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Summary record of the 2012th meeting

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1987, vol. I

2012th MEETING

Wednesday, 10 June 1987, at 10.05 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. 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.

Co-operation with other bodies (*continued*)*

[Agenda item 10]

STATEMENT BY THE OBSERVER FOR THE EUROPEAN COMMITTEE ON LEGAL CO-OPERATION

1. The CHAIRMAN welcomed Mr. Hondius, Observer for the European Committee on Legal Co-operation. He recalled that it had been in 1966 that the European Committee had decided to establish working relations with the Commission and to invite it to attend discussions on questions within the competence of both bodies. Since then a most fruitful co-operation had been maintained. Areas of common interest included such matters as the jurisdictional immunities of States and their property. The Committee of Experts on Public International Law, within which the activities of the European Committee relating to public international law were concentrated, had on its agenda such subjects as liability and diplomatic law, which were also topics of interest to the Commission.

2. Exchanges between the European Committee and the Commission were to the mutual advantage of both bodies and he welcomed the opportunity to invite the Observer for the European Committee to address the Commission.

3. Mr. HONDIUS (Observer for the European Committee on Legal Co-operation) thanked the Chairman for his welcome and said that, in December 1986, the European Committee had been fortunate enough to hear a statement by a distinguished representative of the Commission, Mr. Reuter.

4. Reporting on the progress of the legal work of the Council of Europe, in particular the work carried out under the auspices of the European Committee on Legal Co-operation, he pointed out that in 1987 the Council of Europe had entered the first phase of implementation of the Third Medium-Term Plan (1987-1991), entitled *Democratic Europe: humanism, diversity, universality*.[1] That plan placed greater emphasis than the preceding plans on the political role of the Council of Europe and on the role of its ministerial conferences. An informal conference of European Ministers of Justice was currently taking place at Helsinki and the next formal conference would be held in 1988 at Lisbon.

5. The chapter of the Medium-Term Plan devoted to legal co-operation was entitled "A law to match Europe's future". The legal work undertaken in that context would focus on the elaboration of instruments to meet the challenges of science and technology, such as biomedical sciences, informatics and pollution, and on certain legal problems arising at the social and political levels, such as changing family structures, poverty, refugees and, unfortunately, terrorism.

6. The European Treaty Series—many treaties in which had been elaborated by the European Committee on Legal Co-operation—now numbered 124 instruments, 106 of which were already in force. The latest of them—the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organizations—had been opened for signature in 1986 and had been signed by six States, including Switzerland, which was the seat of a great many non-governmental organizations. Three draft conventions had been, or were being, prepared on financial and fiscal matters. The first, dealing with mutual assistance in tax matters, had been prepared in collaboration with OECD and had been adopted; the second concerned the communication of information between States to combat "insider trading"; the third dealt with bankruptcies involving assets in more than one country.

7. Other Council of Europe conventions were the responsibility of steering committees outside the European Committee on Legal Co-operation. The Steering Committee for Human Rights had submitted to the Committee of Ministers, for adoption, a draft convention for the prevention of torture and inhuman or degrading treatment or punishment, and the Steering Committee on the Mass Media had begun drafting a convention on transfrontier broadcasting. Two conventions dealing with water were still before the Committee of Ministers, but problems of international law or technical difficulties had so far prevented their adoption. They were the draft convention for the protection of international watercourses against pollution and the draft convention for the protection of the underwater cultural heritage.

8. The Council of Europe was aware of its responsibility with regard to monitoring the application of treaties. That applied especially to conventions which did not provide for special implementation machinery: wherever necessary, the Council had to take action to improve their implementation or to overcome practical difficulties.

9. The Council of Europe had also made a number of new recommendations to the Governments of its member States, the texts of which had been prepared by the European Committee on Legal Co-operation. One of those recommendations reflected certain changes in the world of diplomacy: it contained a model agreement to enable family members forming part of the household of a member of a diplomatic mission or consular post to engage in a gainful occupation in the receiving State.

