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Summary record of the 2051st meeting

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

Extract from the Yearbook of the International Law Commission:-
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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,

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 (*continued*) (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 (*continued*)

PART IV OF THE DRAFT ARTICLES:

ARTICLE 15 [16] (Regular exchange of data and information)[3] (*continued*)

1. Mr. SHI congratulated the Special Rapporteur on his excellent fourth report (A/CN.4/412 and Add.1 and 2), and said that draft article 15 [16] was acceptable on the whole. He thanked the Special Rapporteur for reminding members of the distinction between exchange of data and information within the meaning of the article under consideration and exchange of data and information within the meaning of the provisions on notification of planned measures. The primary issue before the Commission was whether, as noted by the Special Rapporteur in his comments, regular exchange of data and information could be made a general rule of a residual character in the absence of specific agreements between States. There was no doubt that numerous agreements on international watercourses attested to the existence of specific régimes on regular exchange of different categories of data and information. Furthermore, although the Charter of Economic Rights and Duties of States might belong to the realm of "soft law", the importance and authority of article 3 of the Charter, to which the Special Rapporteur had referred (*ibid.*, para. 17), could not be underestimated, for it had been the subject of a consensus in the General Assembly. In the circumstances, States would probably have no difficulty in accepting a régime for the regular exchange of data and information under a general framework agreement on international watercourses. Also, the fulfilment of the obligations under articles 6 (Equitable and reasonable utilization and participation) and 7 (Factors relevant to equitable and reasonable utilization), which the Commission had provisionally adopted,[4] made the exchange of such data and information necessary. Article 15 [16], therefore, was the logical complement to articles 6 and 7.

2. With respect to paragraph 1, he agreed with Mr. Beesley (2050th meeting) that there was no reason to limit regular exchange to data and information concerning the physical characteristics of watercourses. He also agreed that information concerning planned uses, which fell within the scope of the articles on notification, should be excluded from the paragraph. Moreover, although the effective functioning of a régime for the regular exchange of data and information depended on co-operation between watercourse States, and although article 15 [16] was a specific application of the general obligation to co-operate imposed on watercourse States, greater emphasis should be placed on the obligation of exchange in a provision on the regular exchange of data and information. For that reason, he preferred the alternative proposed by the Special Rapporteur in paragraph (2) of the comments, which read: "watercourse States shall exchange, on a regular basis and in a spirit of co-operation, reasonably available data and information", to the wording used in paragraph 1 of the draft article: "watercourse States shall co-operate in the regular exchange of reasonably available data and information".

3. Paragraph 2 of the draft article called for two comments. First, the obligation to provide data and information which were not reasonably available was reasonably qualified by the formal equality of States. When it came to pecuniary compensation, however, account should be taken of the real situation of States, namely of the gap between developed and developing States in financial terms. Secondly, the words "other entity" were confusing and nothing would be lost if they were deleted. There was no need to refer, in an article that set forth residual rules on the obligation of States to exchange information, to any entity that might be created by watercourse States. It might be preferable instead to recommend the creation of such entities in the part of the draft entitled "Other matters" envisaged by the Special Rapporteur.

4. The important rule set out in paragraph 4 commanded unreserved support, but the obligation to warn, as rapidly and fully as possible, of any condition or incident or immediate threat thereof affecting the international watercourse could hardly be considered part of the obligation of regular exchange of data and information. The proper place for that rule would be in part VI of the draft, dealing with water-related hazards and dangers.

5. It was important to maintain a proper balance, as provided for by the Special Rapporteur under paragraph 5 of the article, between national defence and security needs and the need of States for data and information. The Special Rapporteur had rightly emphasized the principle of good faith, since the concept of a State secret could easily be abused.

6. Article 15 [16] could be referred to the Drafting Committee for consideration before the Committee concluded its work on the draft articles referred to it at the Commission's previous session.

