Document:-
A/CN.4/SR.2011

Summary record of the 2011th meeting

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

Extract from the Yearbook of the International Law Commission:-
1987, vol. I

30. Mr. REUTER said he fully agreed with the Special Rapporteur that procedural mechanisms which were not obligatory would be quite meaningless. The Commission's role was not to dispense fair words and advice to States, but to formulate rules of law. It mattered little if the Commission agreed on only a few rules, provided that they were obligatory. And it would be an illusion to think that it could confine itself to general principles, even though they were undoubtedly legal principles; it must adopt a minimum of obligatory mechanisms, which were not too heavy and were as precise as possible.

31. In his previous statement (2008th meeting), he had said that the Commission, when examining rules of procedure, would need to revert to the substantive rules, and Mr. Calero Rodrigues had just given a striking demonstration of that fact in connection with draft article 9, and of the distinction to be made between a risk of disturbance and certainty of disturbance. But that was far from being the only problem raised by article 9. For the Special Rapporteur distinguished—and that distinction was crucial—between harm resulting from a wrongful act and harm caused by disturbance of an existing situation or even of a legitimate expectation. But while the English terminology was sufficiently precise in that respect, French legal language, for example, was much less so. Hence it was extremely important to be quite clear on the meaning of the terms, in order to avoid any misunderstanding.

32. In articles 11 to 15, the Commission would have to settle other difficult questions relating to responsibility—for example, responsibility incurred by failure to notify—but it must first solve the fundamental problems, and to do so it must revert to the substantive rules, which were still very imprecise.

33. Mr. ARANGIO-RUIZ said he did not think that the Commission should get too involved in the meaning of the term "customary law". He would prefer the term "unwritten law", since he had doubts about the concept of custom as applied to international law. As he understood it, the role of the Commission was to draft conventions which consisted partly of customary or unwritten law, and partly of new law—in other words the progressive development of the law. It was for States to decide whether or not the conventions drafted by the Commission were acceptable to them.

34. The CHAIRMAN said that the meeting would rise to enable the Drafting Committee to meet.

The meeting rose at 11.35 a.m.

2011th MEETING

Tuesday, 9 June 1987, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/399 and Add.1 and 2,[1] A/CN.4/406 and Add.1 and 2,[2] A/CN.4/L.410, sect. G)

[Agenda item 6]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

CHAPTER III OF THE DRAFT:[3]

ARTICLE 11 (Notification concerning proposed uses)

ARTICLE 12 (Period for reply to notification)

ARTICLE 13 (Reply to notification: consultation and negotiation concerning proposed uses)

ARTICLE 14 (Effect of failure to comply with articles 11 to 13) *and*

ARTICLE 15 (Proposed uses of utmost urgency)[4] (*continued*)

1. Mr. GRAEFRATH said his initial impression that the Special Rapporteur's approach to co-operation was much too narrow was confirmed by draft articles 11 to 15. The Special Rapporteur regarded the rules laid down in those articles as procedural. On analysis, however, they proved to be a mixture of substantive rules on co-operation and implementation measures and rules that established or would lead to dispute-settlement procedures. Moreover, articles 11 to 15 focused on only one aspect of co-operation among watercourse States and sought to impose on the author State a strict procedure for which there was no basis in customary international law. State practice revealed a very different picture inasmuch as most bilateral and multilateral treaties covered a wide range of activities and procedures concerned with the promotion of co-operation in a variety of forms, including exchange of information, co-ordination of protective measures, common research projects, mutual assistance in times of danger, close co-operation among administrative bodies, establishment of joint commissions and even joint financing of programmes.

2. It was on the basis of such agreed co-operation that procedures operated effectively. Admittedly, procedures were a necessary element of co-operation, but the substance of co-operation could not be reduced to a set of procedural rules. Indeed, in many instances, it

---

[1] Reproduced in *Yearbook . . . 1986*, vol. II (Part One).

[2] Reproduced in *Yearbook . . . 1987*, vol. II (Part One).

[3] 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.

[4] For the texts, see 2001st meeting, para. 33.

might be far more important to have, for example, a permanent system for the exchange of information and data than any *ad hoc* procedure concerning new uses. Given the wide variety of State interests and the great number of co-operation issues involved in a particular watercourse, therefore, it seemed somewhat arbitrary, and also unjustified by State practice, to concentrate, as the Special Rapporteur had done, on new uses that involved risk.

3. The procedure provided for in articles 11 to 15 was also very one-sided, for it was geared mainly to the settlement of disputes and not to organized co-operation. Whether or not States accepted and applied the proposed rules as a matter of law would depend on whether those rules were in keeping with their own interests. In that connection, it was extremely important to determine whether the rules reflected customary international law. Nobody would question that the Commission's task was the progressive development and codification of international law and that codification always contained elements of progressive development, but it was highly questionable whether what certain lawyers regarded as proposals for the progressive development of international law ultimately became part of the codified rules of international law. International practice in the matter of watercourses, as reflected mainly in bilateral agreements, showed that States felt the need to establish rules relating chiefly to specific uses, objects or tasks which corresponded to their particular interests. He knew of no practice, however, to justify the assumption that the strict procedure laid down in articles 11 to 15 could be regarded as customary law. A rule whereby States could embark on a new use of an international watercourse only after prior agreement between the States concerned or a binding third-party decision could not be regarded as a rule of customary law, and still less as a general principle of law. Consequently, he could only conclude that the articles under consideration contained rules for the progressive development of the law and did not seek to codify existing rules.

