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Summary record of the 2064th meeting

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

Extract from the Yearbook of the International Law Commission:-
1988, vol. I

for codification in the form of "black" or "grey" lists, it none the less placed very clear-cut obligations on States. Again, paragraph 1 of article 207, on pollution from land-based sources, began with the words "States shall adopt laws and regulations" and paragraph 2, with the words "States shall take . . .". Owing to their content, however, paragraphs 3 and 4 were drafted in different terms: "States shall endeavour".

50. He had quoted those provisions of part XII of the Convention in order to dispel any misunderstanding as to the nature of the obligations they set forth and in light of the fact that part XII not only constituted a precedent but was also a part of a treaty which was regarded as reflecting customary international law. In addition, part XII of the Convention had deliberately been drafted as an umbrella or framework convention and did not attempt to be exhaustive. Indeed, the Commission might well take as a precedent article 311 of the Convention, which governed the relation of the Convention to other conventions and international agreements.

51. As the Special Rapporteur had requested, he would refrain from commenting on the effects of the topic under consideration on the topic of liability, without, however, questioning the right, or even duty, of anyone who wished to address the matter. He read out article 213 of the United Nations Convention on the Law of the Sea, which dealt with the enforcement of regulations with respect to pollution from land-based sources and which was again drafted in language that was not hortatory, starting: "States shall enforce". The tendency to interpret the whole of part XII of the Convention as a series of provisions designed to establish a régime of liability was understandable, but he would point out that, even in that case, article 235, entitled "Responsibility and liability", provided in paragraph 3 that "States shall co-operate in the . . . development of international law relating to responsibility and liability". While that rule might not bind the Commission, it did have a certain relationship with its work. As far as he was concerned, all those provisions of part XII of the Convention on the Law of the Sea were norms, not general guidelines. While he recognized that other conventions did not go so far, he trusted that the Commission would once again look upon the Convention in that light.

52. Although he had no definite opinion in the matter, he did not think a clear-cut distinction could be made between pre-existing and new pollution. The difficulty was that pre-existing pollution could be aggravated by creating pollution that was not necessarily new. He was not, however, belittling the difficulties in reaching agreement on how to deal with the problem and how to prevent further degradation and to preserve the environment, which was the ultimate objective. Lastly, he endorsed Mr. Yankov's comments, for the reasons he had already explained.

53. Mr. Sreenivasa RAO, commenting on the reasons for the disagreement as to whether there should be a flexible definition or, as Mr. Beesley wanted, a strict one, said that the central issue was to decide, on the one hand, what constituted pollution and, on the other, what were the obligations of States parties to the United Nations Convention on the Law of the Sea. In that connection, the relevant practice and instruments demonstrated the great importance of protecting and preserving the natural environment and preventing pollution. He therefore sought the Special Rapporteur's clarification as to the kind of standards the Commission was required to develop and the kind of activities regarded as unreasonable.

The meeting rose at 1 p.m.

2064th MEETING

Friday, 17 June 1988, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

later: Mr. Bernhard GRAEFRATH

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Francis, 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. 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 and Add.1)

[Agenda item 6]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

PART V OF THE DRAFT ARTICLES:

ARTICLE 16 [17] (Pollution of international watercourse[s] [systems])

ARTICLE 17 [18] (Protection of the environment of international watercourse[s] [systems]) *and*

ARTICLE 18 [19] (Pollution or environmental emergencies)[3] (*continued*)

1. Mr. BENNOUNA congratulated the Special Rapporteur on his fourth report (A/CN.4/412 and Add.1 and 2), chapter III of which contained a wealth of material on doctrine and practice. The Special Rapporteur rightly emphasized therein the interdependence of ecosystems and the need for a global and co-ordinated approach to the dangers of pollution (*ibid.*, paras. 29-37). The urgent need for robust international action matched the growing demands on water resources and the increasingly advanced technology

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

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

[3] For the texts, see 2062nd meeting, para. 2.

which, if not harnessed and controlled, could cause grave and sometimes irreparable degradation. That major challenge of the times would be met only when solidarity prevailed over short-sighted self-interest. Priority should therefore be given to co-operation, while foresight and prevention must be the core of any legal provisions to protect the environment. Arrangements for compensation should be devised which would have a deterrent effect on potential offenders.

