

Document:-
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Summary record of the 2050th meeting

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

Extract from the Yearbook of the International Law Commission:-
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tually responsible. The burden of attributing liability had thus shifted onto the defendants.

24. The CHAIRMAN announced that the meeting would rise to enable the Drafting Committee to meet.

The meeting rose at 11.30 a.m.

2050th MEETING

Tuesday, 24 May 1988, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Present: Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Beesley, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

The law of the non-navigational uses of international watercourses (A/CN.4/406 and Add.1 and 2,¹ A/CN.4/412 and Add.1 and 2,² A/CN.4/L.420, sect. C, ILC(XL)/Conf.Room Doc.1)

[Agenda item 6]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR*

PART IV OF THE DRAFT ARTICLES

1. The CHAIRMAN invited the Special Rapporteur to present the first part of his fourth report on the topic (A/CN.4/412 and Add.1 and 2), i.e. chapter I on the status of work on the topic and plan for future work, and chapter II, which dealt with exchange of data and information and which contained article 15 [16], reading as follows:

Article 15 [16]. Regular exchange of data and information

1. In order to ensure the equitable and reasonable utilization of an international watercourse [system], and to attain optimal utilization thereof, watercourse States shall co-operate in the regular exchange of reasonably available data and information concerning the physical characteristics of the watercourse, including those of a hydrological, meteorological and hydrogeological nature, and concerning present and planned uses thereof, unless no watercourse State is presently using or planning to use the international watercourse [system].

2. If a watercourse State is requested to provide data or information that are not reasonably available, it shall use its best efforts, in a spirit of co-operation, to comply with the request but may condition its compliance upon payment by the requesting watercourse State or other entity of the reasonable costs of collecting and, where appropriate, processing such data or information.

* The international instruments referred to during the discussion are listed in the annex to the fourth report.

¹ Reproduced in *Yearbook . . . 1987*, vol. II (Part One).

² Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

3. Watercourse States shall employ their best efforts to collect and, where necessary, to process data and information in a manner which facilitates their co-operative utilization by the other watercourse States to which they are disseminated.

4. Watercourse States shall inform other potentially affected watercourse States, as rapidly and fully as possible, of any condition or incident, or immediate threat thereof, affecting the international watercourse [system] that could result in a loss of human life, failure of a hydraulic work or other calamity in the other watercourse States.

5. A watercourse State is not obligated to provide other watercourse States with data or information that are vital to its national defence or security, but shall co-operate in good faith with the other watercourse States with a view to informing them as fully as possible under the circumstances concerning the general subjects to which the withheld material relates, or finding another mutually satisfactory solution.

2. Mr. McCAFFREY (Special Rapporteur) reminded the Commission that, at its previous session, in 1987, it had provisionally adopted articles 2 to 7,³ but had agreed to leave aside for the time being article 1 (Use of terms), and the question of using the term "system". It had decided to continue its work on the basis of the provisional working hypothesis accepted in 1980, and it had referred to the Drafting Committee draft articles 10 to 15⁴ which he had submitted in 1987. The Drafting Committee thus remained seized of those six articles, as well as of article 9 (Prohibition of activities with regard to an international watercourse causing appreciable harm to other watercourse States)⁵ which the Commission had referred to it at its thirty-sixth session, in 1984.

3. In his fourth report (A/CN.4/412 and Add.1 and 2, para. 7), he gave a tentative outline for the treatment of the topic as a whole. Part I of the draft articles (Introduction) would consist of articles 1 to 5. Part II (General principles) would contain articles 6 and 7, as well as the former articles 9 and 10, to be renumbered 8 and 9.⁶ He proposed to include article 9 [10] among the general principles, in deference to the views expressed at the previous session. Part III (New uses and changes in existing uses) would contain articles 11 to 15, which would be renumbered 10 to 14. Part IV (Exchange of data and information) would consist of a single article, article 15 [16], which he would introduce shortly. Part V would deal with environmental protection, pollution and related matters, part VI with water-related hazards and dangers and part VII with the relationship between non-navigational and navigational uses.

