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Summary record of the 1856th meeting

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

Extract from the Yearbook of the International Law Commission:-
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the negotiators would have them in mind. Like Mr. Calero Rodrigues (1854th meeting), he preferred a more austere style. He also had doubts about the meaning of the expression "optimum utilization", which suggested a rather naïve view of things. To express an opinion on draft article 8 he would need concrete examples, showing that in a particular case a court had attached so much importance to one factor and so much to another. So it mattered little whether draft article 8 was reduced to a single sentence or disappeared altogether; it was the Commission's commentaries that were important. He suggested referring to factors "whose relative importance will vary depending on all the circumstances".

53. In draft article 29 (now draft article 15 *ter*), which excluded preferential uses, he was surprised to see a text which did not recognize the priority of a State whose supply of water was a matter of survival, if it requested priority. That omission was most unfortunate.

54. In conclusion, he expressed full confidence in the Special Rapporteur, who had been most self-sacrificing. If the Special Rapporteur thought it opportune to refer the draft articles to the Drafting Committee, he would have no objection.

The meeting rose at 1 p.m.

1856th MEETING

Friday, 6 July 1984, at 10 a.m.

Chairman: Mr. Sompong SUCHARITKUL

Present: Chief Akinjide, Mr. Balanda, Mr. Barboza, Mr. Boutros Ghali, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Francis, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Thiam, Mr. Ushakov.

The law of the non-navigational uses of international watercourses (continued) (A/CN.4/367, ¹ A/CN.4/381, ² A/CN.4/L.369, sect. F, ILC (XXXVI)/Conf. Room Doc.4)

[Agenda item 6]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR ³ (continued)

1. Mr. RIPHAGEN said that the topic under consideration had much in common with the topic of inter-

national liability for injurious consequences arising out of acts not prohibited by international law. Both were concerned with rules of international law which offset the effects of the arbitrary division of the world into many individual States. It was for that purpose that Grotius had devised the legal construction of *jus communitationis*, which dealt with human movement across borders.

2. Since the territories of the States through which international watercourses flowed were not watertight compartments and the waters of those watercourses were essential for human life, State practice in respect of their use had taken shape long ago. There was thus a body of rules which established the substantive and procedural rights and obligations of watercourse States. Those obligations included the duty not to overstep certain limits in the exercise of territorial sovereignty, the duty to co-operate and, in some cases, the duty to ensure that the watercourse would be managed jointly as an integrated whole.

3. In view of the limits on territorial sovereignty, vague concepts such as what was "reasonable", "fair" and "equitable" had to be used to qualify the right to exercise such sovereignty. With regard to the obligation of a watercourse State to prevent within its territory any interference with the uses of water in the territory of another State, it was necessary to resort to the very vague term "to an appreciable extent". The flexible concepts of "good faith" and "good-neighbourliness" were also used to describe the way in which the duty to co-operate should be fulfilled.

4. The limitation of the right to exercise territorial sovereignty over an international watercourse was in fact the mirror image of the definition of the obligations of watercourse States. That point had important drafting implications because it was, for example, not clear that the prohibition provided for in draft article 9 was the mirror image of the right of all watercourse States to a reasonable and equitable share of the use of the waters of the watercourse in their territories.

5. The notions to which he had referred were open to divergent interpretations. Priorities therefore had to be set with regard to water uses. High priority had to be given to drinking-water supplies, but the use of water for the disposal of industrial waste had low priority. It was also clear that the existence of a use did not in itself confer any priority. Nor should an existing use be the basis for a claim to participation in the negotiation of watercourse agreements or the exercise of other procedural rights.

6. The question of alternative uses and compensation also had to be taken into account in determining what was fair, equitable and reasonable. In some cases, such a determination could lead to the prohibition of certain uses or activities, particularly in view of the needs of future generations. The concept of the conservation of a resource by non-use thus implied the joint management of that resource as an integrated whole.

¹ Reproduced in *Yearbook ... 1983*, vol. II (Part One).