4. He agreed that draft article 11, which referred solely to State and not private activities, was too narrow and therefore required modification. It was also necessary to determine whether the term "new use" covered any change in an existing use. The Special Rapporteur had himself recognized that the word "contemplates" was vague; it should be changed so as to indicate the point at which a duty to notify other States arose. It should be remembered that a long period of time normally elapsed between the policy decision to undertake a project and the actual decision to start work. A more precise determination of the starting-point for the duty to inform other States was also important because it was used in draft article 14 to define the point at which other States could invoke the obligations of the author State.

5. Articles 11 to 15 dealt solely with new uses that might cause appreciable harm. As Mr. Tomuschat (2009th meeting) had noted, article 11 in its present form could be taken to mean that the author State had to admit from the outset that the planned new use might cause appreciable harm, otherwise there would be no obligation to notify, consult and negotiate. The entire procedure therefore focused not on co-operation, but on avoiding or reducing harm, or ensuring compensation. If equitable utilization was to be the agreed standard, the question was not whether the new use could cause appreciable harm, but whether it would exceed a State's equitable share.

6. Articles 11 to 15 introduced a new threshold based on risk, not harm or injury. Duties were created that could not be deduced from equitable utilization, but were based on the idea of shared resources or an integrated watercourse system. While it would be reasonable to provide for co-operation whenever projects or activities affected another State, such an approach should not be pressed into a strait-jacket of settlement procedures and standstill clauses whereby any new activity would be made subject to the consent of other States. The draft articles thus operated to the disadvantage of a State that was about to do something new and gave the other watercourse States a definite right to interfere and hinder the work, even if they had no real interest in it.

7. Draft article 14, paragraph 3, envisaged punishment in the event of non-compliance with the requirements of notification, consultation and negotiation, since an author State would be liable for any harm caused to other States by a new use. Yet no such punishment was contemplated for causing harm to the author State by imposing unnecessary standstill periods under the procedure envisaged. In any event, he very much doubted whether punishment could serve as an effective incentive to co-operation.

8. Articles 11 to 15 lacked balanced. Under the terms of article 11, an author State was required to admit, through notification, that it was planning to do something risky, and under the terms of article 12, paragraph 2, it could not initiate or permit the initiation of the proposed new use without the consent of the notified States. Hence the notified States had a veto, at least so long as no agreement was reached that satisfied them under article 12, paragraph 3, or so long as the veto was not overruled by a binding decision in a third-party dispute-settlement procedure under article 13, paragraph 5. The effect of a unilateral determination by a notified State that a contemplated new use would cause it appreciable harm was to impose a duty on the notifying State to consult the notified State so as to confirm or adjust its determination. If such confirmation or adjustment could not be achieved by consultation, the next step was negotiation, which was in effect the first step in a dispute-settlement procedure. Thus it would seem that it was always the notified State which decided on the next step in the procedure and that, even if no notification was made, any watercourse State could at any time set that procedure in motion and force the State contemplating a new use to submit to a binding settlement procedure.

9. The Special Rapporteur referred in his third report (A/CN.4/406 and Add.1 and 2, para. 89) to a third-party dispute-resolution procedure to be discussed in a subsequent report. It therefore seemed that there were two different kinds of dispute-settlement procedure: a bilateral one, which would take the form of negotiation,

and a third-party procedure, which would be adopted if the dispute could not be settled by negotiation. Clearly, negotiation and the duty to negotiate were not perceived as means of organizing co-operation, but as a dispute-settlement procedure. That was another reason why the Special Rapporteur's position was not supported by the judgment of the ICJ in the *North Sea Continental Shelf* cases,[5] which the Court had referred back to the parties on the ground that it was for them to shape their international relations through negotiation.

10. The procedure proposed in draft articles 11 to 15 had nothing to do with existing practice and could not be based on the *Lake Lanoux* arbitration. It introduced an entirely new rule whereby a new use of a watercourse that other watercourse States might find risky could be initiated only after the consent of the other States concerned had been secured. Furthermore, his understanding of the terms of article 14, paragraph 3, was that, if a State planning a new use ultimately failed to comply with the proposed new procedure, it always had to submit to a third-party decision if another watercourse State so decided. If it then failed to comply with that decision, it faced the spectre of absolute liability. He could not believe that States which made active use of international watercourses within their territories would be prepared to accept such rules, nor did he see why they should do so. Moreover, the articles did not give any bite to the general principles. They were too narrow in scope, were not well balanced and focused mainly on third-party decisions rather than on co-operation between watercourse States. They would therefore require extensive recasting and he doubted whether that could be left to the Drafting Committee.

11. Mr. BARBOZA congratulated the Special Rapporteur on his excellent third report (A/CN.4/406 and Add.1 and 2), which contained a wealth of examples from State practice. The procedural rules in chapter III of the draft were necessary in order to ensure application of the principles set out in articles 7 and 9, in chapter II, for the concepts of reasonable and equitable use and of appreciable harm were protean and changed depending on the particular watercourse and the case in question. It was therefore impossible for those concepts to be determined *in abstracto*; hence the need for article 8, which indicated some of the factors to be taken into account. Consequently, it was indispensable to establish procedures to shape those concepts.