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* Resumed from the 1996th meeting.

[1] Council of Europe publication (Strasbourg, 1986).

10. The Council of Europe was proud of its position as a dynamic regional organization within the worldwide framework of the United Nations. On 11 May 1987, it had signed in New York the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. That Convention was important for the Council of Europe, which not only was itself the depositary of many international conventions, but also entered into international agreements with other institutions.

11. All the items on the agenda of the International Law Commission were of interest to the 21 member States of the Council of Europe, which was currently giving priority to the question of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. That topic was to be examined from 23 to 25 June 1987 by the Committee of Experts on Public International Law, in connection with the work of the Group of Ministers' Counsellors on Terrorism, which had been set up following the Conference of European Ministers responsible for combating terrorism, held at Strasbourg in November 1986.

12. He thanked the Commission for giving him the opportunity to address it and would be glad to hear members' comments and answer any questions.

13. The CHAIRMAN thanked the Observer for the European Committee on Legal Co-operation for his interesting account of the Committee's valuable work.

14. Mr. REUTER, speaking on behalf of the members of the Commission, thanked the European Committee on Legal Co-operation for having invited the Commission to participate in its work. The Council of Europe had undertaken the long-term task of elaborating a whole network of conventions on widely different subjects. The work it had engaged in was a model of modesty, patience and hope. Whereas the Commission had decided to centre its work on public international law, to the exclusion of private international law and even of international commercial law—although some subjects such as immunities had unexpected relations with other disciplines—the Council of Europe was not confining its work to questions of public international law. There were, however, questions such as terrorism and the traffic in narcotic drugs which public international law could not always ignore.

15. The Observer for the European Committee on Legal Co-operation had said that it was an achievement for two international organizations to be in agreement in studying the same subject. But he would point out that the Council of Europe and the United Nations had never had any disagreement and that, while the Council had followed the Commission in taking up the law of treaties and diplomatic relations, of which it was studying marginal aspects, it was the Council which had opened the way for the study of immunities by the Commission, which showed the solidity of the relations between the two organizations.

16. Mr. KOROMA said he noted from the interesting statement by the Observer for the European Committee that the medium-term plan on legal co-operation covered, among other subjects, that of refugees. There was, however, another important problem which did not appear to be covered, namely that of immigration, which was not only a social and economic problem, but also a legal one. It was worth recalling that, in the seventeenth century, Grotius had examined that problem in terms of economic development and had expressed the view that immigration could be restricted only in the interests of the State, that was to say if it was harmful to a State's economy. At the present time, restrictions were unfortunately being imposed on immigration for purely social reasons. The topic of immigration thus seemed an appropriate one for consideration by the legal bodies of the Council of Europe.

17. Mr. HONDIUS (Observer for the European Committee on Legal Co-operation) thanked Mr. Koroma for mentioning the subject of immigration. He had not alluded to it in his statement, because it was being dealt with by the Council of Europe through bodies other than the European Committee on Legal Co-operation. Apart from the work being done on the problem of refugees, the Council of Europe had a Committee of Experts on the Movement of Persons, which was dealing with immigration matters. The bodies in question reported directly to the Committee of Ministers.

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/399 and Add.1 and 2,[2] A/CN.4/406 and Add.1 and 2,[3] A/CN.4/L.410, sect. G)

[Agenda item 6]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

CHAPTER III OF THE DRAFT:[4]

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)[5] (*continued*)

18. Mr. BENNOUNA, continuing the statement he had begun at the previous meeting, again stressed the need to strengthen the logical connection between the substantive provisions of chapter II of the draft and the rules of procedure in draft articles 11 to 15. He had concluded his earlier statement by saying that the notification formula should be more neutral and refer to substantial harm to the interests of another State, and that in its response the State objecting to the new utilization should allege unlawful conduct on the part of the

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

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

[4] 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.4/4/381.

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

State contemplating that utilization. It was at that point that the mechanism of consultation and negotiation would come into play to prevent a possible dispute.