² Reproduced in *Yearbook ... 1984*, vol. II (Part One).

³ For the texts, see 1831st meeting, para. 1. 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.*

7. Because of the vagueness of the terms “equitable” and “reasonable”, States had a duty to co-operate and to negotiate with regard to the scope of the rights they were entitled to exercise. If, however, the negotiations failed and no agreement was reached, they would also have a duty to seek a solution by other appropriate means.

8. One important feature of the new draft articles was that they were intended to provide for compulsory conciliation procedures. The wording of the articles in chapter V of the draft should, however, be amended to make it quite clear that the conciliation procedures in question were, indeed, compulsory. Stronger emphasis should also be placed on the fact that the Conciliation Commission decided on its own procedure and jurisdiction, as had been made clear in annex V to the 1982 United Nations Convention on the Law of the Sea.⁴

9. Although he had no objection to the Special Rapporteur’s decision to delete the term “system”, he did not think that that decision would improve the text of the draft articles. Whatever wording was used, an international watercourse had to be defined as constituting a unit of some kind that would be divided among the States concerned.

10. It also had to be made clear that the draft referred not only to the waters of a watercourse, but also to the bed of the watercourse and to watercourse installations, whose legal status was extremely important. The extent of co-operation between watercourse States and the content of the duty to co-operate would, of course, depend on the location and characteristics of the watercourse in question; those factors could not be defined in the abstract.

11. He noted that the former draft article 39 had begun with the words “Without prejudice to article 4, paragraph 3”, while in the new version of that article that proviso had been eliminated. As he saw it, that deletion required some explanation. The reason for the reference to article 4, paragraph 3, was that the Commission had recognized that agreements in force relating to a particular international watercourse might, in due course, have to be extended to other projects, programmes or uses. Existing agreements which related only to specific uses might, therefore, have to be updated to take account of new projects, programmes or uses.

12. Mr. QUENTIN-BAXTER said that, although he came from an island country which was thousands of miles away from the nearest land boundary, he was fully aware of the importance of the topic under consideration. He therefore congratulated the Special Rapporteur on his second report (A/CN.4/381) and on his decision to abandon the concept of an international watercourse as a “shared natural resource”, which had been at the centre of the Commission’s work on the topic for some six or seven years. It was encouraging to note that, during the current discussion, no one had questioned the correctness of the Special Rapporteur’s decision. It had been recognized that the “shared natural resource” concept unduly limited the freedom of action of water-

course States, but it remained to be seen how the abandonment of that concept would affect the draft as a whole.

13. He recalled that Mr. Kearney, the first Special Rapporteur for the topic, had convincingly explained the “drainage basin” concept in his report⁵ and had followed the tradition of the Helsinki Rules prepared by the International Law Association in 1966.⁶ At the time, he himself had been impressed not only by the first Special Rapporteur’s presentation, but also by the reserve shown by nearly all members of the Commission.

14. Mr. Schwebel, the second Special Rapporteur, had had to grapple with the conflict between recognition of the “drainage basin” concept and the shadow of the “shared natural resource” concept, which meant that no State could take decisions without the concurrence of the other States concerned. That rule was one which States were prepared to apply in matters relating to boundary waters. In such circumstances, the “shared natural resource” concept obviously had a place in the draft, but there also had to be a more flexible means of dealing with other matters.

15. In his second report,⁷ Mr. Schwebel had therefore suggested the concept of a “watercourse system”, which recognized the unity of a river system while emphasizing that it consisted of components. That concept had been designed to mitigate the rigour of the “shared natural resource” concept, while paying due regard to the facts of geography, the unity of rivers and the nature of water. After an inconclusive debate in the Commission, the matter had been referred to the Drafting Committee, which had thus had a very heavy responsibility thrust upon it. The Drafting Committee had then produced a set of draft articles⁸ prefaced by a “working hypothesis”⁹ which had been provisionally adopted by the Commission.