12. The Special Rapporteur cited cases in which the ICJ had been called upon to establish limits, as in the *North Sea Continental Shelf* cases, and others, such as the *Fisheries Jurisdiction* cases, in which it had been asked to determine the scope of certain preferential rights (*ibid.*, paras. 49-50). The connection with watercourse management was obvious, the aim in all instances being to mark out rights and interests with the distant help of general principles. As in other topics in international law, the fact was that the one under consideration was imprecise and complex; but the Commission should strive to regulate the matter in law. Its mandate from the General Assembly responded to the urgent need to find a solution as soon as possible to a chaotic and litigious state of affairs. The only possible solution was to use procedures such as negotiation and third-party dispute settlement to achieve not only an equitable, but also a rapid settlement of differences.

13. Like Mr. Bennouna (2008th meeting), he had wondered about the link between draft article 10, which set out the "general obligation to co-operate", and the strictly procedural articles, and had come to the conclusion that the foundation for the latter lay not in international co-operation and solidarity but simply in the legal duty not to cause harm to a third party: *sic utere tuo ut alienum non laedas*, which was a well-established principle of international law.

14. The draft combined three principles, namely reasonable and equitable use, optimum utilization and the avoidance of causing appreciable harm. The first two were interconnected in article 7, because the aim of reasonable and equitable use should be to secure optimum utilization of the shared resource. Nevertheless, they could sometimes be incompatible, for example when one riparian State was more developed than the other and had advanced technology enabling it to make much greater use of the waters than did the other riparian State, in which case the concept of reasonable and equitable use would temper the requirements of optimum utilization. Similarly, there was a link between the principle of reasonable and equitable use and the principle of not causing appreciable harm, inasmuch as the latter could sometimes be measured only in terms of the former, in other words of the imbalance it occasioned between States' reasonable and equitable shares in the watercourse. Otherwise, any new use affecting some previous use by the other State would be prohibited, unless it did not affect reasonable and equitable use of the waters.

15. Accordingly, the principle of co-operation would, by definition, seem to apply to joint initiatives to achieve optimum utilization, whereas the principle of not causing appreciable harm related to the obligations to notify and to consult. Those obligations did in all probability entail a process of co-operation, but their origin undeniably lay in the duty not to cause harm. Consequently, the title of chapter III could be replaced by something like "Obligations and procedures relating to international watercourse management", and article 10 could be moved to chapter II, which was concerned with general principles.

16. He was convinced by the Special Rapporteur's arguments and examples that the obligations to notify and to consult were well established, and the question whether they formed part of customary international law did not seem to be particularly important, since the Commission's mandate included both progressive development and codification of international law. The important thing was for the Commission to prepare legal rules to govern the matter of international watercourses, and in so doing it should establish the obligations to notify and to consult, which were to be found, as the Special Rapporteur indicated, in many multilateral and bilateral treaties and also in the decisions of international courts and tribunals, the resolutions of intergovernmental organizations and the

[5] *I.C.J. Reports 1969*, p. 3.

recommendations of learned bodies. The objectiveness of those sources could not be impugned.

17. He agreed basically with the provisions of draft article 11, which took account of cases of harm and cases of risk. If that were not so, the draft would be incomplete and it would be difficult to draw a strict line of demarcation between one case and the other, which would merely create additional uncertainty. Moreover, the obligation stemming from an activity which presented a risk should not be consigned to the uncertain limbo of co-operation. The duty to notify and to consult arose in every instance and only subsquent consideration that was necessarily bilateral, or possibly multilateral, could determine the true nature of the use in question and the appropriate régime to be applied.

18. Draft article 12 could be dealt with by the Drafting Committee. The reasonable period of time referred to in paragraphs 1 and 3 should be as short as possible. In the event of any differences in determining the period, they should be summarily resolved to avoid prejudice to the notifying State and to remove the possibility of a *de facto* veto by another State or States. The notion of co-operation in paragraph 2 should be deleted by saying something along the lines of "the notifying State shall provide the notified States, on request, with any additional data and information . . .", so as to retain the original obligation to notify. It seemed logical to prevent a new use from being initiated without the consent of the notified States, since the obligation covered solely projects which presented a risk of causing "appreciable" harm.

19. Draft article 13 was also acceptable in principle. Since, in paragraph 3, which related to negotiations, the second sentence was merely indicative, the words "*inter alia*" could be inserted after "include". Alternatively, the whole of the sentence could be deleted and its content included in the commentary, which should also take account of the possibility that, ultimately, the use might not be permitted.

20. Draft article 14 posed no problems. As for draft article 15, it was understandable that an urgent project could be undertaken in good faith for what it might be better to term "serious" public health, safety or similar considerations. However, the use might ultimately be prohibited, in which case the notifying State would not be able to proceed with the project and would have to bear the costs or the compensation payable under its internal law. In other words, the State in question would not be able to proceed simply by paying compensation to the other States, a point which tied in with his comments on paragraph 3 of article 13.

