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**Summary record of the 1977th meeting**

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

Extract from the Yearbook of the International Law Commission:-  
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could not stand on its own, because it would have to be supplemented by special agreements between riparian States.

52. In fact, if the Commission wished to do useful work, it should confine itself to making recommendations. It might draft a very general definition of an international watercourse, or several variants between which riparian States could choose, on the understanding that, if they did not find any of the proposed definitions satisfactory, they could adopt another. Of the very detailed provisions the Commission might draft, riparian States could choose those they found suitable, or only some of the rules they contained.

53. If the Commission adopted that approach, the difficulties would be reduced; but if it tried to draft generally acceptable binding rules, its efforts would be in vain, because in that sphere the interests of States were divergent and even the views of members of the Commission were hard to reconcile.

54. Mr. McCaffrey (Special Rapporteur) said that the issue raised by Mr. Ushakov had been before the Commission since the General Assembly had referred the topic to it in 1970. It was striking that, in the Sixth Committee of the General Assembly, very great interest had been shown by many States in the topic of international watercourses. When Mr. Schwebel had been Special Rapporteur, the Commission had decided to structure its work on the topic in the form of a framework instrument. The purpose of that instrument would be to provide guidance to States in solving their watercourse problems. States would thus be able to apply and adjust the provisions of the Commission's draft to suit their particular needs.

55. To say that the draft would have the form of a framework instrument was not to deny its usefulness. Many of its provisions constituted the application to international watercourses of general principles of international law. A clear statement of those principles would undoubtedly assist States and help them to avoid disputes.

56. It was the Commission's custom to refrain from making any recommendation to the General Assembly on the fate of its drafts until the work on each topic had been completed. Moreover, any recommendation made by the Commission at the present stage—for example that a codification conference be convened—would not be binding on the General Assembly, which could always decide to give the draft the form of a declaration or a set of recommendations. The awareness of that fact should not, however, inhibit the Commission at the present stage of its work.

57. Mr. FRANCIS said that, as a citizen of a small island State, he would refrain from dwelling at length on the topic of international watercourses. He wished mainly to comment on Mr. Ushakov's remarks. It was certainly correct to say that the Commission would be wise not to attempt to prepare a draft convention for riparian States; but he could endorse the Special Rapporteur's remarks regarding the great interest shown in the topic. He himself recalled the statements made by the representatives of many riparian States in the Sixth Committee during the discussion on the topic, which

had also been studied by the Asian-African Legal Consultative Committee. The final result of the Commission's work might well be to provide guidelines—or perhaps a handbook—for riparian States. At the present stage, however, the Commission should press on with its work and leave the ultimate fate of the draft to the General Assembly.

*The meeting rose at 1 p.m.*

## 1977th MEETING

*Friday, 27 June 1986. at 10 a.m.*

*Chairman: Mr. Doudou THIAM*

*Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Koroma, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.*

**The law of the non-navigational uses of international watercourses (continued) (A/CN.4/393,<sup>1</sup> A/CN.4/399 and Add.1 and 2,<sup>2</sup> A/CN.4/L.398, sect. G, ILC (XXXVI)/Conf.Room Doc.4)**

[Agenda item 6]

SECOND REPORT OF THE SPECIAL RAPporteur  
(continued)

NEW DRAFT ARTICLES 10 TO 14<sup>3</sup> (continued)

1. Mr. FLITAN congratulated the Special Rapporteur on the scientific precision with which he had introduced his second report (A/CN.4/399 and Add.1 and 2), which contained very interesting ideas on a very sensitive topic.

2. Before turning to draft articles 1 to 9 referred to the Drafting Committee in 1984, he wished to comment on a matter of principle which had already been discussed at some length, namely the form that the draft articles should take. In view of the different situations to be taken into account, and to avoid any misunderstanding, it would be better for the draft to consist simply of recommendations to States. The Commission had been requested by the General Assembly to formulate a framework agreement, not a draft convention. The ex-

<sup>1</sup> Reproduced in *Yearbook ... 1985*, vol. II (Part One).

<sup>2</sup> Reproduced in *Yearbook ... 1986*, vol. II (Part One).

<sup>3</sup> For the texts, see 1976th meeting, para. 30. The revised text of the outline for a draft convention, comprising 41 draft articles contained in six chapters, which the previous Special Rapporteur, Mr. Evensen, submitted in his second report, appears in *Yearbook ... 1984*, vol. II (Part One), p. 101, document A/CN.4/381.

isting texts should not be discarded, but the draft articles should contain rules of a residual nature so that States might have a clear idea of international law pertaining to watercourses at the present time, for water was used to meet a wide variety of needs and was something that made for controversy in international life. The Commission nevertheless had to proceed cautiously. It should not prepare draft articles that were too detailed and went beyond the limits of a framework agreement setting out general principles.