19. In order to differentiate between the treatment to be applied to harming of interests and that to be applied to infringement of rights, it was necessary to bear in mind the distinction already made by the ICJ on many occasions, in particular in the *Barcelona Traction* case,[6] between rights and interests. The Court had held that a right was a legally protected interest. That being so, a State could allege injury only to a legally protected interest, in other words to a right. It could also claim that a utilization might affect its interests, but it would then have to prove that those interests were legally protected in order to open discussions and dispute-settlement procedure.

20. To maintain the necessary balance between the rights of the notifying State and those of the notified State, the notification would probably have to be accompanied by technical data and guarantees of the confidentiality of certain information. It was obvious that industrial or economic secrets might be involved, which should be protected by imposing an obligation of confidentiality on the State receiving the information.

21. It was also necessary to ensure that the notified State did not engage in delaying tactics, as Mr. Shi had stressed at the previous meeting. For although the reply to the notification had to be made within a certain time, no time-limit was prescribed for the holding of consultations and negotiations. Hence it was necessary to make a choice, by deciding either that the machinery set in motion would lead automatically to compulsory dispute settlement—which did not appear to be the solution adopted by the Special Rapporteur—or that a time-limit would be set for consultations and negotiations, after which the notifying State would regain its freedom of action—although that would not prevent responsibility from being attributed to it if necessary.

22. As for the settlement of disputes, Mr. Reuter, although in favour of arbitration, had said (2008th meeting) that the draft should not go so far as to provide for compulsory arbitration, because in the present state of international law that solution would not be acceptable. The example of the law of the sea in regard to the settlement of disputes had been frequently cited. In fact, both recent international practice and the law of the sea showed that dispute-settlement procedures were offered *à la carte*, as it were. The Commission could therefore adopt that course and propose several procedures, from which States would be invited to choose those that suited them best.

23. In his opinion, draft article 14, which sanctioned failure to notify and provided for a cumbersome procedure, was not necessary. It would be sufficient to provide that failure to fulfil the obligation to notify would engage the responsibility of the State.

24. He considered that the debate had been very useful, because it had revealed the links between the procedural and substantive aspects of the draft articles. He was inclined to think, however, that it would be premature to refer the draft articles on procedure to the Drafting Committee before the Commission had been able to form a precise idea of the substantive provisions, that was to say the essential framework of the draft. But if the Commission nevertheless decided to submit the articles to the Drafting Committee, the Committee should also have before it draft article 9 on appreciable harm, to which the procedural articles appeared to be linked.

25. Mr. MAHIOU noted that the draft articles under discussion were intended to define co-operation between watercourse States and the procedure to promote such co-operation. He did not wish to contest the view of those members of the Commission who regarded draft article 10 as a substantive provision to be distinguished from the procedural provisions and be more appropriately placed in chapter II, but he thought that was a secondary matter. It was the scope and content of draft article 10 that were essential, whether it was placed in chapter II as a general principle or in chapter III to introduce the various articles dealing with the mechanisms and procedures of co-operation.

26. The fairly general character of the obligation to co-operate had been duly emphasized. It had even been questioned whether such a vague obligation existed in international law and what its foundations would be. He hesitated to open a debate on that point, which would lead the Commission to raise other questions and even to discuss its own mission and the value of the distinction between progressive development and codification of international law. He would therefore confine himself to comments of more limited scope on the treatment of draft article 10 and its wording.

27. Draft article 10 as submitted by the Special Rapporteur in his third report (A/CN.4/406 and Add.1 and 2) was drafted in such spare terms that it might appear rather disappointing, especially when compared with the corresponding draft article submitted by Mr. Evensen, the text of which had been somewhat overloaded. But he found the new version satisfactory and would like to see it examined by the Drafting Committee.