7. Mr. ROUCOUNAS said he was gratified to note that the Special Rapporteur's fourth report (A/CN.4/412 and Add.1 and 2) contained a wealth of information on State practice without, however, disregarding trends in legal thinking, something that would assist the Commission in evaluating developments in the law and the possibilities for drawing up rules that reflected reality, which was a prerequisite for the satisfactory conduct of its work.

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

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

[3] For the text, see 2050th meeting, para. 1.

[4] See 2050th meeting, footnote 3.

8. Draft article 15 [16], which was undoubtedly of a residual nature and contained a minimum of elements, could encourage States to conclude more detailed agreements. Its intrinsic value lay in the fact that it specified the areas where the principle of co-operation, which derived from the concept of equitable and reasonable utilization, could be highlighted. As the article was also meant to cover cases in which the watercourse was not being used, it took as its objective the exchange of reasonably available data and information, thereby indicating that no State could assert that it lacked information. The words "reasonably available", although restrictive, denoted that such exchange should cover data and information which must be produced continuously, in objective terms, and not data or information of an isolated nature, while the words "regular exchange", as indicated by Mr. Schwebel in his third report,[5] meant that each State should be responsible for compiling and dispatching such information. The proviso reading "unless no watercourse State is presently using or planning to use the international watercourse [system]", was of doubtful value at the present stage of State activity and in face of the phenomenon of pollution, which spared not a single drop of water.

9. The Special Rapporteur should encourage States to set up joint or international entities and entrust them with the special tasks of collecting, compiling and processing data and information. A mechanism of that kind would be of the greatest interest for purposes of co-operation. The Special Rapporteur and the Commission would probably consider the general question of joint commissions at a later stage. Some thought should none the less be given to providing such entities with grounds for meeting, for sometimes they looked well on paper but had little, if any, practical existence.

10. Given its importance, the notion of advance warning, as provided for in paragraph 4 of the article, could form the subject of a separate draft article.

11. Mr. TOMUSCHAT said that it was difficult not to endorse draft article 15 [16], the terms of which were firmly rooted in State practice. His comments would therefore pertain solely to points of detail.

12. With regard to the general structure of the article, as reflected in the title, he agreed with the observations made by Mr. Mahiou (2050th meeting) and by Mr. Roucounas, namely that paragraph 4 introduced a new idea which went beyond the framework of a regular exchange of data and information, since it dealt with exceptional circumstances, which would seldom occur. Logic therefore dictated either that the article should be split up or that the title should be amended. He would opt for deletion of the word "regular" in the title, since paragraph 5 referred to both situations: the regular exchange of data and information, and information about incidents and accidents.

13. He also wondered whether, in general, more emphasis should not be placed on the obligation to exchange data and information. Accordingly, like Mr. Shi, he preferred the alternative proposed in paragraph (2) of the comments.

14. Should the clause in paragraph 1 reading "unless no watercourse State is presently using or planning to use the international watercourse [system]" be deleted? It could doubtless be argued that it was not necessary to exchange information in the case of a watercourse which States did not use or intend to use in a manner that might affect the downstream States, and that there was therefore no need to specify the point. But why not spell out explicitly what could otherwise only be inferred from complex reasoning, namely that States should not be deterred from accepting the future convention by economic considerations? Whenever a watercourse was used to a considerable extent, States would have the necessary data, but States should not for that reason be under the impression that they were duty-bound to establish complex mechanisms of data collection. He disagreed with Mr. Roucounas on that point. In his view, it would be too burdensome for States to create mechanisms of that kind even—or above all—when no use was made of the watercourse. Assuming that a river flowed through several African States which had not thus far been able to set up a network of observation stations, should those States be required to create such a network even if they had not made use of the river? It was important not to lose sight of the costs involved in such an undertaking.