3. With regard to the draft articles referred to the Drafting Committee, he agreed in principle with the Special Rapporteur's recommendation (*ibid.*, para. 63, *in fine*) that draft article 1, which contained the definition of an "international watercourse", should be withdrawn for the time being. Nevertheless, while it was wise not to take a clear-cut position on such a sensitive and complicated issue as the definition of an international watercourse, there was no reason to proceed on the basis of the provisional working hypothesis accepted in 1980. In 1984, the previous Special Rapporteur had decided, in the light of the objections expressed by many members of the Commission, to abandon the idea of an "international watercourse system".<sup>4</sup> Hence the Commission could use as a provisional working hypothesis the text of article 1 which it had approved and referred to the Drafting Committee in 1984.

4. The concept of "shared natural resources", set out in draft article 6, had been sharply criticized in 1983 and was, he reaffirmed,<sup>5</sup> contrary to international law and therefore unacceptable. It had to be rejected if the draft framework agreement requested of the Commission was to be accepted by a large number of States. Clearly, it was essential to avoid including such a controversial issue in the draft.

5. For the same reason, all the factors listed in draft article 8 as determining whether the use of the waters of an international watercourse was reasonable and equitable should be deleted, for they did not embody any legal principles. They involved geographic, climatic and hydrological concepts, and the list was far from exhaustive. Accordingly, it should be left to States to decide which factors were to be taken into account, and article 8 should consist only of the first sentence of paragraph 1.

6. In connection with draft article 9, on the duty to refrain from causing "appreciable harm" to other watercourse States, the Special Rapporteur proposed in his report (*ibid.*, paras. 179-187) many new ideas that were of considerable scientific value. On the basis of the text of draft article 9 referred to the Drafting Committee, the Special Rapporteur presented three different ways of formulating the principle of equitable utilization embodied in that article, indicating that he preferred the third approach (*ibid.*, para. 184). Personally, he was in favour of that third approach, which reconciled the right of equitable utilization with the duty not to cause harm and was more precise than the first two alternatives. Similarly, he shared the Special Rapporteur's view that "an article drafted along the general

lines of this third alternative would best achieve the goals of a provision on this subject, viz. to set forth the 'no harm' rule while making it consistent with the principle of equitable utilization" (*ibid.*).

7. As to the new draft articles 10 to 14 submitted by the Special Rapporteur, the explanation of the word "available" given in paragraph (9) of the comments on article 10 was in his view somewhat contradictory, because data and information which were not readily available could not be produced. Consequently, it would not be possible to indemnify the notifying State for any expenses it incurred.

8. On the other hand, he shared the view expressed by the Special Rapporteur in paragraph (2) of the comments on article 11. It would indeed be difficult to set a precise time-limit of six months, which might be too long in some cases and too short in others. Equally valid were paragraph (5) of the comments on article 13 and paragraphs (3) and (4) of the comments on article 14.

9. Lastly, it was not necessary at the present time to decide on the question of drafting further articles on specific situations, in view of the General Assembly's request for the preparation of nothing more than a draft framework agreement. States themselves should solve any important problems for which the draft articles, in their present form, failed to supply an answer.

10. Mr. MAHIOU commended the Special Rapporteur on his very thorough and complex second report (A/CN.4/399 and Add.1 and 2). The flexible and respectful attitude that the Special Rapporteur had adopted towards his predecessors risked, in a sense, making the Commission's task more difficult in that it had four different options to choose from. The report did perhaps contain too many footnotes and lengthy quotations and the Special Rapporteur had felt compelled to reopen the debate on certain issues, but despite those defects his analysis and conclusions were very convincing.

11. As Mr. Ushakov (1976th meeting) had said, the work would naturally be much easier if the Commission simply had to prepare guidelines for States; but as the Special Rapporteur recalled (A/CN.4/399 and Add.1 and 2, para. 59), the Commission had adopted a specific approach and had to continue to follow that approach. It must therefore strive to work out the framework agreement which it had been instructed to prepare.

12. He could agree to the Special Rapporteur's proposal that draft article 1 be withdrawn for the time being and that the Commission defer its consideration of the definition of an international watercourse (*ibid.*, para. 63). He none the less wondered whether it might not be possible to use that definition, since it had become a less controversial issue as a result of the abandonment of the "system" concept in 1984.