28. With regard to the link between the principle of co-operation between watercourse States and the mechanisms and procedures provided for in draft articles 11 to 15, he thought that, even after review, draft article 10 would still be rather general and would state a flexible rule. On that point he agreed with the interpretation made by Mr. Bennouna and Mr. Barboza (2011th meeting), who considered that the object of co-operation was to promote good relations between States, and especially to avoid disputes. It was the preventive aspects of article 10 that should be emphasized, rather than the idea of participation in a common enterprise. The main point was adherence to certain conduct in the utilization of watercourses, but the obligation to co-operate being essentially a flexible notion, it was difficult to judge whether the rule was being broken. In studying the utilization of watercourses, the Commission was entering the sphere of the economic activities of States, for the evaluation of which it was often necessary to adopt an approach that was more statistical than legal, and in any case less legal than the

[6] *Barcelona Traction, Light and Power Company, Limited*, Judgment of 5 February 1970, *I.C.J. Reports 1970*, p. 3.

Commission's approach in other spheres of international relations. Because of the diversity of utilization of watercourses, co-operation between States presupposed a constant evaluation which brought out the position and importance of the mechanisms for consultation, negotiation and perhaps also the settlement of disputes.

29. An over-legalistic approach aiming at exact determination of every right and obligation of States was not necessarily the best. It must sometimes give way to a spirit of co-operation, for it might well be asked what the content of the obligation to co-operate was—whether it was an obligation of conduct or an obligation of result—and it might be thought that the answer lay somewhere in between. The obligation to co-operate was certainly an obligation of conduct; but at the same time States were called upon to act with a view to obtaining a result. Consequently, the mechanisms and procedures for co-operation would be insufficient unless they were imbued with a spirit of co-operation seeking to give effect to a legal régime. He even went so far as to think that certain minor breaches of an obligation could be accepted by a State because that spirit of co-operation prevailed. A State would tolerate a slight departure from the established régime if it was in agreement with the offending State on safeguarding the essentials. Besides, co-operation was not omnipresent, as Mr. Njenga (2007th meeting) had shown.

30. The procedures for notification, consultation and negotiation were all the more necessary because their subject-matter could be technical, because the legal rule could not cover all the concrete situations resulting from that technicality, and because the rule was relative and must permit of a reasonable and equitable result. The subject with which the Commission was dealing opened the way for differences or even disputes. The procedures for notification and consultation must be precise, since they were indispensable for establishing a climate of co-operation and permitting States to act in good faith and to achieve reasonable and equitable results.

31. Several members of the Commission had remarked on the wide gap between the very general nature of the obligation to co-operate and the technical, not to say restrictive, nature of the procedures provided for in draft articles 11 to 15. That was understandable, but the paradox was explained by the fact that a very general rule required precise procedures for its practical application and, conversely, a very clear rule did not require such mechanisms. There was thus an inversely proportional relationship between the generality of a rule of international law and the precision of the procedure for its practical application.

32. Rather than make a textual examination of draft articles 11 to 15, he would discuss the scope of the obligations it was proposed to place on States. For it was by the content of those obligations that States would judge the draft. Four procedures had been submitted in ascending order of the importance of the obligations provided for: information, consultation, negotiation and settlement of disputes. Those obligations were not all on the same level and would evoke different questions, and even anxieties, on the part of States, according to their effect on the sovereignty and sovereign equality of States.

33. The duty to provide information did not appear to raise any real difficulties. Since the action of one State could cause injury to another, it was natural that there should be an exchange of information, and that duty was generally recognized in international relations. He did not share the fears expressed about it by some members of the Commission and pointed out that States already exchanged information on activities conducted in even more sensitive areas, where sovereignty was claimed *a fortiori*, such as national defence. A State or a group of States might inform other States of military manœuvres held in their territory, in order to prevent those manœuvres from being mistaken for an act of intimidation or for mobilization. The information to be supplied would depend on the circumstances, that was to say the possible harmful consequences and technical factors relating to them. In some cases mere notification would be enough; in others additional particulars would be necessary, and perhaps even consultations.