16. Like some other members, he had difficulty in agreeing with the current Special Rapporteur’s decision to abandon the term “watercourse system”. The elimination of that term might be more a matter of language than of substance, but caution was necessary because, if importance was attached to a change of wording, the change might not be purely cosmetic.

17. Two major elements of draft articles 1 to 9 appeared to be connected with the concept of a “watercourse system”. The first was the “shared natural resource” concept; with its elimination, one of the reasons for the idea of a “watercourse system” had disappeared. The second element was the very important, but elusive, principle embodied in draft article 5, which dealt with the parties to the negotiation and conclusion of watercourse agreements and had also been patterned on the “watercourse system” concept. Since that concept had been

⁴ See 1831st meeting, footnote 6.

⁵ *Yearbook ... 1976*, vol. II (Part One), p.184, document A/CN.4/295.

⁶ See 1831st meeting, footnote 4.

⁷ *Yearbook ... 1980*, vol. II (Part One), p. 159, document A/CN.4/332 and Add.1.

⁸ See footnote 3 above.

⁹ See 1854th meeting, footnote 4.

abandoned, however, the text of the new draft article 5, paragraph 1, had become a tautology. It provided that every watercourse State was entitled to participate in the negotiation of and to become a party to any watercourse agreement that applied to that international watercourse as a whole. If some watercourse States chose to conclude an agreement which left out another watercourse State, they could do no more than regulate their own part of the watercourse and their agreement would clearly not apply to the watercourse as a whole. Any agreement relating to a watercourse in its entirety would obviously require the participation of all the States having territorial control over that watercourse.

18. The question of agreements which applied to part of a watercourse, as dealt with in draft article 5, paragraph 2, could be usefully illustrated by the 1958 Agreement between Czechoslovakia and Poland concerning the use of water resources in frontier waters, which contained the following provision relating to pollution:

The Contracting Parties have agreed to abate the pollution of frontier waters and to keep them clean to such extent as is specifically determined in each particular case in accordance with the economic and technical possibilities and requirements of the Contracting Parties.¹⁰

Those two countries had agreed to improve the quality of boundary waters, but had not committed themselves to spending more than was reasonable for that purpose. Boundary waters had thus been treated as a shared natural resource. In view of the geographical location of Czechoslovakia and Poland, the boundary waters between them would inevitably flow into the territory of other States. Although downstream States might be affected by the pollution of the waters in question, Czechoslovakia and Poland had no obligation to canvass the situation of those States. A provision such as draft article 5, paragraph 2, would, moreover, be of no assistance in such a situation; it might well hinder the countries concerned.

19. Draft article 4 was unlikely to have the effect of encouraging States to conclude watercourse agreements. Rather, it placed particular emphasis on the framework convention, even to the extent of specifying the content of special watercourse agreements and of playing down the need for watercourse States to conclude such agreements. That article should therefore be redrafted to encourage the States of a single river system to conclude agreements governing its uses.

20. With regard to chapter II of the draft, he noted that, although the "shared natural resource" concept had been eliminated, article 6 still referred to the idea of sharing. The emphasis in paragraph 1 of that provision was, however, wrong: it spoke of a "share of the uses of the waters of an international watercourse", but it should refer to the sharing of the waters themselves. Water was a commodity in short supply to which each riparian State had a right, although it could waive that right in return for something else, such as electric power from a dam.

21. The redrafting of article 6 and the elimination of the "system" concept had produced a curious consequence: paragraph 2, taken together with paragraph 1, established an obligation that was very similar to an obligation under liability for injuries arising out of acts not prohibited by international law, although it did not draw the same distinction between the physical consequence and its effects. In his view, paragraph 2 could not be placed side by side with paragraph 1, which provided that every watercourse State was entitled to a reasonable and equitable share of the uses of the waters of an international watercourse.