21. The General Assembly and a wide range of bodies and persons interested in the present topic were following the Commission's work closely. Essentially, a conflict between two equal territorial sovereignties had to be resolved and neither should prevail over the other: the sovereignty of the upstream State, which claimed that it was free to act in its territory as it saw fit, and the sovereignty of the downstream State, which required that the waters of the watercourse flowing into its territory should have suffered no adverse effects as regards volume or quality. It was a classic situation calling for regulation by law, which should respect the nature of the shared resource that international watercourses were. The Commission's work had suffered delays because of changes of special rapporteur and the unusual fact that it had also gone back on earlier agreements: for example, the deletion of an article which had regarded watercourses as a shared natural resource, a concept which, in his view, rightly indicated their legal nature.

22. He was firmly opposed to the idea of turning the procedural articles into mere recommendations, or basing definite obligations to notify and to consult on the concept of co-operation. The Commission should spare no effort to arrive promptly at the legal formulations required of it by the General Assembly.

23. Mr. SHI noted that the Special Rapporteur regarded the procedural rules in draft articles 11 to 15 as an indispensable adjunct to the general principle of equitable utilization. There was undoubtedly an objective need for procedural rules of some kind, since without them the principle of equitable utilization could become devoid of meaning. Nevertheless, the actual rules embodied in articles 11 to 15 could hardly be considered as part of the existing law of international watercourses; rather, they were generalizations drawn from bilateral and regional treaties on specific international watercourses and from intergovernmental or non-governmental resolutions or declarations and studies on the subject. In short, the proposed articles were an attempt at progressive development of the law.

24. The question therefore arose as to what kind of procedural rules the Commission should develop. Clearly, if progressive development was to be successful, the rules would have to be widely accepted by sovereign States; and the articles in question would have a better chance of being generally accepted if they struck a proper balance in the protection of the rights and interests of all the riparian States concerned. In the procedural rules proposed by the Special Rapporteur, however, the scales were tipped against States contemplating new uses of an international watercourse.

25. In the first place, notification of contemplated new uses was made an absolute duty and a penalty was imposed for failure to notify. Notice of a new use was required under draft article 11 whenever the use might cause appreciable harm to other States. So long as there was a possibility of appreciable harm to other watercourse States, it was undoubtedly appropriate to require prior notification. No such duty to notify would exist, however, if the author State considered, on the basis of all available data and information, that the contemplated use would not cause appreciable harm to other watercourse States. Yet, even in that case, draft article 14 would allow other watercourse States to invoke against the author State the obligation to notify under article 11. The only condition set for invoking that obligation was a mere belief in the possibility of appreciable harm, for article 14, paragraph 1, provided that "any of those other States believing that the contemplated use may cause it appreciable harm may invoke . . .". States could easily take advantage of that loophole in order to raise objections, and the State contemplating a new use could be unjustly obliged to enter

into negotiations. Article 11, when read in conjunction with article 14, paragraph 1, implied that a State contemplating a new use was under a duty to notify other watercourse States whether or not the use in question might cause appreciable harm. Furthermore, under article 14, paragraph 3, failure to notify would give rise to liability for "any harm" whatsoever. It was a provision that imposed a penalty for failure to provide notification—a particularly harsh penalty, since the initiation of the new use might ultimately prove to be justified.

26. According to draft article 12, paragraph 1, the notifying State had to allow the notified State a "reasonable" period of time for study and evaluation; in the event of disagreement as to what constituted a "reasonable" period of time, paragraph 3 of the article required the States concerned to negotiate in good faith with a view to agreeing upon such a period. Those provisions were formulated in such a way that the burden of the duty to negotiate fell essentially on the notifying State. Admittedly it was laid down that such negotiations must not "unduly delay" the initiation of the contemplated use, but "undue delay" was a vague and uncertain concept and no attempt had been made to define it. The terms of article 12 would thus afford a notified State the pretext to use delaying tactics without exposing itself to the charge of violating the principles of co-operation and good faith.

27. As to the duty to reply to a notification, the draft articles did not require a notified State to explain in detail its grounds for objecting to a contemplated use and to furnish the notifying State with sufficient data and information. The articles were, on the other hand, strict in requiring a notifying State to supply sufficient technical data and information. Moreover, unlike failure to notify, failure to reply was not penalized. The duty of the notifying State to consult and to negotiate was thus erected into an absolute and unconditional duty, without reasonable regard for that State's rights and interests. Furthermore, the articles under consideration lacked satisfactory provisions to deal with a situation in which prior notification had been given and consultations and negotiations had been conducted for some time without success. In the absence of an appropriate provision to cover that situation, an objecting State could in effect veto a contemplated use by indefinitely delaying the negotiations.

28. In conclusion, the proposed procedural rules prejudiced somewhat the rights and interests of States contemplating new uses of an international watercourse. It was not easy to strike a balance between the interests of all the riparian States concerned, despite the efforts made by the Special Rapporteur.

29. Mr. BARSEGOV said that he would first like to say a few words about the legal basis of the proposed mechanism for implementation, which comprised the procedures of notification, consultation and dispute settlement. As evidence of the existence of general international legal rules in that field, some members of the Commission had referred to customary law, something which compelled him to linger for a moment on custom. Any conventional course on international law taught that custom was formed as a result of inter-State practices that were enduring, uniform, continuous and peaceful, in other words that had not led to any opposition. To those conditions for the formation of custom, namely duration, uniformity, continuity and absence of opposition, a generally held view would add the requirement of *opinio juris*, that was to say the clearly expressed will of States that the practice in question was to be considered as customary law. Only if all those elements were combined was there a rule of international law. Yet some now maintained that, in view of the contacts existing nowadays between States, their positions were known immediately—some even went so far as to speak of "instant history"—and duration was no longer required as a condition for concluding that a customary rule did exist. A few examples would illustrate what such an interpretation would lead to.