34. If the notifications made were not sufficient to dispel anxieties, particularly where States required complicated data concerning large projects, they would have to proceed to the stage of consultations in order for the situation to be clarified and explained. If difficulties remained, they would be under an obligation to negotiate. That was a real constraint, more serious than the previous ones. As many arguments could be advanced in favour of one view as of another: it was more useful to know what the negotiations should relate to and by what procedures they should be conducted. It was important to reassure States by specifying that sovereignty was not a subject for negotiation. It was necessary to act in such a way that the exercise of its powers by a State did not injure another State. In other words, the utilization of a watercourse was only a practical manifestation of the exercise of sovereignty, but it was limited by respect for the sovereignty of other States. The freedom of action of one State ended where that of another began, and it was in the light of two general principles—reasonable and equitable utilization and the prohibition on causing appreciable harm—that the exercise of the powers of each State was to be understood. There should be no unnecessary negotiations and the emphasis should be on the obligation of the notified State—hence the importance of stressing the reasonable and equitable utilization of a watercourse, which operated in favour of both the notifying State and the notified State. Some defence must be found against the manœuvres possible for a notified State acting in bad faith, either by preventing the use of delaying tactics or by providing for consequences unfavourable to that State. That was why the time-limit, the forms of procedure and their exact consequences were so important.

35. Thus it was clear how the draft articles should be formulated to take account of those elements. That was where the balance had to be struck between the States concerned. The absence of mechanisms and procedures for negotiation, or provision for inadequate ones, would cause serious problems and lead to unilateral acts that would appear dictatorial and be a source of disputes between States. In short, it was necessary to ensure that a State initiating a new utilization did not do so

to the detriment of another watercourse State and that the notified State did not have excessive power, or a power of veto, against the notifying State. If the exclusion of those two extremes was taken as a starting-point, only appropriate mechanisms of consultation and negotiation could provide a possible compromise resulting from improvement of draft articles 11 to 15.

36. There remained the last obligation: the compulsory settlement of disputes. On that point, it would suffice to invoke the tradition of the Commission. Any procedure for compulsory settlement would take the Commission into a sensitive area where States often had firmly established positions, even though some development had certainly taken place. Several members of the Commission had alluded to the 1982 United Nations Convention on the Law of the Sea, which, among other major innovations, provided for the compulsory settlement of disputes. But there again, as Mr. Barsegov (2011th meeting) had pointed out, derogations were possible, particularly where the sovereign rights of a State were involved. It was in the light of that development and of the positions of States that the compulsory settlement of disputes should be considered. He believed, first, that such settlement should indeed be provided for; secondly, that it should constitute an option for States; and thirdly, that the provision should be placed in an annex to the draft. Thus the draft would appear acceptable to States and would not provoke objections by those in favour of the substantive rules for a convention which the Commission was preparing rather than mere recommendations, because it would not force States to choose an obligatory and rigorous procedure for the settlement of disputes.

37. Mr. PAWLAK said that he wished to discuss what he considered to be the three most crucial and difficult issues raised by the topic under consideration. The first was the question of the legal basis, if any, of the obligation to notify other States of new watercourse uses—in other words, whether customary international law provided any legal basis for the draft articles on notification, consultation and exchange of information. On that question he shared the views of Mr. Ogiso (2010th meeting), Mr. Shi (2011th meeting) and other members that no such basis existed.

38. For a long time international law had existed only as customary law. With the growing number of international treaties, however, the status of customary international law had been considerably reduced, although it had not lost its value, which was recognized in Article 38 of the Statute of the ICJ.

39. State practice by itself did not constitute customary international law: for a rule of customary law to exist, two elements must be present, namely *usus* and *opinio juris vel necessitatis*. The traditional doctrine required that State practice should be long-standing or *diuturnus usus*. In the days of jet aeroplanes and satellite broadcasting, it was perhaps possible to accept a faster development, but the time factor was still necessary. He did not share the view of lawyers of the common-law tradition that customary law could grow out of court decisions, since decisions did not always show the legal basis on which they were taken. For a given State practice to become a norm of customary international law, it was necessary for State organs to be convinced that the practice constituted a norm of public international law. That point had been stressed by the PCIJ in the "*Lotus*" case.[7]

40. Probably the most important factor, however, was the acceptability of customary rules to States. Their consent could sometimes be tacit. In his own country, Poland, legislation such as the Maritime Code of 1961 recognized the validity of rules of customary international law. The Polish Supreme Court, in its judgment of 15 May 1959, had allowed immunity from jurisdiction claimed by a foreign State on the basis of the relevant rule of customary international law.