15. He understood the reasons which had prompted the Special Rapporteur to include a reference to an "other entity" in paragraph 2. Such a reference, however, presupposed that the entity was entitled to make a formal request for data and information. However, the Commission was confined to drafting law applicable between States, leaving aside the question of management of international watercourses by international organizations or bodies. At the present stage, nothing was known about the importance of co-operation through those bodies, and the Commission could not prejudge their powers. Moreover, why speak of an "entity" only in paragraph 2 and not in paragraph 1, for instance? The idea was attractive, but it was too early to give it concrete expression.

16. He agreed with the central idea in paragraph 3, concerning the need to ensure that the data and information were usable. Obviously, at the present time, the best means of communication was to establish direct computer links so that data were automatically transmitted to neighbouring States, provided the data related to the basic features of the watercourse. There were, however, risks involved in a plethora of information. How could a small State, for instance, digest tons of data dumped on its doorstep? "Usable" data should therefore be understood to refer to data that were simplified, but not excessively so.

17. It had been said in regard to paragraph 4 that the examples cited were too concrete and should be replaced by a general clause. He did not agree with that opinion. A common denominator already existed, namely the words "other calamity". It was in the event of a natural disaster that warnings and additional information would be given, and there was no need to add the words *inter alia*.

18. He agreed with the Special Rapporteur that the Commission should consider the question of the place-

[5] *Yearbook ... 1982*, vol. II (Part One), p. 121, document A/CN.4/348, para. 236.

ment of the article in the draft as a whole. In his view, it should come immediately after the part concerning principles and before that concerning notification of planned measures. Lastly, he was of the opinion that article 15 [16] should be referred to the Drafting Committee.

19. Mr. CALERO RODRIGUES said that the outline of the topic and the schedule for the submission of the remaining material, as shown in chapter I of the fourth report (A/CN.4/412 and Add.1 and 2), were very useful. The last part of the draft should indeed include provisions on the settlement of disputes, but he had doubts about the advisability of including in a framework convention detailed provisions on the regulation of international watercourses, the management of international watercourses and the safety of waterworks. States could deal with those problems in agreements on particular international watercourses. In any event, he himself would wait until the Special Rapporteur submitted the draft articles on the subject before adopting a position in the matter.

20. On the whole, the Special Rapporteur, possibly following in Mr. Evensen's footsteps, had submitted a small number of draft articles that could well be subdivided into more numerous but shorter texts, but that was a problem that could be settled by the Drafting Committee.

21. In his report, the Special Rapporteur supported his arguments by documentation on State practice, the work of intergovernmental and non-governmental bodies and expert opinion. As usual, the documentation was extensive, perhaps even too extensive. For example, the Special Rapporteur cited a provision from the Charter of Economic Rights and Duties of States (*ibid.*, para. 17) which was not relevant in the context, since it was based on the concept of shared natural resources. Nevertheless, he had no intention of discouraging the Special Rapporteur from continuing to cite in his forthcoming reports any instruments he might consider useful.

22. He supported draft article 15 [16] as a whole. Like Mr. Tomuschat, he believed that paragraph 1 provided a basis for the regular exchange of data and information, but the expression "optimal utilization" seemed ill-advised. He would go still further and affirm that there was no real need to explain why the exchange of data and information was required: the reason was all too obvious and such an exchange was even imperative. Again, it was inappropriate to say that the data and information should concern "the physical characteristics of the watercourse". The essential thing was to communicate data and information on the fundamental hydrological, meteorological and hydrogeological characteristics of the watercourse, as well as on present and planned uses thereof. He also had doubts regarding the inclusion of the proviso "unless no watercourse State is presently using or planning to use the international watercourse [system]". If a watercourse State possessed data and information, it should communicate them to the other watercourse States, even if those States were not for the time being planning to use the watercourse. Paragraph 1, which had a fundamental role to play, should be simplified in order to make it clearer.