2. Protection of the environment was not an autonomous activity, divorced from other human activities. As was clear from the UNEP study, "The environmental perspective to the year 2000 and beyond",[4] such protection should be omnipresent in the quest for the right balance between man and his environment. That point was relevant to articles 16, 17 and 18 in part V of the draft articles, which raised a question of methodology: whether, from a practical standpoint, part V could be isolated from the other parts of the draft, concerning the various non-navigational uses of watercourses. He noted that article 2 (Scope of the present articles), provisionally adopted by the Commission,[5] provided for a link between the uses of international watercourses and measures of conservation, thus recognizing the difficulty of separating the two. It might therefore be preferable to deal with conservation in each of the provisions on uses. Protection of the environment and pollution were issues very much in evidence in a number of provisions concerned with general principles governing utilization and procedure, such as articles 2, 4 (para. 2), 6, 7 (para.1 (*e*)) and 10.

3. The Special Rapporteur had had the choice between confining his draft to general principles, in which case the principles already adopted should simply be developed further to cover environmental protection and pollution, and introducing a separate part to deal with those matters. He himself would prefer the latter course, but it would then be necessary to enter into far more technical detail.

4. With regard to draft article 16, he agreed with Mr. Graefrath and Mr. Yankov (2063rd meeting) that it was too heterogeneous. The definition of pollution in paragraph 1 should be separated from the rest of the article and could perhaps be placed in article 1 (Use of terms), or in one of the articles on protection of the environment. He also agreed that the definition was too broad and that it was not designed to produce legal effects, since pollution was defined by reference to effects detrimental to human health or safety and was not prohibited as such; what was prohibited was appreciable harm caused to other States. It might therefore be advisable to draft a narrower definition for the purposes of the future convention, confined to toxic substances to be specified in lists compiled by agreement between watercourse States.

5. Paragraph 2 referred to the ecology of the international watercourse system, which was a very vague notion if it was intended to be an element in a prohibition of pollution having legal effect, it should be more clearly defined. A more important point, however, was the Special Rapporteur's view that the obligation under article 16 not to cause appreciable harm differed from the obligation under article 8. The distinction between damage caused by a use of a watercourse and damage caused by pollution was, however, very uncertain. He was not convinced by the Special Rapporteur's arguments and saw no reason why there should be strict liability in one case and a duty of due diligence in the other.

6. The Special Rapporteur also raised the fundamental question of the relationship between the obligation not to cause appreciable harm and the obligation of equitable and reasonable utilization, and had decided, for the purposes of article 16, paragraph 2, to give priority to the former. There again, however, he provided no convincing reasons for the separate treatment of the obligations set forth in article 6 and those set forth in article 8.

7. The Special Rapporteur's reasons for choosing due diligence as the basis for responsibility (paras. (8) *et seq.* of his comments) seemed to be defective in certain respects. The duty of due diligence as the basis for responsibility would be more readily acceptable were it preceded, as suggested by Mr. Graefrath, by positive rules concerning co-operation. A State could then be held responsible if it failed to take the necessary measures or to use the means of prevention at its disposal. The rule of due diligence should perhaps be the consequence of the obligations imposed by article 17, and the Commission might wish to take as a model the text prepared by the American Law Institute, which the Special Rapporteur cited in paragraph (2) of his comments to article 17. In article 16 as it stood, however, the basis of responsibility seemed *a priori* to be one of strict liability, whereas the Special Rapporteur explained in his comments that he had taken due diligence as the basis. That, however, would not be sufficient when it came to drafting a convention.

8. He agreed entirely with Mr. Graefrath regarding paragraph 3, and did not understand why the Special Rapporteur had dropped the very useful distinction between existing and new pollution. Possibly paragraph 3 should distinguish between existing and new forms of pollution while also referring to part III of the draft on planned measures, which contained very detailed provisions on the obligation of States to co-operate.

9. As one not well versed in the topic under consideration, he had learnt much from an informative report. He was however concerned about some apparent methodological difficulties, as compared with the Commission's earlier work, and it appeared necessary to build a bridge between that work and the present proposals.

10. Mr. OGISO congratulated the Special Rapporteur on a very interesting fourth report (A/CN.4/412 and Add.1 and 2) concerning a topic in which he took a personal interest. He noted that the reference to "human health or safety", in paragraph 1 of draft article 16, was in general terms and was not restricted to watercourse States. The reference to the ecology of a watercourse, in paragraph 2, could likewise be construed as covering all areas affecting the ecology of an international water-

[4] General Assembly resolution 42/186 of 11 December 1987, annex.