30. In the 1950s, a few Latin-American States had unilaterally decided to increase the limit of their territorial sea to 200 miles and had declared that the limit constituted a rule of customary international law. It was well known that the 1982 United Nations Convention on the Law of the Sea had not confirmed that view, since it had retained the 12-mile limit for the territorial sea. However, references were starting to be made nowadays to the instant creation of custom, even among those who had been opposed to the 200-mile limit at the time. For instance, one State which had refused to accede to the Convention on the Law of the Sea in order not to assume certain obligations that were not in its interests, none the less sought to utilize some provisions on the exclusive economic zone and the continental shelf that were favourable to it by asserting that they were customary rules.

31. Having examined the legislation of various States on the exclusive economic zone and the continental shelf, he had found great differences between those bodies of legislation and the provisions of the Convention. For example, some "territorialists" had not, further to the Convention, rescinded their laws establishing a 200-mile limit on the territorial sea. The same was true in the case of the continental shelf, which Mr. Calero Rodrigues, for example, considered as being comparable with the territory of a State, a view that was also upheld by some States but had not been confirmed by either the 1958 Convention on the Continental Shelf or the 1982 Convention on the Law of the Sea. Accordingly, so long as there were fundamental divergences in the practice of States, it was absolutely impossible to speak of the existence of international custom in that field. It was necessary to guard against hasty conclusions, particularly when they could well have major consequences in practice.

32. Similarly, it was an inescapable conclusion that those who viewed certain rules relating to watercourses as being rules of customary law were simply taking their wishes for reality. There was no uniform general practice concerning mechanisms of implementation. In fact, while it was true that mechanisms of that kind were provided for in certain agreements concluded between a small number of States concerned, it was apparent from the examples cited by the Special Rapporteur that each of those agreements was on a particular water resource and that a particular object was fixed for the procedures of notification, consultation and negotiation—the con-

struction works for hydraulic installations in the Drava Basin, or the protection of Lake Constance, for instance. In each case, the State concluding an agreement knew what consequences it wished to avoid and what works could lead to such consequences; thus States were sometimes compelled to make reservations in regard to certain procedures.

33. The existence of such agreements between only a small number of parties and relating to specific watercourse uses was not enough to infer that a general rule of international law had been formed. Perhaps there was a tendency for agreements of that kind to increase in number, but it was quite premature to speak of general rules of procedure in that field. It was no coincidence that, in his third report, the Special Rapporteur cited only one general convention on the matter, namely the Convention relating to the Development of Hydraulic Power affecting more than one State, which dated back to 1923 (A/CN.4/406 and Add.1 and 2, para. 64). There was no more recent example in the report. The legal and technical problems which that Convention had sought to govern were very different from the question now under consideration by the Commission, since the aim had been to use hydraulic power in the common interest. When States reached an agreement to use water in the common interest, they were required to act in accordance with the obligations stemming from the agreement. However, even in that Convention, which appeared to presuppose the possibility of a broader use of dispute-settlement procedures, those procedures were set out very cautiously: the Convention merely stipulated that the States concerned would negotiate with a view to concluding specific agreements. Hence the Convention did not provide for procedures involving third parties or binding decisions.

34. Proof of the existence of general legal rules could also be sought in the practice of international arbitral tribunals. As the Special Rapporteur himself had pointed out, however, there had been no recent decisions by international tribunals on international watercourse problems in general, or on the duty to notify and consult in particular.

35. With regard to draft article 11, there was no need to be a great specialist in international relations or in international law or to be particularly well versed in the techniques of the utilization of watercourses to realize that, aside from the requirement, already noted in the Commission, of a favourable political climate in relations between watercourse States, the States concerned could fulfil an obligation to notify only if they maintained good relations and had the technical know-how enabling them to evaluate the potentially adverse effects of a particular new use on their own territory and on that of other States. Yet the fact was that not all States had the necessary specialists and the means to obtain the costly equipment they would need in order to conduct the requisite studies. In practice, the requirement of notification based on appropriate evaluations was therefore unrealistic for the majority of States. Furthermore, it should be recognized that the present state of science and technology did not make for reliable forecasts. Again, with regard to the economic, scientific and technical side of relations between States, inter-State contacts had to be relatively close if States were to be in a position to assess the potential effect of the execution of a particular plan for the use of a watercourse in other States. In addition, the concept of appreciable harm was quite relative, from the standpoint of both its intensity and its extent.

36. As for the notion of a "new use", he wondered about the reasons why a use should be regarded as new and whether it should be so for the whole of mankind, for all the riparian States or for only one of them, and in that case, which one. With reference to paragraph (4) of the Special Rapporteur's comments on article 11, he would point out that the terms "new use" and "contemplated new use" constituted fundamental elements of the draft articles on the implementation of the draft as a whole, and it was essential to define them. To his mind, in terms of methodology it was not justified to draft articles without, at the same time, explaining the conceptual basis thereof. Such a method was unfortunately becoming more common in the practice of the Commission and he would revert to that problem in the discussion on methods of work. For the moment, he would simply emphasize the need for a precise definition of what "new use" was taken to mean, so that the corresponding provisions could be elaborated. Unfortunately, the Special Rapporteur did not propose any interpretation, although in his comments he in fact cast doubt on the necessity and usefulness of such a definition. According to paragraph (3) of his comments, new projects or programmes and any change in an existing use should be considered as new uses.