41. The abundant material presented by the Special Rapporteur did not, however, provide evidence of any rule of customary international law on which to base an obligation to notify and consult. In particular, international treaties and court judgments did not constitute custom, because they were not of a general character. Moreover, States other than those bound by the treaties or judgments in question would not consider that they had established such a rule of customary law: *opinio juris* was not present. There was accordingly no basis in customary international law for procedural articles requiring co-operation between watercourse States. Any such articles would have to be formulated as new norms forming part of the progressive development of international law.

42. The second issue he wished to discuss was whether draft articles 11 to 15 were acceptable in the light of existing international law. In his third report (A/CN.4/406 and Add.1 and 2, paras. 40-41), the Special Rapporteur said that

> . . . the basic norm governing the use of international watercourses, that of equitable utilization, is predicated upon good-faith co-operation and communication among the States concerned. . . .
>
> State practice therefore reveals a recognition of the need for a spectrum of procedures relating to the utilization of international watercourses, ranging from the provision of data and information . . . to notification of contemplated actions with regard to an international watercourse that may adversely affect another State. . . .

43. For his part, much as he favoured the concept of co-operation in good faith, he could not agree that the obligation to co-operate could be derived from the State practice cited by the Special Rapporteur. That obligation derived rather from general principles of international law such as the sovereign equality of States, and from notions such as the interdependence of States and good-neighbourliness. He agreed on the importance of procedures relating to utilization—although he would have preferred to speak of co-operation in utilization—but those procedures could not be placed on the same level as co-operation itself. Co-operation was the goal and the manifestation of the behaviour of States; provisions on information and notification were only the means of achieving co-operation.

44. Draft articles 11 to 15, in their present form, were not adequate to serve as effective and convenient instruments for co-operation between watercourse States. They set out procedures ranging from notification, consultation and negotiation to third-party dispute settle-

[7] Judgment No. 9 of 7 September 1927, *P.C.I.J., Series A, No. 10.*

ment, but they did not provide an instrument for co-operation between States. New uses should obviously be covered by the process of co-operation, but co-operation should not be confined to such uses. Co-operation was needed not only to settle disputes, but above all to achieve and maintain the equitable uses and benefits of a watercourse. Furthermore, the draft articles should be formulated so as not to give any State a power of veto over the utilization of a watercourse by other States. As he saw it, such a veto by a notified State was envisaged in draft article 13, paragraph 5.

45. The third issue he wished to discuss was the course to be adopted by the Commission to meet the need for an international notification procedure that would facilitate the fulfilment by States of their obligation to co-operate in the utilization, preservation and development of international watercourses. In his view, draft articles 11 to 15 did not provide a basis on which the Drafting Committee could formulate suitable provisions. The discussion had revealed a marked division of opinion among members of the Commission, which could not be bridged in the Drafting Committee. He therefore supported Mr. Bennouna's suggestion that draft articles 11 to 15 should be reformulated in conjunction with other articles, among them article 9.

46. A workable procedure for notification and consultation would have to be established, but that procedure should create a minimum of obligations for watercourse States. It should also be recognized that co-operation between watercourse States must be based on the fundamental principles of international law, and on good faith and good-neighbourliness.