23. Paragraphs 2 and 3 concerned specific aspects of co-operation for the regular exchange of data and information. The provision in paragraph 2 to the effect that a watercourse State requesting data or information which were not reasonably available must bear the reasonable costs of collecting and, where appropriate, processing such data or information, was quite normal. The provision contained in paragraph 3 was useful, for the collection and processing of data and information, far from constituting a burden, were a manifestation of co-operation. He had no settled view as to whether paragraph 4 should form the subject of a separate article or not: it could in fact be maintained in draft article 15 [16] if the article remained in its present form. Paragraph 5 involved the delicate issue of striking a balance between the national security requirements of a given watercourse State and the information needs of the other watercourse States. The Special Rapporteur had manifestly made an effort to achieve that balance, but the proposed text called for further scrutiny to see if it could be improved.

24. In his opinion, draft article 15 [16] could be referred to the Drafting Committee.

25. Mr. BARSEGOV congratulated the Special Rapporteur on his fourth report (A/CN.4/412 and Add.1 and 2), which contained a wealth of useful information, and on his effort to submit realistic and mutually acceptable provisions on a topic which, because of its specificity and innovative character, called for careful consideration.

26. The practice of States in regard to the exchange of data and information was expressed in a multitude of treaties, whence its variety. To attempt to deduce a common denominator from the general practice could lead only to an impoverishment of that practice. A very great measure of co-operation was necessary in order to view an international watercourse as an entity and not as the sum of distinct parts, yet such co-operation could be achieved only through agreements between States belonging to the same region or States of one and the same watercourse. Accordingly the draft articles could not lay down requirements in that regard: they could only offer recommendations precisely as a basis for the negotiation of such agreements.

27. Co-operation for the purpose of equitable, reasonable and optimal utilization of a watercourse must not detract in any way from the principle of the territorial sovereignty of States on the portion of the international waterway within their boundaries or from the principle of the permanent sovereignty of States over their natural resources. For that reason, it would serve no useful purpose to try to regulate such co-operation in excessive detail. To do so would be tantamount to imposing upon States more obligations than they were prepared to shoulder or, in certain cases, fewer. The reciprocal exchange of data and information was of definite value, but it need not be regular in character: the exchange could also take place in accordance with needs as they arose and with the prevailing conditions, not only physical and natural, but also

political conditions, although it was to be hoped that co-operation between States would continue even in the case of difficult relations.

28. The Special Rapporteur, after proposing a general international obligation to exchange data and information, had gone on to propose exonerating States from the obligation if "no watercourse State is presently using or planning to use the international watercourse". However, that general obligation could not be made dependent on the extent or degree of the uses of the watercourse. In particular, the obligation to communicate data that were not available, or not readily available, could not be imposed, any more than the obligation to establish specialized entities for the collection, processing and exchange of data and information. Admittedly, there were precedents for co-operation in that field, for example between the Soviet Union and the neighbouring countries. International law, however, was not based on precedents; a precedent in itself did not create a rule of law and still less a rule of international law. Again, the communication of data that were confidential or vital to a State's national defence or security was a matter to be decided by the State concerned, and it would be sufficient on that point to say that the information to be communicated should be as complete as possible.

29. As for accidents or the immediate threat thereof, if States at the present time did not readily report them in great detail, that was because they feared undesirable reactions. Mankind, however, was a single entity and any calamity could become a disaster for everyone. A solution would therefore have to be found, perhaps by specifying that in such cases information had to be given as rapidly and as fully as possible. That could be done either in the draft on international liability for injurious consequences arising from activities not prohibited by international law, or in the draft on the topic under consideration. In either case, the question was sufficiently important to warrant a separate article.

30. Lastly, he agreed that draft article 15 [16] should be referred to the Drafting Committee.

31. Mr. YANKOV congratulated the Special Rapporteur on an excellent report (A/CN.4/412 and Add.1 and 2) and also thanked him for submitting a projected outline of the topic, albeit a preliminary one.

