precisely in those terms that co-operation should be described in the draft articles, which should encourage States to co-operate, not force them to do so.

25. The question of notification dealt with in draft articles 11–14 should probably be regarded as a specific aspect of co-operation. With regard to article 11, paragraph 1, he could not agree that projects and programmes should concern "the utilization, conservation, protection or management of an international watercourse system". That wording was the result of the Special Rapporteur's monolithic approach and was not acceptable. Reference was, in fact, being made to projects and programmes concerning use of the waters of a watercourse that might cause appreciable harm to the use of the waters of the same watercourse by another State or States. If, in a State's own assessment, a project or programme would result in appreciable harm to another State, the project or programme should be abandoned. The first State had a clear obligation not to undertake the project or programme in question, unless of course the other State agreed to accept the harm, a possibility that should not be ruled out. The other State might agree to accept the harm if, although it was appreciable, it would be bearable because the project or programme would offer certain advantages. Alternatively, the other State might accept compensation for the harm caused or co-operation, including financial assistance, for measures to minimize or prevent the harm.

26. Harm that could be accepted must, however, be

[10] P. C. Jessup, *A Modern Law of Nations* (New York, Macmillan, 1948).

[11] General Assembly resolution 34/186 of 18 December 1979, para. 2.

only potential harm, not a necessary consequence of the project or programme. In such a case, the risk had to be evaluated in a factual study, and in that connection the co-operation of the potentially harmed State might be useful in determining the likelihood of harm and ways and means of preventing or minimizing it. Information and data might be exchanged in order to help the State wishing to undertake the project or programme to make its own decision.

27. In that respect, it had been stated in the *Lake Lanoux* arbitral award in 1957 that:

> In form, the upper riparian State has, by virtue of the procedure, a right of initiative; it is not obliged to associate the lower riparian State in the preparation of its projects. If during the negotiations the lower riparian State submits projects to it, the upper riparian State should examine them, but it has the right to prefer the solution adopted by its project, if it takes into consideration in a reasonable manner the interests of the lower riparian State.[12]

Although that opinion was valid in the limited context of procedures and schemes, the principle underlying it might be more broadly applicable because, as Mr. Quentin-Baxter had noted in his preliminary report on international liability for injurious consequences arising out of acts not prohibited by international law,[13] international law did not undermine the sovereignty of States by making their essential freedom of action within their own borders subject to a foreign veto and, except in the last resort, it did not place its faith in prohibitory rules.

28. According to draft article 11, paragraph 1, before a State undertook, permitted or authorized a project or programme that might cause appreciable harm to other States, it must submit a notification to those States. Once the notification was made, a reply was to be given within six months, although an extension could be requested for the reply; consultations and negotiations would be undertaken, and a procedure for the settlement of disputes might come into play. However, the idea of co-operation seemed to disappear, because the reply became a "protest" in draft article 13 and the concept of a "dispute" seemed to prevail.

29. The entire procedure, which would involve the reply, consultations and negotiation and the settlement of the dispute, could be a very protracted one and would therefore have a suspensive effect: the first State would not be able to proceed with its project or programme before the procedure had been completed. Yet that State could remove the obstacle by saying that it deemed the project to be "of the utmost urgency" or that further delay might cause unnecessary damage or harm. It could, in the words of draft article 13, paragraph 4, claim that it was faced with an "emergency situation". If it did so, it would be able to go ahead with its project or programme and would only have to face any "claims for damage or harm" which might be made and which would be settled "in good faith and in accordance with friendly neighbourly relations by the procedures for peaceful settlement" provided for in the draft articles. Having provided for too restrictive a suspensive effect, the draft also provided for too wide an escape clause. The system thus established was not a good one, either in terms of logic or in terms of the interests of the States concerned.

30. Moreover, if he understood draft article 14, paragraph 2, correctly, the only consequence for a State which did not comply with the provisions of draft articles 11–13 was that it would be liable for the harm caused as a result of its project or programme. Hence the best approach would be for a State not to make any notification at all. The only consequence it would suffer would be liability and the notification procedure would not have any suspensive effect. The system of notification and the suspensive effects of the ensuing procedure were thus irrelevant. Why then had the Special Rapporteur drafted articles 11–13 in such a drastic way that States might hesitate to accept them because they might consider that they were being placed in a strait-jacket of limitations on their freedom of action? Would it not be better to be more straightforward and more realistic by indicating on which terms and in which conditions States were supposed to conduct themselves in that matter?

31. Lastly, the Commission should agree to the outline proposed by the Special Rapporteur as a basis for the continuation of its work; request the Special Rapporteur to give further consideration to the proposed draft articles in the light of the comments and observations made at the present session of the Commission and at the thirty-eighth session of the General Assembly; request the Special Rapporteur to present to the Commission's next session a report dealing with draft articles 1–9 and, if possible, with draft articles 10–19; request the Special Rapporteur to endeavour to submit that report as soon as possible, so that it could be distributed to the members of the Commission before the beginning of the thirty-sixth session; and decide to set aside enough time for the examination of that report on a priority basis at the thirty-sixth session.