47. Mr. NJENGA said that on the whole he agreed with the criticisms of draft articles 11 to 15 made by other members.

48. The purpose of draft articles 11 to 15, as stated by the Special Rapporteur in the first sentence of paragraph 61 of his third report (A/CN.4/406 and Add.1 and 2), was an admirable one; but the articles created an intricate and mostly one-sided web of obligations which would seriously erode the sovereign right of a State to utilize its resources for the benefit of its people, with due regard for the legitimate rights and interests of other States. The Special Rapporteur cited a wide variety of authorities and said that they provided ample support for the inclusion in the draft of "a set of articles on notification and consultation regarding contemplated new uses of an international watercourse" (*ibid.*, para. 88).

49. His own reading of the authorities, however, did not lead him to conclude that the practice of States had developed far enough for the rules in question to be codified. Nor could it be said, even taking progressive development into account, that the existing authorities would make the draft articles generally acceptable to that section of the international community which was vitally interested in international watercourses, namely riparian States.

50. The extent of what could be achieved had been revealed by the arbitral award in the *Lake Lanoux* case (*ibid.*, para. 48). The tribunal had held that States were required, in accordance with international practice, "to seek the terms of an agreement by preliminary negotiations without making the exercise of their competence conditional on the conclusion of this agreement"; it had also held that States recognized the need to reconcile some of the conflicting interests involved by making mutual concessions and that "the only way to achieve these adjustments of interest is the conclusion of agreements on a more and more comprehensive basis". It had been recognition of the basic needs of neighbouring States which had motivated the 1972 statute of the Senegal River and the treaty régime governing the Niger River (*ibid.*, paras. 21 and 43), which provided for extensive co-operation, including the prior approval of other contracting States, before any projects were undertaken that might appreciably affect the characteristics of those rivers.

51. A similar instrument was the Agreement for the Establishment of the Organization for the Management and Development of the Kagera River Basin,[8] signed in 1977 by Burundi, Rwanda and the United Republic of Tanzania, and subsequently acceded to by Uganda. That Agreement provided for the integrated management and development of the entire basin, for under article 3 its operation was extended to such other geographical areas as would facilitate or make possible the study and planning of projects and programmes for the harmonious development of the Kagera Basin. Under article 7, the Commission of the Organization was vested with regulatory powers, including the assessment and, where appropriate, approval of project proposals, with power to sign agreements with Governments and international institutions for technical assistance and financing.

52. The requirement under draft article 11 that a State contemplating "a new use of an international watercourse which may cause appreciable harm" must provide other States "with timely notice thereof" would be counter-productive, since the notifying State was, in effect, being asked to admit a possible wrongful act in advance, with all the consequences that entailed. Furthermore, while the term "appreciable harm" might have a special meaning for a legal tribunal, it would involve a subjective determination by a State contemplating a new use and by a notified State.

53. Article 11 also implied that an obligation was created for the upper riparian State, but not for the lower riparian State. That was as cavalier an approach as that characterizing the 1959 Agreement between the United Arab Republic and Sudan for the full utilization of the Nile waters,[9] under which major projects, such as the Aswan High Dam and the Jonglei Canal, had been agreed without even consulting Ethiopia—which contributed 85 per cent of the waters of the Nile reaching Khartoum—or the other upper riparian States. If there was to be such an obligation, it should apply to all rivers that might be significantly affected by contemplated uses, either in the short term or in the long term. He therefore proposed that the first sentence of draft article 11 should be amended to read: "If a State contemplates a major new use of an international watercourse which may significantly affect the use of the watercourse by

[8] See 2007th meeting, footnote 14.

[9] *Ibid.*, footnote 15.

other riparian States, it shall provide those States with timely notice thereof."

54. Great care should be taken to ensure that draft article 12 could not be used to delay a project unreasonably by making repeated requests for data. He supported alternative B of paragraph 1, but thought it would be preferable to refer to a period of time "not exceeding nine months", rather than to a period "which shall not be less than six months". A nine-month period would leave the notified State sufficient time to request additional information under paragraph 2, and there would then be no need for paragraph 3.