4. Under the heading "Other matters", the outline mentioned a number of points on which the Commission might wish to make recommendations. They were matters on which no definite rules of international law had yet emerged and some of them were perhaps not capable of being the subject of such rules. He suggested that they should be dealt with in annexes to the draft articles, but the Commission might wish to cover some of them in the body of the draft.

³ For the texts of articles 2 to 7 and the commentaries thereto, provisionally adopted by the Commission at its thirty-ninth session, see *Yearbook . . . 1987*, vol. II (Part Two), pp. 25 *et seq.*

⁴ For the texts, *ibid.*, pp. 21-23, footnotes 76 (art. 10) and 77 (arts. 11-15).

⁵ *Ibid.*, p. 23, footnote 80.

⁶ Since from article 8 onwards the draft articles had been renumbered in the Special Rapporteur's fourth report, the numbers attributed to them originally are indicated in square brackets.

5. He also proposed (*ibid.*, para. 8) a schedule for dealing with the remaining material, subject to any decisions the Commission might take concerning the substantive coverage of the topic and to the Commission's overall programme of work, including the possible staggering of the consideration of topics. He planned to submit one report each year, however, even if its consideration was to be deferred, so as to maintain a regular flow of material and avoid submitting too extensive a report in any one year.

6. The Commission would note that he planned to present, at the current session, the material relating to parts IV and V of the draft articles and, in 1989, that relating to parts VI and VII. Material on the annexes would be submitted in 1990 so that the Commission might complete its work on the whole topic on first reading in 1991, during the term of office of its current members, thereby achieving the objective it had set itself in its report on its previous session.⁷

7. Part V (Environmental protection, pollution and related matters), dealt with in chapter III of his fourth report, would be submitted later in the session. At the present stage, he would deal with part IV, on exchange of data and information. That subject had been introduced in his third report (A/CN.4/406 and Add.1 and 2), but the Commission had been unable to devote much time to it at the previous session. The Commission had discussed it at its thirty-second session, in 1980, and had referred to the Drafting Committee an article proposed by the then Special Rapporteur, Mr. Schwebel, entitled "Collection and exchange of information". The Committee, however, had been unable to consider the article for lack of time.

8. He wished to stress at the outset that the regular exchange of data and information was an issue distinct from that of notification of planned uses and new uses of an international watercourse, which had been dealt with in his third report and formed the subject of articles 10 [11] to 14 [15] now before the Drafting Committee. The text which he now proposed as article 15 [16] dealt with the ongoing form of exchange of information, not with *ad hoc* notification of plans for new uses.

9. The bedrock of the provision concerning the regular exchange of data and information was the general obligation of co-operation between States for the purpose of achieving the equitable and reasonable utilization of a watercourse. That point had been particularly stressed in the discussions in the Sixth Committee of the General Assembly. Clearly, in the absence of information on the watercourse outside its territory, it was difficult for a State to be sure that it was fulfilling its obligation to use the waters in an equitable and reasonable manner.

10. The fourth report contained a survey of State practice, of the work of intergovernmental and non-governmental bodies and of expert opinion on the topic (A/CN.4/412 and Add.1 and 2, paras. 15-26). Most of the authorities were given in the footnotes to make for easier reading of the text, which gave examples of the

action being taken by States to facilitate the regular exchange of information.