32. Mr. STAVROPOULOS, referring to the concluding remarks by Mr. Calero Rodrigues, said that the distribution of reports took considerably longer than it had when the United Nations had first been established. For example, the report under discussion had been submitted for reproduction on 19 April 1983, but had been made available only in the first week of June. Again, in the early days of the United Nations, summary records had been distributed within one day of the meetings concerned, whereas now it was not at all certain when the summary record of the present meeting would be available. Efforts should therefore be made to ensure that the summary records were distributed as rapidly as possible so that they could be used at the present session, not at the next one.

33. He had not intended to introduce his note (A/CN.4/L.353) concerning the UNEP 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, which

[12] United Nations, *Reports of International Arbitral Awards*, vol. XII (Sales No. 63.V.3), p. 316, para. 23; see also *Yearbook . . . 1974*, vol. II (Part Two), p. 198, document A/5409, para. 1068.

[13] *Yearbook . . . 1980*, vol. II (Part One), p. 262, document A/CN.4/334 and Add.1 and 2, para. 50.

he had thought would be self-explanatory, but a misunderstanding had arisen in connection with that note. In introducing his report, the Special Rapporteur (1785th meeting) had said that the draft principles had encountered difficulties in the General Assembly, a statement that had been misunderstood, as revealed in one of the comments made at the previous meeting.

34. What had happened in the Second Committee was that considerable efforts had been made to find a compromise solution for the wording of the resolution on the draft principles that was to be submitted to the General Assembly. It had been impossible to reach agreement on a revised text because, as had been explained by the delegation of Pakistan, a sponsor of the draft resolution, some delegations had continued to press for the replacement of the word "adopts" by the words "takes note of", as proposed by the representative of Brazil. Ultimately, the Brazilian amendment had been adopted in the Second Committee by 59 votes to 25, with 27 abstentions. Later, the General Assembly had adopted the draft resolution recommended by the Second Committee without a vote, in its resolution 34/186 of 18 December 1979.

35. In his submission, however, there was no difference from the legal point of view between the word "adopts" and the words "takes note of". It was a well-known fact that, under Article 25 of the Charter, the Members of the United Nations had agreed to accept and carry out only the decisions of the Security Council. Under Article 10 of the Charter, the General Assembly could only make recommendations to the Members of the United Nations. Paragraph 3 of General Assembly resolution 34/186 requested all States to use the draft principles as guidelines and recommendations in the formulation of bilateral or multilateral conventions regarding natural resources shared by two or more States, and surely the fact that the draft principles had been "noted" did not deprive them of any of the force they might have had if they had been "adopted". Moreover, the General Assembly continued to be interested in the question of co-operation in environmental matters connected with natural resources shared by two or more States, as could be seen from resolution 37/217, in which it had reiterated the terms of its resolution 37/186 and had requested the Governing Council of UNEP to submit a further progress report on the implementation of that resolution to the General Assembly at its fortieth session.[14]

36. Mr. REUTER thanked Mr. Stavropoulos for his explanations but said that they made no difference to the remarks he had made at the previous meeting.

Other business

[Agenda item 11]

37. The CHAIRMAN requested the Secretary to the Commission to provide some clarification concerning the availability of summary records.

38. Mr. ROMANOV (Secretary to the Commission) said that, as early as the 1765th meeting, Mr. Al-Qaysi had raised the question of delays in the distribution of the summary records of the Commission's meetings. In that connection, he himself had sent a note to the Chief of the Languages Service, who had replied in a memorandum which read:

> While I regret the delays you mention, I should however like to point out that the problem raised is unfortunately of a perennial nature, and in fact inherent in the procedure we are required to follow in the production of summary records for the International Law Commission.
>
> The summary records of bodies other than the Commission are prepared by two monolingual (either English or French) teams of précis writers, each of which is alternately responsible for producing the summary record covering one entire meeting.
>
> The basic problem as regards the Commission's summary records is that they are prepared by a *bilingual* team (two English and two French précis writers) and that the record of each meeting is designated as being original English or French according as the rapporteur for the item under consideration speaks English or French.
>
> Consequently, an "original English" record, for example, contains summaries of French statements prepared by the French précis writers, which must first be translated into English before the record as a whole can be sent to the English reviser. The length of the delay this entails obviously depends on the extent of the "non-original" language component that has to be translated.
>
> The pattern of summary record production mentioned in your memo is an accurate reflection of what the current procedure involves, for of the first 10 records of the present session, eight were "original French" and two "original English", and as the lead language version appears first, it is entirely logical that more French than English records have appeared. As regards the other language versions, their production depends entirely on that of the lead languages, so that they obviously appear even later.
>
> As the members of the Commission who have expressed concern about the unavailability of its summary records might not be aware of the above procedure, it has been explained in some detail. It might be added that, when originally introduced, this procedure was fully justified as offering an ideal solution to the problem of according equal importance to the two working languages spoken in a relatively small bilingual body. Since that time, however, not only the Commission's membership but also the number of its working languages has been considerably increased, and the greater complexity of producing its summary records reflects this development. Indeed, at the present time the delays referred to are extremely difficult to avoid unless something is done to modify the existing procedure.