37. A reading of the comments on draft articles 12 and 13 showed that, in the opinion of the Special Rapporteur, the question of the necessary periods of time for the study and evaluation of potentially adverse consequences should command the Commission's careful attention. The Special Rapporteur considered that the period depended on the particular situation. He doubted the possibility of formulating general recommendations in that regard, which proved that the question could be settled satisfactorily only on a case-by-case basis, when the specific aspects of a use were known and the particular features of a given watercourse could be taken into account. A special rapporteur could not be expected to define the concept of a "reasonable" period of time for notification. Nothing made it possible in practice to establish one period rather than another for States that were supposed to reply to a notification.

38. The obligation to negotiate in connection with the contemplated use of a watercourse was a requirement that could not give rise to any controversy. Nevertheless, that aspect undoubtedly warranted close scrutiny by the Commission. In the explanations given to justify that obligation, the Special Rapporteur referred to the practice of the ICJ. In paragraph (5) of his comments on article 12, he expressed the view that the Court's judgment in the *North Sea Continental Shelf* cases "holds interesting lessons for the field of watercourse law, requiring as it did that the parties apply equitable principles in their negotiations". However, the obligation imposed by the Court on the States concerned to conduct negotiations in order to arrive at an

equitable solution was by no means typical of judgments relating to natural resources, since it was also found in judgments rendered in cases of quite another type. Obviously, negotiations on the use of a watercourse could be based on the general obligation to co-operate, and in that respect the Charter of the United Nations provided a much broader basis for the obligation to negotiate. The fact remained, however, that the obligation to negotiate had a specific legal content and that it was possible to envisage ways of increasing the effectiveness of negotiations.

39. His only objection in that respect concerned the reference made by the Special Rapporteur to the judgments rendered by the ICJ in the *North Sea Continental Shelf* and *Fisheries Jurisdiction* cases in order to justify the proposed concepts, whereas the negotiations contemplated by the Court in its judgments were based on observance of the sovereignty and sovereign equality of States. Those cases involved the delimitation of the continental shelf, in one instance, and the settlement of fisheries' disputes in the other. Those judgments could not be considered as precedents, since the question asked by the Special Rapporteur himself was of a quite different kind, concerning as it did the right of a foreign State to participate in the settlement of matters falling within the exclusive jurisdiction of another State on whose territory there was a watercourse. The solution proposed was unrealistic in that it ignored the sovereignty of the State over that part of the watercourse passing through its territory.

40. He recognized that the content of sovereignty was not immutable. In many cases where the solution to a problem fell traditionally within the exclusive jurisdiction of States, those States negotiated and concluded agreements, and that was how the process of interdependence was reflected in the law. In the course of that process, the content of sovereignty became less strict, and the different types and degrees of co-operation among States became more clearly defined. A current development was the emergence of new ways of organizing contacts between States which ensured close interrelationships in many fields, including the economic and political fields. Did that mean that the notion of sovereignty and, consequently, the principles of international law relating to sovereignty, sovereign equality and territorial integrity were in the process of disappearing? Did the reference to sovereignty indicate a return to the nineteenth century? Of course not. The concept of sovereignty was to be found at the root of all the changes taking place. Indeed, it was the guarantees of sovereignty which enabled States to act more boldly, to embark on various forms of co-operation and gradually to extend the areas in which they co-operated with other States. Those considerations applied to all the draft articles, including articles 13 and 14 on the settlement of disputes.

41. In general, the Special Rapporteur seemed to have exaggerated the role of binding procedures for the settlement of disputes. As to his conception of the modalities whereby States would invoke those procedures and the cases in which they would be implemented, it was to be noted that the settlement procedure would apply to differences of view concerning the consequences of a proposed project. A reading of draft article 14 led to the conclusion that such differences could stem not only from existing projects, but also from information indirectly received on the nature of the proposed project. In that regard, he wished to point out that an arbitral tribunal dealt not with differences of view, but with legal questions, as provided in the Hague Conventions of 1899 and 1907 for the pacific settlement of international disputes. For example, Yugoslavia and Austria, which were parties to the 1954 Convention concerning Water Economy Questions relating to the Drava,[6] had entered into a number of obligations relating to the diversion of water in the Drava Basin and had set out procedures for the settlement of disputes which might arise with regard to water-use rights. Questions concerning the use of the waters of the Drava were dealt with by a commission of experts. If such binding procedures were recognized in international law, they would certainly be embodied in an instrument as fundamental as the Charter of the United Nations. But the Charter was based on a quite different premise, inasmuch as it laid down a free choice of means to settle disputes.

42. States accepted binding procedures in the case of certain international agreements. However, there was a trend towards fewer agreements of that kind, and States displayed a particularly cautious approach towards such procedures when questions affecting territorial sovereignty were involved. For example, such procedures did not apply to disputes relating to the resources of maritime areas falling within national jurisdictions. Yet was the conservation of marine resources not a question that affected the interests of mankind as a whole? How had the Third United Nations Conference on the Law of the Sea dealt with that question? Far from referring to universal norms for collective settlement, it had opted for the creation of exclusive economic zones. Members of the Commission who favoured collective management of water resources should study the positions adopted in that regard by the countries whose legal systems they represented, and should compare those positions with the approach they now adopted towards the question of water resources under the permanent sovereignty of States.