11. The material furnished could be divided into eight categories: (i) instruments containing general provisions on the regular collection and exchange of information, e.g. the 1964 Agreement between Poland and the Soviet Union concerning the use of water resources in frontier waters, article 8 of which required the parties to establish principles of co-operation governing the regular exchange of hydrological, hydrometeorological and hydrogeological information (*ibid.*, para. 16); (ii) the many international agreements requiring the exchange of data and information for the specific purpose of ensuring the equitable allocation and optimum utilization of waters (*ibid.*, para. 17); (iii) instruments providing for the exchange of information relating to the measurement of water flow, extractions, releases from reservoirs and the like (*ibid.*, para. 18); (iv) international instruments whereby States established observation stations, sometimes even on each other's territories, to facilitate the regular gathering of data and information (*ibid.*, para. 19); (v) agreements for joint research to determine the hydrological characteristics and development potential of a watercourse (*ibid.*, para. 21); (vi) agreements, declarations, resolutions and studies calling for the regular exchange of data and information for the effective protection of international watercourses, preservation of water quality and prevention of pollution (*ibid.*, para. 22); (vii) international instruments providing for the exchange of data and information when planned uses might adversely affect the other party (*ibid.*, para. 24); frequently the same article of a treaty dealt with both subjects; (viii) agreements concerning the duty to warn of water-related hazards or dangers (*ibid.*, para. 25); provisions of that kind were usually intended to deal with threats posed by floods, floating ice and pollution.

12. Introducing article 15 [16], which was alone to constitute part IV of the draft articles (Exchange of data and information), he observed that it could also have been placed immediately after article 9 [10], dealing with the obligation to co-operate. He himself did not attach much importance to the question of its position.

13. Paragraph 1 of the article set out the two purposes of the duty to exchange data and information. The first was "to ensure the equitable and reasonable utilization of an international watercourse"; the second was "to attain optimum utilization" thereof. Paragraph 1 also specified that watercourse States "shall co-operate in the regular exchange" of data and information. It was thus emphasized that provision was being made not for an *ad hoc* process but for a continuing one.

14. It was important that the exchange of data and information should take place not only on a regular basis, but also in a timely fashion, since information often lost its value as time passed. That point was stressed in paragraph (4) of the comments to article 15 [16]. Perhaps the time requirement should be moved to the body of the article.

15. The data and information referred to were qualified as being "reasonably available". The purpose of that qualification was to make it clear that a water-

⁷ Yearbook . . . 1987, vol. II (Part Two), p. 54, para. 232.

course State was under an obligation to provide only such information as it had already collected for its own use or as was easily accessible. No additional research was called for.

16. The words “and concerning present and planned uses thereof” were not redundant, despite the treatment of planned uses in earlier articles. Regular information on both kinds of uses was valuable to watercourse States.

17. The concluding proviso released watercourse States from the obligations under paragraph 1 when no watercourse State was “presently using or planning to use the international watercourse”.

18. Paragraph 2 dealt with the case in which a watercourse State was requested to provide data or information that were not reasonably available. In that situation, the watercourse State was required to use its best efforts to comply with the request in a spirit of cooperation. It could, however, charge appropriate costs to the requesting State.

19. Paragraph 3 provided that the data and information must be supplied in a form which facilitated their utilization by the other watercourse States. The point was quite an important one, because systems of collection of data varied from one State to another.

20. Paragraph 4 dealt with conditions or incidents that posed a threat to the watercourse or to other watercourse States; it provided that watercourse States should inform each other expeditiously of such conditions or incidents. He had in mind, for example, floods, pollution, floating ice, the breaking of dams and perhaps the planned release of large quantities of water to protect a dam or other hydrological system.

21. Paragraph 5 dealt with sensitive information, and in essence provided that watercourse States were under no obligation to share it. Under the terms of the paragraph, watercourse States would, however, be required to do their best to provide a general description of any such information, so that the other watercourse States would be informed of the matters in question as fully as possible in the circumstances.

22. As explained in paragraph (1) of the comments, the proposed article set out the minimum requirements necessary to ensure application of the principle of equitable utilization, and the rules it laid down were residual. As recognized in article 4, there was a need for watercourse States to conclude specific agreements among themselves and to provide for modalities of exchange of information in keeping with the requirements of the international watercourse concerned.