32. Draft article 15 [16] had a prominent place in the draft as a whole, because it illustrated the principle of international co-operation and the role of such co-operation in the matter of prevention. In that connection, he agreed with the Special Rapporteur that the rules contained in the article were general rules of a residual nature, and would apply only in the absence of a special agreement. It was from that standpoint that he would assess the merit of the proposed provisions and make his own observations. While the Special Rapporteur appeared to have achieved the objective he had set himself—to formulate general rules—there were still a number of details which could be eliminated from the proposed text in order to avoid placing an unduly restrictive and excessively strict interpretation on rules which were intended to be general in character.

33. Paragraph 1, which was well drafted, had to be read in conjunction with articles 6 (Equitable and reasonable utilization and participation), 7 (Factors relevant to equitable and reasonable utilization) and 9 [10] (General obligation to co-operate). However, in the interests of consistency with the proposed objective, and in order to avoid laying down an excessively heavy obligation, it would be perhaps desirable to delete the adjective "regular" from both the title and the text of the article. As Mr. Barsegov had pointed out, it was essential to cover the case of occasional exchanges of data and information; otherwise it would be necessary to specify in detail all the modalities of the desired communication of data and information. Such data and information had to relate to existing or planned uses of the waterway, on the understanding that communication would be reciprocal; for reciprocity was the very essence of the principle of international co-operation.

34. The words "or other entity" in paragraph 2 had attracted some comments and it would be advisable to revert to that point when it was known what the exact extent of the powers of such "entities" under the draft would be.

35. Paragraph 3 did not call for any particular comment. Opinion appeared to be divided as to whether paragraph 4 should be maintained in its present form or converted into a separate article or articles. It should not be forgotten that the paragraph contained a provision which could have an impact on the exchange of information in a very specific case. Moreover, it had some connection with part V of the draft, on environmental protection and pollution, and even with part VI, on water-related hazards and dangers. For his part, he would be inclined to maintain paragraph 4 in article 15 [16], but would perhaps add a cross-reference to the provisions on water-related hazards or even include an express mention of those various hazards. In the interests of clarifying the scope of the text, express mention should be made of ecological harm, in addition to the consequences arising from actual incidents or the immediate threat thereof. True, ecological considerations could be inferred from the present wording, but the term "calamity", or *catastrophe* in the French version, although it had in common usage the accepted meaning of an event which normally affected the environment, did not cover all cases. It suggested a particular event of a spectacular kind rather than the phenomenon of continual deterioration, as in certain forms of pollution.

36. In paragraph 5, the Special Rapporteur had succeeded in striking a balance between the legitimate interests of all the States concerned, and his comments (paras. (15)-(16)) showed that he was fully aware of the delicate character of considerations of national defence and security. It was precisely for that reason that the Special Rapporteur laid stress on good faith and on a spirit of co-operation between watercourse States. Nevertheless, it would be advisable to scrutinize that provision further.

37. In conclusion, he supported the proposal to refer draft article 15 [16] to the Drafting Committee.

38. Mr. McCAFFREY (Special Rapporteur), replying to the comments of Mr. Beesley (2050th meeting) and Mr. Shi, said that he was fully prepared to introduce in paragraph 1 a reference to other types of "readily available data and information", and not to confine the text to physical characteristics—hydrological, meteorological, hydrogeological or other. The importance of information of an ecological character would become apparent on examination of the articles in parts V and VI, relating to environmental protection and to water-related hazards and dangers. Exchange of data in those two areas was essential.

39. It was his intention to reply in greater detail to the various comments made during the debate when the Commission completed its consideration of article 15 [16].

40. Mr. BEESLEY said that ecological and environmental considerations required the collection and exchange of information to play a significant role in the future convention on watercourses: the regular monitoring of water quality and research into the causes and effects of pollution were an essential component of efforts to improve the *status quo*. Ecological and environmental considerations also required the obligation to collect and exchange information to be qualified as little as possible by competing considerations.