43. Suitable examples were to be found in the mineral resources of the ocean, the rational and optimum exploitation of which concerned mankind as a whole, and the decision by the United Nations Conference on the Law of the Sea to establish exclusive rights over the resources of the continental shelf was of particular importance in that regard. Even if a State did not assert its rights over the continental shelf and did not exploit its resources, no other State could lay claim to those resources. He would remind the Special Rapporteur that no procedure, whether mandatory or optional, was provided for in that regard, even in the case of litigation with an international organization deemed to represent mankind as a whole, concerning the outer limit of the continental shelf. The same could be said with respect to the procedure for the settlement of disputes relating to the rights of other States over the surplus of the allowable catch of the living resources of the exclusive

[6] United Nations, *Treaty Series*, vol. 227, p. 111.

economic zone. If the Special Rapporteur wished to find precedents in the law of the sea, he could draw on those examples. In his own view, the Commission should recognize objective realities and concentrate on tasks which were both promising and practicable, without confining itself to the codification of international law.

44. As the area for codification of the law shrank and mankind found itself confronted by new problems, the important thing was the progressive development of international law, which meant filling in gaps which already existed or were likely to occur with the creation of new areas of international relations. The new problems included the rational use of non-renewable water resources, an area in which progressive development, as well as codification, was needed. The Soviet school of international law not only recognized that fact, but was actively formulating an appropriate doctrine. In the Soviet memorandum on the development of international law presented at the forty-first session of the General Assembly,[7] it was emphasized that present-day realities urgently required not only that all States should adhere strictly to the existing principles and norms of international law, but also that there should be a qualitative development of international law, in the light of the emergence of a new category of problems of a universal nature or affecting mankind as a whole.

45. In what direction should international law develop in order to become the basis of an international legal order and of an international juridical legitimacy? The members of the Commission could not raise objections to the basic tenets of international law, such as sovereignty, and in particular the permanent sovereignty of States over their natural resources. Dealing with matters concerning relations between States, and consequently finding solutions that were acceptable to all parties and took account of their interests, called for deft use of the mechanisms of international law, on the basis of the principle of the sovereign equality of States. In the present instance, the search for implementation machinery should draw on the wealth of experience afforded by practice. Yet, when circumstances required, practice tended towards the creation of commissions of experts able to consider the questions raised by specific uses of watercourses. Needless to say, the draft articles prepared by the Commission should not undermine existing international agreements through which States organized their relations. They must also take account of article 16 of the 1969 Vienna Convention on the Law of Treaties. Nor should it be forgotten that a newly independent State was not bound by agreements concluded at the time it had been under colonial rule.

46. The fact that the entire effort of the Commission on the topic of the law of the non-navigational uses of international watercourses was based on a quite vague working hypothesis could have adverse consequences for the Commission's work. The inherent flaw in the Commission's practice of preparing draft articles without first clearly defining the actual subject of such regulations could place the Commission in an inextricable situation in so far as concepts were concerned. Thus far, the Commission had always spoken of the undefined nature of the watercourse system concept; yet it was now proceeding to prepare draft articles purportedly based on a sound conceptual foundation. Thus it was faced with the question of the legitimacy of using terms such as "international" in connection with watercourses. Hitherto, "international rivers" had been taken to mean rivers which flowed into the sea after passing through the territories of a number of States and which, by virtue of international agreements, were open to the commercial shipping of all States. Consequently, not all rivers passing through the territories of a number of States were international rivers, nor were they all subject to an international régime. The international river concept was not a geographical concept, but a legal one, based on the assumption that the régime was determined by a special agreement concluded by riparian States, although the river could also be used by third States. In the present instance, the future scope of the draft articles being prepared would not coincide with what was currently meant in international law by "international rivers" subject to an international shipping régime, and the result was a certain legal inconsistency.

47. In Soviet legal doctrine, a distinction was drawn between the concept of an international river and that of a multinational river, which were not given the same legal content. Multinational rivers could not be used by third States. In the light of the discussion of the question, it was necessary to clarify the terminological link between the existing concepts of a multinational river and an international river. The proposed definition of a "watercourse" led to the inevitable conclusion that the Commission did not intend to give that concept the same legal content as the concept of an international river. Serious thought must therefore be given to the terms used, in order to obviate any possibility of misinterpretation.

48. In conclusion, he expressed the hope that the Special Rapporteur would give careful consideration to the concerns expressed in the course of the debate and take account of them in further preparation of the draft articles. He wholeheartedly shared Mr. Graefrath's view that the draft articles required in-depth consideration before being referred to the Drafting Committee.