22. Draft article 9 appeared to offer a final guarantee for downstream States because the rule it established would engage State responsibility. If the aim of draft article 9 was to deal only with pollution, the obligation for which it provided would be very strong, since pollution was an area of transboundary harm in which rules of prohibition were coming to be accepted, at least by developed countries, on the basis of the principles established in the *Trail Smelter* case.¹¹ Chronic pollution was something that could be avoided, usually within an economic framework. There was therefore some merit in an article along the lines of draft article 9.

23. The rule stated in draft article 9 nevertheless had its limitations. If the flooding which had occurred in 1983 in the Colorado river basin in the United States of America and which had been caused when the sluice-gates of a dam had been opened to release waters that had reached dangerously high levels had taken place, for example, in Europe or in Africa, it would have had broad international implications. In such a case, draft article 9 could not have been invoked as a basis for claiming the international responsibility of the source State and, even if it could have been, the case would have been one of *force majeure* under the rules of State responsibility. The apparently strong protection afforded by draft article 9 thus melted into nothing and the only remedy left was that provided by the principles of liability. It was probably safe to say that the United States authorities would never think of such a case in terms of State responsibility; to them, it would clearly be a case of liability for the injurious consequences arising out of the lawful use of the waters of a watercourse in their territory. It would be on that basis that arrangements for compensation would be made internally. That situation was thus one in which State responsibility was precluded and in which there were nevertheless a number of important obligations that had to be fulfilled.

24. Draft article 9 dealt not only with transboundary harm, but also involved an element of sharing. Draft article 6 provided for the right of each watercourse State to a share of the waters of the watercourse and, if a State did not receive a fair share of those waters, its rights and interests would be harmed and State responsibility would be engaged. In that connection, he drew attention to the need to take account of the concept of equity. As the example of the 1958 Agreement between Czechoslovakia and Poland concerning the use of water resources in

¹⁰ Art. 3, para. (4) of the Agreement (United Nations, *Treaty Series*, vol. 538, p. 110).

¹¹ See 1848th meeting, footnote 10.

frontier waters had clearly shown, there was no definite agreement even on the definition of pollution. Those two countries had thus set their own admissible levels of pollution for particular purposes, with an eye to costs and benefits as well as to priorities. That was a reasonable approach and one which was adopted by countries throughout the world, which nevertheless had to take account of the interests of downstream States in setting those priorities. There was thus no automatic formula for determining what constituted “harm” and the problems involved could not be solved merely by using terms such as “appreciable harm”, however useful such terms might be.

25. If the question of sharing “in a reasonable and equitable manner” was also raised in connection with draft article 9, the hard rule of State responsibility would have to be made subject to the soft rule of estimating what was fair, reasonable and equitable. Referring again to the example of the dispute between Mexico and the United States relating to the Colorado River, whose waters had been used so intensively for irrigation in the United States that only a trickle of salt water was reaching Mexico across the frontier, he noted that a settlement had been reached as a result of negotiations between the two Governments concerned and that it had been agreed that the United States would spend large amounts of money to set up desalination plants, to provide outlets for contaminated salt water and to pay compensation for the losses incurred by Mexican farmers (see A/CN.4/373, para. 48). That result was in keeping with the concept of what was “reasonable and equitable”. The “equitable” solution in that case would have been for the United States to stop using the waters of the Colorado River and leave them to Mexico, since Mexico was the poorer country, but, in view of the agricultural situation in the United States, that solution would not have been “reasonable”. The best solution was thus that the wealthier country, the United States, should spend money to strike a balance in favour of Mexico.

26. The main issue in that context related to draft article 8. Some members of the Commission attached a great deal of importance to that article, while others, including Mr. Calero Rodrigues (1854th meeting) and Mr. Reuter (1855th meeting), wished to dispense with it. A list of relevant factors, such as that contained in draft article 8, involved the question of an equitable balance of interests. Indeed, where the law provided no firm automatic rule, the only answer was a balance of interests and the natural tendency was to produce a list of the relevant factors to be taken into account: hence the content of draft article 8, which had been based on article V of the Helsinki Rules.¹²

27. It was interesting to compare article V of the Helsinki Rules with article 3, paragraph (1), of the Montreal Rules adopted by the International Law Association in 1982,¹³ which read:

¹² See 1831st meeting, footnote 4.