55. Draft article 13 came very close to imposing a veto on any contemplated new use. All the notified State had to do was to claim that a proposed new use would, or was likely to, cause it appreciable harm, and a whole set of obligations would be created for the notifying State. For instance, it would have to "consult with the notified State with a view to confirming or adjusting the determinations" and, if that was not successful, it would have to enter into negotiations "with a view to arriving at an agreement on an equitable resolution of the situation", in other words one that was acceptable to the notified State, and it might even have to pay that State compensation. If all those efforts failed, it would have to accept a compulsory third-party settlement under paragraph 5—a procedure that would be totally unacceptable to States, since it would undermine their territorial sovereignty and the principle of the sovereign equality of States. The most that would be acceptable would be provision, in paragraphs 1 and 2, for adequate consultation in good faith with a view to arriving at an amicable adjustment of the interests involved. Paragraphs 3 and 4 dealt only with details that need not be expressly stipulated.

56. Draft article 14 would place any State that contemplated a new use in an impossible position. If it failed to notify a new use, even if it acted in good faith in the belief that no appreciable harm would result, the other watercourse State or States could still call upon it to fulfil all the obligations of negotiation, compensation and third-party settlement. If it made a notification and the notified State did not react, it could proceed under paragraph 2, but would still have to comply with all the obligations under articles 11 and 12 regarding notification and the waiting period. And if a State failed to provide notification, it would incur liability for harm, even if such harm did not amount to "appreciable harm" under article 9. Article 14 was a Draconian provision unlikely to be accepted by States.

57. Draft article 15, under which a State could proceed with a new use on the grounds of "public health, safety, or similar considerations", was a positive provision. But it was hard to see how it would be possible, in the event of an emergency project, for a State to comply with the requirements of article 11 on notification and article 13 on consultations. Paragraph 3 of article 15, in particular, required closer examination, since a State could not properly be penalized for appreciable harm in cases involving what was, in effect, *force majeure*.

58. He would have no objection to articles 11 to 15 being referred to the Drafting Committee, if they could be sufficiently improved to remove certain difficulties that had arisen.

59. Mr. REUTER said that, without wishing to appear unduly optimistic, he had the impression that the Commission was agreed on a starting-point, namely that the régime of international watercourses would be regulated by negotiations, since recourse to arbitration had been rejected. The Commission's task was therefore to help States to negotiate, which it could do in two ways: by stating the general principles to be respected in the negotiations in an article which might be rather vague but was accepted by all members, and by drawing up rules of procedure.

60. He did not think that any member of the Commission had spoken against the idea of notification, even though the content and modalities of the notification, as well as the sanction for failure to notify, remained to be specified. Similarly, although the questions connected with responsibility had not yet been sufficiently discussed, there was one point on which everyone seemed to be in agreement, namely that the case in which there was an obligation to notify was that of a change in the physical conditions of the watercourse—that was to say a change in the quality, volume or régime of the waters—which would alter the situation for other States in regard not only to current exploitation of the watercourse, but also to its potential exploitation.

61. He was not so sure that members of the Commission were in agreement on draft article 12, which placed States under an obligation to refrain for a certain time from undertaking works that might change the physical conditions of the watercourse. Personally, he was in favour of alternative B of paragraph 1 as proposed by the Special Rapporteur, which provided for a fixed period. But the freezing of the works provided for in article 12 seemed essential in any case, since it was important for the success of negotiations that they should begin in good faith, which would hardly be the case if a State could create a *fait accompli* before the negotiations had even started.

62. In short, he believed that there was a basis for agreement, minimal perhaps, but sufficient to enable the Commission to refer some articles to the Drafting Committee. It was indeed necessary to draft a few articles by the end of the present session, for otherwise the Commission would always be reopening its general discussion and would never complete the study of a topic which, unlike some others, was a good one on which agreement was possible. In addition to those articles, the Commission could of course also draft certain recommendations: for instance, as some members had proposed, an annex containing optional provisions on arbitration, or optional procedures for setting up technical organizations when the régime of a watercourse raised particularly difficult scientific problems.

63. In any case, it seemed obvious that a text stating only a minimum of obligations accompanied by certain recommendations would be better than no text at all.

The meeting rose at 1 p.m.