49. Mr. BENNOUNA said that the problem or the misunderstanding created by draft articles 11 to 15 apparently arose out of the fact that they could not be read separately from the substantive provisions in chapter II of the draft. Hence the looseness and lack of precision, which were due less to the procedure than to the principles themselves, inasmuch as the procedure referred back to the principles. The Commission thus found itself in a position in which it should clarify earlier articles, namely those on the principles on which the procedural articles were based. However, the situation should not be overdramatized, since the Special Rapporteur, like his predecessors, had made it clear that those draft articles were simply of a residual character, in that they would apply only in the absence of any agreement between the parties. The provisions were thus intended to prevent conflicts. Moreover, the notion of co-operation should not be interpreted as meaning the

[7] Memorandum transmitted to the Secretary-General by a letter from the Soviet delegation dated 24 November 1986, and circulated as document A/C.6/41/5.

taking of joint action, but should be recognized as being preventive in character. The third report of Mr. Schwebel contained, in chapter III, a section E specifically entitled "Avoidance and settlement of disputes".[8]

50. If articles 11 to 15 were intended to impose restrictions on the jurisdiction of States and thereby impose specific obligations on them, they should be as clear and concise as possible. However, the lack of precision was not so much a matter of the legal terminology used as of the essential logical link between the procedure and the substantive principles. The first question to which it was important to provide a clear answer was the exact relationship between articles 11 to 15, on procedure, the articles on equitable sharing and reasonable and equitable utilization, and the article on the prohibition of activities which might cause appreciable harm to other watercourse States. He wondered whether articles 11 to 15 related to equitable utilization, to appreciable harm, or to both at the same time, and whether they were intended to prevent any breach of the future treaty. If they related both to equitable utilization and to the prohibition on causing appreciable harm, the Commission should seriously consider the link between those two concepts. In his third report (A/CN.4/406 and Add.1 and 2, para. 40), the Special Rapporteur justified the procedural provisions by saying that "the rule of equitable utilization would mean little in the absence of procedures at least permitting States to determine in advance whether their actions would violate it". In the Special Rapporteur's view, those provisions were designed to give full impact to the rule of equitable utilization.

51. Whereas draft article 11 referred only to a use which could cause appreciable harm to other States, draft article 13 referred both to appreciable harm and to depriving a State of its equitable share. Moreover, the Special Rapporteur used the conjunction "and", rather than "or", so that the notified State must show that both those conditions existed to be able to object to a contemplated use: hence the question of the link between them. Yet why did the notification provided for in article 11 relate solely to appreciable harm? As Mr. Calero Rodrigues (2010th meeting) had said, such lack of rigour had to do with the persistent difficulties with the wording of draft article 9. Clearly, the wording of articles 11 to 15 could not be decided on until the wording of article 9 had been finalized.

52. In draft article 9, setting out the prohibition on causing appreciable harm, the previous Special Rapporteur, Mr. Evensen, had provided for only one exception, namely the existence of a watercourse agreement or other agreement or arrangement between the States concerned. He had thus glossed over the question of the link between appreciable harm and the obligation regarding reasonable and equitable utilization. That had not always been the case, however. In draft article 8 (Responsibility for appreciable harm) as submitted by Mr. Schwebel in his third report,[9] the only exception provided for had been equitable utilization. Paragraph 1 of that draft article had read:

> 1. The right of a system State to use the water resources of an international watercourse system is limited by the duty not to cause appreciable harm to the interests of another system State, except as may be allowable under a determination for equitable participation for the international watercourse system involved.

Under those circumstances, appreciable harm arising out of equitable utilization would not be prohibited. It was thus possible to conceive of equitable utilization that harmed a State's interests and obliged the States concerned to attempt to reconcile their interests.

53. In paragraph 2 of draft article 8, Mr. Schwebel had also addressed the problem of whether the use of the watercourse was by the State or by private individuals. It had read:

> 2. Each system State is under a duty to refrain from, and to restrain all persons under its jurisdiction or control from engaging in, any activity that may cause appreciable harm to the interests of another system State, except as may be allowable under paragraph 1 of this article.

That provided an answer to the problems of the link between equitable utilization and appreciable harm, and of the type of utilization, which might be by the State or by persons acting under its control.

54. Paragraph 3 of the same draft article 8 dealt with the current question of the use of the term "contemplate" by using instead the terms "undertakes", "authorizes" or "permits" a project. If the Commission agreed to the exception of equitable participation, as provided for by Mr. Schwebel in draft article 8 on appreciable harm, there would be no need to refer to it in the procedural rules. It would simply be necessary to state in draft article 13 that a notified State which considered that the new use was contrary to the article in question should so inform the notifying State, without any further details. Naturally, the article in question must be clear and complete.

55. Draft article 11 posed a major problem by obliging a State to provide notice of a use which it considered unlawful because it would cause appreciable harm. How in international law was it conceivable to compel a State to provide notice of its intention to commit an unlawful act? Much more neutral wording should therefore be used. A passage of the arbitral award in the *Lake Lanoux* case required that consideration should be given "to all interests, whatever their nature, which may be affected by the works undertaken, even if they do not amount to a right" (A/CN.4/406 and Add.1 and 2, para. 73). Moreover, the Helsinki Rules laid down the obligation to provide notice of any use likely to affect the interests of another State (*ibid.*, para. 85). The terminology was quite different from that used in draft article 11. In those two examples, States were to some extent exempted from providing notice of uses affecting only their own territory. A provision drafted along those lines would in no way entail an assessment of the lawfulness of the conduct.

The meeting rose at 1.05 p.m.

[8] *Yearbook . . . 1982*, vol. II (Part One), p. 181, document A/CN.4/348.

[9] *Ibid.*, p. 103, para. 156.