13. The Special Rapporteur had taken a more cautious attitude towards the "shared natural resource" concept, but it would be premature to discard it, as the Special Rapporteur advocated in his report (*ibid.*, para. 74). The concept had developed considerably as a result of the Commission's work and the Special Rapporteur himself had introduced some equally controversial con-

<sup>4</sup> See *Yearbook ... 1984*, vol. II (Part Two), p. 89, para. 290.

<sup>5</sup> See *Yearbook ... 1983*, vol. I, p. 213, 1791st meeting, para. 9.

cepts, such as “limited territorial sovereignty” (*ibid.*, para. 162), which might create further confusion about the “shared natural resource” concept.

14. With regard to the determination of reasonable and equitable use of the waters of an international watercourse, there was no need for the Commission to resume its discussion of article 8, which had already been referred to the Drafting Committee; but it was an important provision and some of the factors listed should indeed be included in the article itself, which should not be confined solely to the first sentence of paragraph 1.

15. He fully agreed with the Special Rapporteur’s analysis and conclusions concerning the concepts of injury and equitable utilization (*ibid.*, para. 172, and especially para. 173). The Special Rapporteur had drawn a useful distinction between “factual harm” and “legally recognizable injury”, which would entail consequences and lead to compensation.

16. Of the three proposals made by the Special Rapporteur concerning the duty not to cause “appreciable harm” (*ibid.*, paras. 182-184), the first was the least satisfactory, because the use of the term “injury” in the very broad sense might give rise to problems, while the purpose of article 9 was precisely to avoid any problems of interpretation. The idea stated in the second proposal was quite correct, but the wording might have to be amended. Like the Special Rapporteur, he would be in favour of the third proposal (*ibid.*, para. 184), which was much more concise and would be acceptable if the text were amended to remove any ambiguity. As it now stood, the proposed wording appeared to authorize a State to cause harm to another State, although only in exceptional circumstances.

17. The draft articles on the procedural rules to be applied in the event of a dispute between States concerning the utilization of a watercourse related to matters that had already been dealt with both in the draft on State responsibility for wrongful acts and in the draft on international liability for injurious consequences arising out of acts not prohibited by international law. Since those topics related to loss or injury caused in a wide variety of sectors and already provided for general means of solving such problems, the purpose of the draft articles under consideration would be to arrange for more detailed methods to deal with individual situations in the framework of specific agreements, as the Special Rapporteur in fact suggested in his report (*ibid.*, para. 193). The Special Rapporteur, however, apparently ruled out the idea of the need for specific procedures, and he himself had also begun to question whether they were really necessary. The matter thus called for further consideration.

18. Finally, the Special Rapporteur discussed various situations that might arise between States in the utilization of an international watercourse (*ibid.*, paras. 192-197). However, the distinction he made in paragraph 197 between an existing use and a new use of a watercourse was not at all convincing and was quite difficult to imagine. His own doubts would almost certainly be dispelled by explanations from other members

of the Commission and the Special Rapporteur, whose conclusions were none the less very interesting.

*The meeting rose at 11.30 a.m.*

## 1978th MEETING

*Monday, 30 June 1986, at 10 a.m.*

*Chairman:* Mr. Doudou THIAM

*Present:* Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Illueca, Mr. Koroma, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

**The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/393,<sup>1</sup> A/CN.4/399 and Add.1 and 2,<sup>2</sup> A/CN.4/L.398, sect. G, ILC (XXXVI)/Conf.Room Doc.4)**

[Agenda item 6]

SECOND REPORT OF THE SPECIAL RAPPORTEUR  
(*continued*)

NEW DRAFT ARTICLES 10 TO 14<sup>3</sup> (*continued*)

1. Mr. CALERO RODRIGUES thanked the Special Rapporteur for his second report (A/CN.4/399 and Add.1 and 2) and his oral introduction (1976th meeting). The report itself seemed rather lengthy, although the wish to make it a self-contained document was understandable. In particular, the discussion in no less than 12 paragraphs of the Harmon Doctrine, in favour of which no one would argue seriously, could have been dispensed with. Other parts of the report, such as that under the heading “equitable utilization or ‘limited sovereignty’ ” (A/CN.4/399 and Add.1 and 2, paras. 92-99), could give rise to prolonged discussion. The statement that

... leading studies of the law of international watercourses have concluded that the rights and obligations of States in respect of the use of international watercourses are the same whether the watercourse is contiguous or successive (*ibid.*, para. 76)

was open to dispute. The distinction between rights and obligations of States with regard to contiguous and suc-

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