¹³ ILA, *Report of the Sixtieth Conference, Montreal, 1982* (London, 1983), p. 2.

(1) Without prejudice to the operation of the rules relating to the reasonable and equitable utilization of shared natural resources, States are in their legitimate activities under an obligation to prevent, abate and control transfrontier pollution to such an extent that no substantial injury is caused in the territory of another State.

That provision was adequate to deal with transboundary pollution where no question of sharing was involved, but it would not be satisfactory if sharing were involved. That pointed to the crux of the problem with regard to draft article 8. Sharing was the foremost issue in the topic under consideration and a draft on international watercourses could not be elaborated without dealing with that issue. The rules that might engage State responsibility therefore had to be qualified by means of a prior determination of “reasonable and equitable” shares and it must be the Commission’s aim to encourage States to solve the problems they faced in particular situations by means of special watercourse agreements.

28. Although he was not in favour of the suggestion that draft article 8 should be deleted, he agreed that a long, non-exhaustive list of relevant factors would be inelegant. He therefore proposed that the list contained in paragraph 1 (a) to (k) should be included in a schedule to the future convention, not in the commentary to article 8.

29. As Mr. Boutros Ghali had suggested (1853rd meeting), account should also be taken of quantitative factors, comparative costs and population growth. Mr. Reuter, moreover, had stated that needs and contributions were the basic factors to be considered and that a distinction had to be drawn between consumption and non-consumption uses of water, while Mr. Boutros Ghali had also drawn attention to the navigational uses of international watercourses. Bilateral water boundary agreements in Europe and in North America often contained entire chapters on timber floating, which could be regarded either as a navigational use or as an industrial use, depending on circumstances. The main point was that it was a competing use which had to be given priority. Although draft article 2 could be retained for the time being, he thought that the Commission would eventually have to decide whether the draft articles should also apply to the navigational uses of international watercourses.

30. Mr. BOUTROS GHALI, referring to the statement he had made at the 1853rd meeting, said he wished to make it quite clear that a distinction had to be drawn between the various uses of international watercourses. For example, a cubic metre of water from the Nile did not have the same intrinsic value in Egypt and in Ethiopia. Egypt, which was a desert country and had, moreover, been called a gift of the Nile, had only that river to rely on for water supplies. The different possible uses of an international watercourse should therefore be defined before any attempt was made to determine the consequences of such uses or to decide on a procedure for the settlement of disputes.

31. Mr. CALERO RODRIGUES said that he wished to clarify a point raised by Mr. Quentin-Baxter. At no point had he said that he found draft article 8 unnecessary. He was, rather, not far from agreeing with Mr. Mahiou (1854th meeting) that the article was very important.

What he had said was that he did not think that the list of relevant factors contained in paragraph 1 (a) to (k) should be included in the text of article 8. Unless an exhaustive list could be produced—and that would be an impossible task—the value of such a list would be very limited; the inclusion of some elements and the omission of others would only complicate matters. He therefore assured Mr. Quentin-Baxter that his intention had been only to suggest either that the list should be deleted or that it should be included in the commentary to draft article 8.

32. Mr. USHAKOV proposed that draft article 1 should read:

“An international watercourse means a watercourse which crosses the territory of two or more States and whose components are defined by agreement between the watercourse States concerned.”

The first part of that provision defined the main characteristic of an international watercourse. It would, of course, be difficult to identify the “States concerned”, to which the second part of the provision referred, since there were various criteria, including that of a “drainage basin”, that could be used.