41. With regard to paragraph 1 of the draft article, he noted that it contained no reference to the role of joint fact-finding bodies, which had been found to be a useful mechanism in international water disputes. The omission was deliberate, for the Special Rapporteur had explained that, if the draft articles did not provide for the establishment of joint fact-finding bodies, reference to them might best be cast in a recommendation contained in an annex; but he had also invited the Commission to consider including a reference to such bodies in draft article 15 [16] itself. That suggestion was worth considering, because paragraph 1, as now drafted, gave the impression that information-gathering was envisaged only for States acting unilaterally.

42. Secondly, in paragraph 1, the obligation to collect and exchange data was qualified by the requirement that such data be "reasonably available" and by the proviso that the obligation did not apply where a State was not using or planning to use a watercourse. Yet the collection of data relating to environmental effects might well require some degree of effort and special research, and there might be cases in which the duty to co-operate should comprise the acquisition of data which were not easily available. The phrase "reasonably available" was conceivably flexible enough to cover those situations, but equally States might argue on the basis of the text that they were not obliged to go beyond a minimal effort to collect data. Furthermore, while it was eminently sensible that States should not have to exchange information on unused watercourses, that was but one case where the obligation to collect and exchange depended on the use to which the watercourse was put. The obligation really operated on a sliding scale: there was more need to exchange information on the Great Lakes than on the Yukon River.

43. The Special Rapporteur and other members of the Commission had placed emphasis on the role which information exchange played in ensuring the success of the substantive provisions of the future convention. It might be useful, in the text of the draft article itself, to link the attainment of the convention's objectives to the obligation to collect and exchange data, in which case the reference to unused watercourses at the end of paragraph 1 and the words "reasonably available" would prove redundant. Paragraph 1 could accordingly be revised to read as follows:

> "1. Watercourse States shall co-operate in the collection and regular exchange of data and information concerning the physical characteristics of the international watercourse [system], including those of a hydrological, ecological, environmental, meteorological and hydrogeological nature, and concerning present and planned uses thereof, to the extent necessary to ensure the equitable and reasonable utilization of the watercourse [system], and to attain the optimum utilization thereof."

Extending the scope of co-operation so as to cover the collection of data was more suggestive of joint fact-finding. In addition, moving the opening phrase to the end and linking it to the obligation to collect and exchange data, while removing the other qualifications, tended to ensure that the obligation was flexible enough to extend to all situations in which it might prove necessary or useful.

44. With regard to paragraph 2, the reference to data or information "not reasonably available" could still stand, as it sought to guard against vexatious and expensive requests for information. There might, however, be situations in which extensive and costly research would be indispensable in order to prevent or abate harmful or inequitable use. In other words, the data might be necessary, but not "reasonably available". If the costs of collection were significant and the data related to transboundary pollution, there was no reason why the victim State rather than the State of origin should have to pay.

45. In most instances, the costs of data collection should, *prima facie*, be shared. To the extent that data were necessary to achieve the objectives of the future convention, namely to ensure the equitable and optimum use of international watercourses, there seemed to be no need to indicate that the requested State might require reimbursement from the requesting State. On the other hand, it was impossible to know in advance exactly what information would be required to achieve the convention's objectives, since that would in all likelihood be determined on the basis of the information itself. A requested State was likely to dispute the need for the data and information requested, and it was desirable to provide a mechanism for the collection of data which were not, strictly speaking, necessary. In that sense, paragraph 2 performed a useful function.

46. To cover situations in which it would be inequitable to require the victim State to pay for the collection of data on transboundary pollution that were not "reasonably available", the costs being properly a part of the "true costs" of the polluting enterprise, a

second subparagraph might be added to paragraph 2, reading as follows:

> "Where the request for data and information relates to effects on the watercourse [system] exclusively attributable to uses by the State so requested, that State shall be responsible for the costs of collecting such data and information, provided that the data and information are reasonably necessary to ensure the attainment of the objects of this Convention."