23. As explained in paragraph (3) of the comments, the term “reasonably available” was employed in paragraph 1 of the proposed article to indicate that a watercourse State was obligated to provide only such information as was reasonably at its disposal, i.e. that which it had collected for its own use or which was easily accessible. Although the data and information provided would not have to be processed unless otherwise agreed, appropriate processing would obviously be of assistance to the receiving State. As noted in paragraph

(4) of the comments, the information had to be exchanged on a timely basis; that requirement should perhaps be incorporated in paragraph 1 of the article.

24. Paragraph (6) of the comments discussed paragraph 2 of the proposed article, which dealt with requests for data and information that were not reasonably available. The underlying idea was that, if a watercourse State was willing to meet the cost of acquiring the data and information it requested, that showed that it placed a fairly high value on them. Accordingly, as stated in paragraph (6) of the comments, no reasonable request for such information should be refused.

25. As noted in paragraph (7) of the comments, the purpose of the reference in paragraph 2 of the proposed article to an “other entity” was merely to provide for the frequent cases in which the watercourse States involved had set up a joint commission or other body through which data and information were regularly exchanged. The previous special rapporteurs had made provision for the establishment of such bodies in the articles on exchange of data and information, and the Commission might wish to consider whether such provision should be made in the text of the article or whether the point should be covered by a recommendation in an annex. He favoured the latter approach.

26. Paragraphs (9) to (11) of the comments discussed paragraph 3 of the proposed article, concerning the need to provide information in a usable form.

27. Paragraphs (12) and (13) dealt with the obvious need for an early warning system to provide information about incidents or conditions that endangered the watercourse or other watercourse States. That point was covered in paragraph 4 of the proposed article, mainly because the same channels as those used for the regular exchange of data and information would often be used. The obligation to warn could, however, be dealt with in a separate article in a later part of the draft articles.

28. Paragraphs (14) *et seq.* of the comments concerned paragraph 5 of the proposed article, which dealt with the problem of sensitive information. The aim of paragraph 5 was to achieve a balance between the legitimate needs of the States concerned, namely the need to uphold the confidentiality of sensitive information and the need to have data and information relating to the watercourse. As stated in paragraph (17) of the comments, the previous special rapporteurs had dealt with the subject of sensitive information by dividing it into two categories—information that was vital to national security, and information that was merely restricted—and had elaborated separate régimes for each category. He had not adopted that approach, on the ground that any provision of restricted data and information would most probably be preceded by consultations, and that separate treatment of such material might therefore introduce unnecessary complications into the paragraph, which stated only a residual rule. The Commission might wish to consider whether the exchange of sensitive information required more detailed regulation, as proposed by the previous special rapporteurs.

29. He awaited members' comments with interest, particularly on draft article 15 [16], and would be glad to answer any questions.

30. Mr. BEESLEY commended the Special Rapporteur for a report that showed a highly analytical and scholarly approach, and expressed his agreement in principle with the projected outline (A/CN.4/412 and Add.1 and 2, para. 7).

31. He noted, however, that paragraph 1 of draft article 15 [16] referred specifically to data and information of a hydrological, meteorological and hydrogeological nature; he would like to know whether the Special Rapporteur would be prepared to consider the inclusion of other kinds of data in that basic provision. He was thinking in particular of ecological and environmental data and of the need to conserve the living resources of rivers and to attain their optimum utilization, as was also mentioned in paragraph 1. Although, in his view, such matters would be covered by implication, he would prefer an express reference to ecological and environmental data and information to be added to the provision, unless there was some objection of which he was unaware.

32. Mr. SEPÚLVEDA GUTIÉRREZ endorsed the schedule submitted by the Special Rapporteur, and commended him for his fourth report (A/CN.4/412 and Add.1 and 2), which would provide the Commission with an excellent basis for its further work.

33. Paragraph 1 of draft article 15 [16] should, in his view, be brought into line with draft articles 1, 6 and 8 [9], since they dealt with closely related matters.