33. Mr. OGISO said it had been stated that the topic under consideration should not concern island countries, such as Japan and New Zealand. Mr. Quentin-Baxter *inter alios* had, however, explained his interest in the subject very well. In addition to the interest in the subject he himself had as a member of the Commission, Japan was interested—even though it had no international rivers—in making a contribution to the development of areas where international rivers flowed, since the use of their waters was indispensable for the economic development of the riparian States.

34. In draft article 1, one major change had been the deletion of the word “system”. According to the Special Rapporteur, the main reason for the deletion had been the doubts expressed by a number of delegations in the Sixth Committee of the General Assembly. He was, however, not sure whether there was any substantive difference between the present text, which used the words “international watercourse”, and the former text, which had used the words “international watercourse system”. If the change was not purely cosmetic and there was in fact a difference of substance and legal meaning, an explanation should be included in the commentary.

35. He was also not sure whether draft article 1 placed all the components or parts of a watercourse on the same footing or whether there was a distinction between the main components and the subsidiary components. Assuming, for instance, that the mainstream of a large river flowed through State A, with one tributary flowing from State B into the mainstream in State A, would the entire stream become an international watercourse or only the tributary? He would appreciate it if the Special Rapporteur could clarify that point. Difficulties might arise if an attempt were made to distinguish between the main and subsidiary components of a river. His own view was that a particular river would be regarded as an

international river if the mainstream flowed through more than two countries, but not if it flowed through one country and had a tributary flowing into it from another country.

36. He would also like to know whether it was the Special Rapporteur’s intention to include in the definition of an international watercourse man-made canals or lakes that had formed as a result of the construction of a large dam. He believed that the reference to canals and lakes in the Special Rapporteur’s commentary (A/CN.4/381, para. 24) covered cases in which a canal or lake formed a subsidiary part of a watercourse, not those in which it was the main component of an international watercourse. He did not know whether there were in fact any large canals that extended into the territory of more than one country, but, assuming that they were to be constructed in future, they would presumably be covered by a special international agreement. On that basis, it would seem that man-made canals should be excluded from the definition of an international watercourse, but he would appreciate having the Special Rapporteur’s views in that regard.

37. As to draft article 1, paragraph 2, he was not sure about the meaning of the words “components or parts of the watercourse in one State are not affected by or do not affect uses of the watercourse in another State”. In particular, the words “are not affected by or do not affect uses” implied that it was present uses that would be affected; but that did not take account of the situation which might arise if a project was undertaken to develop parts of an international river. If, as he believed, it was the Special Rapporteur’s intent to cover such a contingency, he would suggest that the words in question might be amended to read “are not affected by or are not likely to be affected by uses...”. That suggestion might be referred to the Drafting Committee for consideration.

38. Ground water had been referred to by a number of speakers. In his view, ground-water resources located in the border area between two countries and of the kind referred to in the Special Rapporteur’s commentary (*ibid.*, paras. 27-29) should be excluded from the draft convention. Ground water that supplied water to a main international stream might, however, affect the flow of that particular international river. That was another point that required clarification by the Special Rapporteur.

39. With regard to draft article 4, he agreed with Mr. Ni (1854th meeting) that the last part of the first sentence of paragraph 1 could be deleted. As it now stood, moreover, that provision was ambiguous and should be redrafted with a view to greater clarity.

40. There was a slight difference in nuance between two statements made by the Special Rapporteur in his comments on that article. The Special Rapporteur stated (A/CN.4/381, para. 38) that “Great caution should ... be exercised especially in claiming that special watercourse agreements in force must be re-examined ...”, which seemed to suggest that he discouraged re-examination of special watercourse agreements, whereas later he stated that

... considerable restraint should be demonstrated in regard to allegations that special watercourse agreements concluded in good faith subsequent to the entry into force of the framework convention would have to apply and adjust the provisions of the framework convention to a special watercourse agreement or arrangement if the States parties held a different opinion. ... (*Ibid.*, para. 39.)

He would like some clarification in that regard and trusted that the commentary would make the position a little clearer.