Alternatively, the costs could be shared by the requested and requesting States.

47. A formulation of that kind would cover transboundary pollution and uses such as dams or diversions. In each case, it would seem fair to ask the State of origin to pay for the collection of information relating exclusively to the effects of such watercourse uses. Even in the case of pre-existing uses, there was no reason why the obligation to provide information should not be parallel to the obligation in article 10 [11] relating to the notification of proposed new uses. True, that obligation, as it stood in that article, applied only to the provision of "available" data, and did not extend to special research; but that approach had been criticized in the Sixth Committee of the General Assembly (A/CN.4/L.420, para. 178).

48. Paragraph 3 was judicious and required little comment. However, it might be preferable to recast it as a recommendation, to appear in the commentary or in an annex.

49. The scope of paragraph 4 seemed rather narrow: the obligation to warn should apply beyond situations where there was a threat of "loss of human life" or "calamity", and should include threats to living resources and the environment. For example, a spill of low-level radioactive waste or mildly toxic substances might not threaten loss of life or be a calamity, but might still be significant enough for downstream States reasonably to expect notification so as to take steps to protect the public.

50. The scope of paragraph 4 might have been deliberately limited to avoid raising fears about the possible liability of the State of origin under the general principles of international law, but such fears could be dispelled by adding a saving clause. The first sentence of paragraph 4, which might, for example, end as follows:

> ". . . that could result in a threat to human life or health, major damage to property, to ecological systems or the environment, or other such serious consequences in the other watercourse States"

would be followed by the saving clause:

> "The duty to inform as set out in this paragraph exists without prejudice to any question of liability for failure to warn under general principles of international law."

51. The Special Rapporteur had recognized that paragraph 5, whatever its merits, was open to abuse. The reference to "good faith" was therefore meant to serve as a safeguard. Although the solution appeared acceptable, the paragraph warranted further reflection because of its possible consequences.

52. Lastly, he agreed that draft article 15 [16] should be referred to the Drafting Committee.

53. The CHAIRMAN, speaking as a member of the Commission, said that in the course of the Commission's work on the topic a great many opinions had been expressed, not only on the substance of the issue but also on the scope and form of the instrument to be produced. As opinions had changed and evolved, the purpose of the work itself had seemed to be lost from view. The foundation for the standards that the Commission was elaborating was, after all, to be found in another standard, namely the sovereignty of all States over their resources, and particularly over the waters in the watercourses passing through their territories. That basic difficulty had been averted by proposing to elaborate a framework agreement on the basis of which watercourse States could enter into agreements among themselves on watercourses. In that case, the articles proposed by the Commission would merely form a set of residual rules.

54. Draft article 15 [16] as submitted by the Special Rapporteur was the logical outcome of that consensus. It was designed to foster co-operation among States—not to develop a right that already existed—and to facilitate the best possible use of international watercourses. Its theoretical foundation comprised the concepts of co-operation, good neighbourliness and good faith. Good faith was always presumed in international law. As for co-operation and good neighbourliness, they were nebulous concepts that the resolutions of the General Assembly did nothing to elucidate. The Special Rapporteur turned them into a general legal obligation, but it was perhaps more of a moral obligation, for the spirit of co-operation was nothing more than the will to act like a good neighbour. Accordingly, article 15 [16] could only constitute a general recommendation to States to engage in co-operation in particular instances. The contemporary world had already done exactly the same thing by imposing interdependence upon States in a number of areas: pollution of the earth's surface and its atmosphere, and so on.

55. Draft article 15 [16] itself covered much too much ground and it would be preferable to break it up into a number of separate articles.