34. He agreed with the Special Rapporteur on the need to provide for the establishment by watercourse States of joint bodies or technical agencies responsible for considering all factors affecting riparian States, including the regular exchange of data and information. A modern treaty on international watercourses without such a provision was inconceivable, and some thought should therefore be given to the type of body or agency required.

35. The nature of the proposed legal obligation to inform required closer definition of its precise elements, including the sanction for failure to comply with such an obligation, which had not been specified. True, the article and the Special Rapporteur's comments both spoke of the principle of good faith, but that principle too had yet to be defined in all its legal aspects. Moreover, an obligation to inform might well impose a heavy burden on smaller watercourse States when it came to payment for information that was not immediately available. That point could perhaps be taken up in detail in the Drafting Committee.

36. Mr. FRANCIS thanked the Special Rapporteur for his excellent report (A/CN.4/412 and Add.1 and 2), which brought the Commission closer to the goal of concluding its first reading of the draft articles within the current quinquennium. The report was remarkable for its close analysis of State practice with regard to the exchange of information and data in the context of co-operation. That analysis was all the more welcome because there had in the past been some criticism, in the

case of certain topics, of the paucity of material on State practice, especially where countries of the third world were concerned.

37. As to the right place for the provision on the duty to alert other States of impending danger, his own view, bearing in mind the possible consequences of tardy transmission of information to other watercourse States, was that it should appear early in the draft. That would serve to indicate the urgency of the provision.

38. Mr. MAHIOU said that article 15 [16] was comprehensive, and that the Special Rapporteur's comments effectively illuminated its content. He thanked the Special Rapporteur for proposing a schedule that would enable the Commission to complete its work on the draft articles as a whole by the end of the current quinquennium, in accordance with the decision it had taken at its thirty-ninth session. The impediments mentioned by the Special Rapporteur, namely the staggering of consideration of topics and the possibility that the Drafting Committee might be unable to cope with the volume of material before it, were unlikely so to retard the progress of work as to prevent the Commission from keeping to the schedule.

39. In his fourth report (A/CN.4/412 and Add.1 and 2, para. 12), the Special Rapporteur said that the need for data and information was implicit in article 7, which had been provisionally adopted by the Commission at its thirty-ninth session. He himself believed that that need was explicit in article 7, paragraph 1 of which laid down the obligation to take into account all factors and circumstances relevant to the equitable and reasonable utilization of a watercourse. The need for an exchange of data and information was confirmed in paragraph 2 of the same article, which provided that the watercourse States concerned should enter into consultations in application of paragraph 1.

40. With regard to article 3 of the Charter of Economic Rights and Duties of States, which the Special Rapporteur cited in his report (*ibid.*, para. 17), he pointed out that, while some provisions of that Charter had not gained universal approval, article 3 had been accepted by all States and accordingly expressed a view that was shared by all. That was an important element to consider, the article being worded quite strongly, since it stated that "each State must co-operate on the basis of a system of information and prior consultations". It enunciated an obligation that was fully in line with the subject of the draft articles and in conformity with the requirement of co-operation incorporated in draft article 9 [10], which was before the Drafting Committee. Article 3 of the Charter of Economic Rights and Duties of States was especially relevant to the Commission's work since it referred to prior consultations between States, an obligation that was laid down in a number of bilateral and regional agreements on watercourses cited by the Special Rapporteur.

41. Although the question of exchange of information was an important one, he did not think that it deserved to be the subject of a separate section, as suggested by the Special Rapporteur, whose article 15 [16] alone constituted part IV of the draft articles. He therefore con-

curred with the other solution suggested by the Special Rapporteur, namely that the article be placed at the beginning of part III (see para. 12 above).