39. It was thus clear that changes in the procedure for the production of summary records were beyond the Commission's control.

40. With regard to the delayed distribution of reports prepared by special rapporteurs, he said that, in inquiring into the date of submission of those reports, he usually sent special rapporteurs a letter worded along the following lines:

> The linguistic and reproduction services of the Secretariat have informed us that it is necessary to receive the reports of special rapporteurs in time for their editing, translation and reproduction at Headquarters in New York well in advance of the opening of the session since, as you know, the Geneva Office has limited resources for translating and reproducing those reports, particularly during the Commission's session. In addition, attention is drawn to the fact that documents which are issued at the Geneva Office are not included in the general pattern of document distribution at Headquarters, a fact which has been regretted by a number of delegations in the Sixth Committee which have emphasized the need to have the reports of special rapporteurs available for missions in New York.

41. To some extent, that might explain why difficulties arose with regard to translation and reproduction if a

[14] General Assembly resolution 37/217 of 20 December 1982, para. 6 (*a*).

report was submitted during or just before a session. What happened in such a case was that pre-session documentation, which was taken into account in the translation and reproduction work-load estimated by Documents Control at Headquarters in New York, became in-session documentation, which was not taken into account in the estimated work-load of the Geneva translation and reproduction services.

42. Mr. STAVROPOULOS said he thought that the question of the delayed distribution of reports and summary records should be discussed in the Planning Group.

43. Mr. DÍAZ GONZÁLEZ said that the inference to be drawn from the Secretary's explanations was that the summary records of the Commission, instead of constituting a working tool, were already archives by the time they appeared. The delay suffered by the Spanish-speaking members of the Commission before they saw the summary records of statements delivered by them in their own language was particularly long, since the summaries were drafted in English or French before being translated into Spanish in terms that were sometimes far removed from those which had actually been employed.

44. As to reports by special rapporteurs, not only did they reach the Spanish-speaking members of the Commission with some delay, but they were also drafted in terms which often necessitated preliminary decoding. Because the Spanish version of the reports was always distributed after the English and French versions, the Spanish-speaking members had less time than other members to read and absorb them. The matter should be brought before the Planning Group, since the solution to the problem apparently did not depend either on the Commission or on the Secretariat.

45. Mr. REUTER said he was under the impression that, in the letters sent to special rapporteurs by the Secretariat, the time-limit for submitting reports was 15 February or 1 March. The Secretariat might furnish some statistics on the submission of reports, which would show whether some special rapporteurs were more punctual than others.

46. Mr. ROMANOV (Secretary to the Commission) explained that the Secretariat did not set deadlines for the submission of reports. It merely informed special rapporteurs that it would be grateful if they could submit the manuscripts of their reports at their earliest convenience. It was thus left to special rapporteurs to determine when their reports would be completed and submitted.

47. The CHAIRMAN, speaking as a member of the Commission, suggested that the Planning Group should discuss ways of ensuring that all language versions of reports and summary records were made available as rapidly as possible.

The meeting rose at 12.45 p.m.

1788th MEETING

Thursday, 23 June 1983, at 10 a.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Flitan, Mr. Jagota, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Pirzada, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov.

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/348,[1] A/CN.4/367,[2] A/CN.4/L.352, sect. F.1, A/CN.4/L.353, ILC(XXXV)/Conf. Room Doc.8)

[Agenda item 5]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR[3] (*continued*)

1. Mr. NJENGA said that, in justifying the unprecedented step of submitting a comprehensive set of draft articles in his first report (A/CN.4/367), the Special Rapporteur had rightly pointed out that the topic under consideration had been before the Commission since 1979, that the General Assembly had requested the Commission to treat it as urgent, and that draft articles should therefore be formulated as soon as possible. It might, however, have been preferable for the Special Rapporteur to adopt a more modest approach in his first report and to determine whether there was any consensus on general principles before submitting a full set of draft articles. Although what the Special Rapporteur had achieved must not be underestimated, he should bear in mind that whatever general principles were adopted were likely to affect the draft articles as a whole.

2. The outline for a draft convention (*ibid.*, para. 65) was entirely acceptable. It represented a logical and coherent way of dealing with the topic and would be viable whatever solutions ultimately commanded a consensus in the Commission.

3. In view of the diversity of international watercourses in terms of size and physical, hydrological and geographical characteristics, he fully agreed with the opinion expressed by the Special Rapporteur in his report (*ibid.*, para. 14) that

> . . . a definition of international watercourses based on a doctrinal approach to the topic would be counter-productive, whether the

[1] Reproduced in *Yearbook . . . 1982*, vol. II (Part One).

[2] Reproduced in *Yearbook . . . 1983*, vol. II (Part One).

[3] For the texts, see 1785th meeting, para. 5. The texts of articles 1 to 5 and X and the commentaries thereto, adopted provisionally by the Commission at its thirty-second session, appear in *Yearbook . . . 1980*, vol. II (Part Two), pp. 110 *et seq.*