56. In paragraph 1, the English and Spanish versions used the word "reasonably", whereas the French version said *normalement*—a matter the Drafting Committee would no doubt look into. The paragraph raised a more important problem, however, namely that of "physical characteristics" which were to be the subject of the regular exchange of data and information. The term was somewhat vague. In general, States were well acquainted with the physical characteristics of their watercourses and, if they needed information, it was on the possible effects on the watercourse of its utilization or the construction of hydraulic works. The last part of the sentence ("and concerning present and planned uses [. . . of] the international watercourse [system]") was superfluous and dangerous. A State which was not using and not planning to use a watercourse or its

resources did not surrender its rights over the watercourse. On the contrary, it was still concerned by everything which another State might do and which might affect its own use of the watercourse later on.

57. Paragraph 2 presented the same linguistic problem as did paragraph 1: a wavering between "reasonably" and "normally", in the matter of both the availability of information and of payment by the requesting State. But another, more significant divergence also appeared: the French text said that the requested State *pourra exiger du demandeur* payment of the reasonable costs of its research, while the Spanish version said that that State might "condition" (*condicionar*) the supply of the information requested upon payment of the costs by the requesting State. It was an extremely important difference and one that the Drafting Committee should examine.

58. The Spanish version of paragraph 3 spoke of *utilización cooperativa*, which was a calque of the English, but the Special Rapporteur had probably had in mind *utilisation concertée*, as in the French version. Generally speaking, attention should be given to protecting the interests of countries which, like the developing countries, did not possess the technical and financial resources required to "collect and process data and information". The idea of setting up permanent joint bodies was a possible solution, particularly if they were so constituted that the contributions by countries with limited means were not too onerous.

59. Paragraph 5 must be handled very carefully if States were to accept its provisions, and the problem of form represented by the expression "data or information vital to . . ." raised a problem of substance that must be given due consideration.

60. He hoped the Drafting Committee would endeavour to streamline a long and dense draft article which, at present, tended to complicate rather than facilitate the drafting of a framework agreement.

The meeting rose at 12.50 p.m.

2052nd MEETING

Friday, 27 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, 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 (*continued*) (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 (*continued*)

PART IV OF THE DRAFT ARTICLES:

ARTICLE 15 [16] (Regular exchange of data and information)[3] (*continued*)

1. Mr. RAZAFINDRALAMBO observed that of the five paragraphs composing draft article 15 [16], only the first three dealt with the regular exchange of data and information; the information referred to in paragraph 4 was of an occasional nature, and paragraph 5 stated an exception to the obligation. Consequently, if the Commission wished to keep paragraphs 4 and 5 in the draft article, the word "regular" should be deleted from the title, as had been suggested during the debate. The Special Rapporteur might consider whether paragraph 4 should not become a separate article, perhaps in part VI, on water-related hazards and dangers, although he himself had no objection to its remaining in article 15 [16].

2. Several points concerning the position of developing countries required careful consideration. The regularity of exchanges advocated by the Special Rapporteur presupposed that watercourse States had information available, which was constantly kept up to date. But it would be over optimistic to assume that all countries, particularly developing countries, had the financial and technical means to compile such information. Several speakers had stressed the high cost of data collection. If a developing country was interested in collecting data, that could only be done as part of a development project with technical and financial assistance, under a bilateral or multilateral co-operation agreement. Studies carried out in such a framework would be highly specific and irregular, and it would be difficult to place them at the disposal of third countries that were not beneficiaries of the bilateral or multilateral assistance in question. At the very least, a special agreement would have to be concluded between all the interested parties, including any assistance bodies concerned. He therefore agreed with Mr. Barsegov and Mr. Yankov (2051st meeting) that the exchange of data should be allowed to take place on an *ad hoc* basis, with as flexible a procedure as possible.

3. More consideration should be given to the possibility of requests for further information. If a watercourse State needed more complete information, it should be entitled to request it, provided that it was willing to meet the costs of collection and, if necessary, of use. That might complicate the proposed mechanism, however, and discourage States from accepting the principle of an obligatory exchange of information. Hence there was some merit in the idea of establishing a mixed

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

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

[3] For the text, see 2050th meeting, para. 1.