42. It might be asked whether a clearer indication of the type of data and information to be exchanged should not be given in paragraph 1 of article 15 [16]. In 1980, the general view had been that the article should refer to data and information only in general terms, as an exhaustive listing might raise more problems than it resolved. He therefore favoured the more flexible approach adopted by the Special Rapporteur. On the other hand, the drafting of paragraph 1 seemed to need some attention. The phrase “unless no watercourse State is presently using or planning to use the international watercourse [system]” was difficult to understand without consulting the comments and seemed to contradict the opening phrase of the paragraph, which indicated that data and information would be exchanged “in order to ensure the equitable and reasonable utilization of an international watercourse [system]”. In paragraph (4) of the comments, the Special Rapporteur said that data and information should be provided “in a timely fashion”. That idea was not expressed in paragraph 1 of the draft article, although it might be useful there.

43. In regard to paragraph 2, he agreed with Mr. Sepúlveda Gutiérrez that the payment of costs might create a number of problems. He did not oppose the idea of such payment, but would suggest that the different levels of development reached by States should be taken into account in determining the amount. He also endorsed Mr. Sepúlveda Gutiérrez’s suggestion, with regard to paragraph 3, that joint bodies should be established to ensure that the information collected was compiled in a consistent manner and could be easily used by the States concerned. As Mr. Sepúlveda Gutiérrez had noted, the subject of joint bodies might best be covered in an annex rather than in the draft articles.

44. Paragraph 4 of draft article 15 [16] shared a number of elements with the work being done on the topic of international liability for injurious consequences arising out of acts not prohibited by international law. The wording of the paragraph should perhaps be revised to reflect the Commission’s work on that topic, particularly the development of the notion of risk and its consequences. Instead of enumerating the implications of incidents concerning which watercourse States should inform one another as rapidly and as fully as possible (“loss of human life, failure of a hydraulic work or other calamity”), the draft article should simply refer to “dangerous or disastrous situations for the other watercourse States”.

45. The Special Rapporteur had asked for the views of the members of the Commission on whether a distinction should be drawn between sensitive information and restricted information in paragraph 5 of the draft article. He had no firm opinion on that point, but would tend to support the view expressed by the Special Rapporteur.

46. Draft article 15 [16] should be referred to the Drafting Committee for further consideration.

47. Mr. GRAEFRATH agreed in general with the approach adopted by the Special Rapporteur and endorsed draft article 15 [16] as submitted. He would point out, however, that earlier versions had referred to the collection and processing of data and information, whereas the present version mentioned only exchange. The means of collection and processing of information might vary from State to State, and it might be more correct to refer to that activity before broaching the subject of information exchange.

48. He suggested the deletion of the last part of paragraph 1, reading “and concerning present and planned uses thereof, unless no watercourse State is presently using or planning to use the international watercourse [system]”. The reference to “planned uses” was out of place in the general description of information that should be exchanged.

49. Earlier versions of paragraph 2 of the article had mentioned the need to conclude agreements on the collection and processing of information, but the latest version spoke only of co-operation, which he took to be a broader concept that nevertheless extended to the conclusion of specific agreements. The heading of the article, “Regular exchange of data and information”, did not cover the subject of paragraph 4, which was information exchange in emergency situations. It might be preferable to devote a separate article to that important subject. He did not think that the phrase “on a timely basis” should be included, because “regular” meant precisely that.

50. The CHAIRMAN, noting that there were no further speakers, suggested that the Commission adjourn to allow the Drafting Committee to meet, and that it should continue consideration of the topic at the next meeting.

51. Mr. TOMUSCHAT said that the fact that members were somewhat reluctant to comment on draft article 15 [16] showed that it was linguistically accurate and logically sound. It might therefore be possible to complete the discussion at the next meeting and move on to another topic.

52. The CHAIRMAN suggested that it might be premature to take a decision to that effect at present. In response to a comment by Mr. THIAM, he said that the projected timetable should be adhered to until it became clear how many more members would speak on draft article 15 [16].

The meeting rose at 12.10 p.m.

2051st MEETING

Wednesday, 25 May 1988, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Present: Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Mahiou, Mr. McCaffrey,