41. Like other speakers, he had some misgivings about the term “to an appreciable extent” used in draft article 4, paragraph 2. If the use of the waters of an international watercourse was adversely affected, such adverse effect must of necessity be “appreciable”; if it were not, he did not see how the use could be “adversely” affected. To his mind, the term “to an appreciable extent” could confuse the issue. He also noted that the term appeared at a number of other points in the draft and he had the impression that, in some places, it was used more for psychological reasons than out of legal necessity.

42. The comment he had made on the words “are not affected” in draft article 1 could also apply to draft article 4, paragraph 2, and to draft article 5, paragraph 2. With regard to the latter provision, he would like to know whether the intent was that any decision as to whether the use of the watercourse was “thereby affected” should rest with the State whose use of the water was, or was likely to be, affected, or whether the other watercourse State which proposed an agreement also had a right to take part in such a decision. Since the paragraph in question provided for an entitlement to participate in the negotiation, he thought it was proper to interpret it as conferring a sole right of decision upon the State whose use of the water was affected. That should, however, be made clear, if not in the body of the draft, then in the commentary.

43. Referring to draft article 6, he said that it was not clear whether any substantive difference from the original text of the article had been introduced by discarding the concept of a “shared natural resource”. Since the concept of sharing had been retained, the content of the old and new versions of article 6 seemed to be the same; the deletion of the concept of a “shared natural resource” could thus be regarded as purely cosmetic. The Special Rapporteur might, however, have some substantive change in mind and some further clarification would therefore be appreciated. For his own part, he wondered whether the concept of a “shared natural resource” might not serve a useful purpose in certain cases. In that connection, he noted that there were two categories of special watercourse agreements: one relating to agreements for the management and administration of the watercourse, and the other to agreements for a particular development project. In the case of the latter category in particular, it might sometimes be useful to adopt the concept of a “shared natural resource” if the watercourse States concerned agreed to do so. Accordingly, without making any firm proposal, he would suggest that, rather than excluding the concept entirely, a provision along the following lines should be considered:

“Watercourse States parties to a special watercourse agreement may accept the concept of a shared natural resource for the purpose of that particular agreement to the extent that the proposed special watercourse agreement is applicable to a particular project or programme or to a particular use of that water resource.”

He would appreciate having the Special Rapporteur’s comments on that suggestion.

44. He noted that the Special Rapporteur had used the words “reasonable and equitable manner” in draft article 7, whereas, in his commentary (*ibid.*, para. 48), he had used the words “fair and equitable share”. That could suggest that the word “reasonable” and the word “fair” had almost the same meaning. While he could accept either the words “reasonable and equitable” or the words “fair and equitable” some further clarification regarding any difference in legal meaning between the word “reasonable” and the word “fair” would provide a basis for the interpretation of subsequent articles.

45. Doubts had also been expressed with regard to the word “optimum” in draft article 7. The fact that that term had been used in a number of legal instruments and, in particular, in fisheries agreements which referred to the “optimum annual catch” of fish provided some precedent for the concept and he was therefore prepared to accept it. He was not, however, very sure about the legal content of the term “good-neighbourly relations” and was inclined to regard it more as a political concept than as a legal concept. In that connection, he noted that draft article 4, paragraph 3, referred only to “good faith”. He would like to know whether there was any legal significance in the fact that different terms had been used in draft article 4, paragraph 3, and draft article 7.

The meeting rose at 1.10 p.m.

1857th MEETING

Monday, 9 July 1984, at 3 p.m.

Chairman: Mr. Alexander YANKOV

Present: Chief Akinjide, Mr. Balanda, Mr. Barboza, Mr. Diaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Francis, Mr. Jacovides, Mr. Koroma, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, 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.4/367,¹ A/CN.4/381,² A/CN.4/L.369, sect. F, ILC (XXXVI)/Conf. Room Doc.4)

[Agenda item 6]

¹ Reproduced in *Yearbook ... 1983*, vol. II (Part One).

² Reproduced in *Yearbook ... 1984*, vol. II (Part One).