[5] See 2050th meeting, footnote 3.

course, whether or not they were within the jurisdiction of a watercourse State. For instance, groundwater originating from an international watercourse might be used as drinking water by the population of a non-watercourse State; or sea water polluted by an international river might cause appreciable harm to non-watercourse States through adverse effects on the marine ecology. Again, draft article 17 referred in paragraph 1 to "the ecology of the watercourse and of surrounding areas", and in paragraph 2 to protection of "the marine environment". Those references seemed to indicate the possible involvement of non-watercourse States in environmental protection and prevention of pollution. He therefore wished to ask the Special Rapporteur whether some provision should not be included on co-operation, including exchange of information between watercourse States and non-watercourse States that might be affected by pollution.

11. Article 16, paragraphs 1 and 2, could be construed as distinguishing between pollution that caused appreciable harm and pollution that was less harmful. In article 23, paragraph 2, of the draft articles submitted by the previous Special Rapporteur, Mr. Evensen, a distinction had been drawn between pollution that caused harm and pollution that merely caused inconvenience.[6] Did the prohibition of "appreciable harm" in paragraph 2 of article 16 apply also to inconvenience?

12. In the discussion on another topic (2049th meeting), he had referred to a case in which chemical substances emitted by a factory over a long period had gradually accumulated in fish, causing a high incidence of a serious nerve disease in the local population, whose diet consisted largely of fish. The definition of pollution in article 16, paragraph 1, would seem to apply to such cases, but the language might need to be revised to ensure that indirectly produced effects detrimental to human health were covered. In the case he had mentioned it was not the "composition or quality of the waters" which had been harmful to human health, but the chemicals accumulated in the fish eaten by the population. Indeed, the fact that the harm had been discovered not by analysis of the waters but by diagnosis of a disease pointed to a need for co-operation, not only between watercourse States but also with non-watercourse States that might be affected by the pollution of international waters.

13. He assumed that the "lists of substances or species" referred to in article 16, paragraph 3, would comprise "black lists" of substances that were strictly prohibited and "grey lists" of those whose emission should be monitored, and that they could be supplemented at any time and items moved from one list to the other. It was possible, however, to interpret the provision as meaning that, once approved, the lists would be permanent. It might therefore be appropriate to explain in the commentary, or in the article itself, that the lists could be amended.

14. Some members had suggested that the phrase "At the request of any watercourse State", in the same paragraph 3, should be deleted. Since it seemed to refer to notification procedures, it might be useful to insert the words "where necessary", to show that the procedure was not intended to be a formal one.

15. It would be difficult, for practical reasons, to treat strict liability as a general principle of international law, since a number of Governments did not seem prepared to adopt it unconditionally. As a general approach in a framework agreement on international watercourses, the Special Rapporteur's view that liability should depend on the condition of due diligence was therefore most appropriate, and it was unfortunate that article 16 did not take account of that reasoning; it might be advisable to revise the text accordingly. If that approach was not acceptable, a separate clause might be added, stipulating that liability should be provided for, where necessary, in watercourse agreements envisaged under article 4, paragraph 1.

Mr. Graefrath, First Vice-Chairman, took the Chair.

16. Mr. BARBOZA, noting that a number of speakers had asked whether separate provisions on pollution were needed in the draft, said that it depended on the scope of the protection the Commission wished to provide. If the intention was to extend protection of the marine environment beyond national jurisdiction to include "the ecology of the international watercourse [system]", then of course separate provisions on pollution would be required. Otherwise, a State whose environment was not directly affected by pollution would be unable to initiate procedures to stop the pollution of the watercourse.

17. Article 16, paragraph 2, established a prohibition by virtue of which a watercourse State might not act in such a way that the level of pollution in the waters of other riparian States or in the ecology of the system rose above the threshold of tolerance. As that was a prohibition, the responsibility which derived from its violation was responsibility for a wrongful act: it was not within the field of strict liability, which, by definition, attached to acts not prohibited by international law. He emphasized that distinction because it had been contended, in the context of his own fourth report (A/CN.4/413), on item 7 of the agenda, that, in all the years it had been working on the subject, the Commission had been unable to trace the dividing line between the two types of responsibility. That was not so. The strict liability mechanism, which applied to acts not prohibited by international law, could in no way be confused with responsibility for wrongfulness.

18. Since the draft articles under consideration dealt with the wrongful acts of States, there would be a number of consequences, as Mr. Graefrath had pointed out (2063rd meeting). The State of origin must cease causing a level of pollution that was unacceptable, re-establish the situation that had existed before the act, and probably provide appropriate guarantees against a repetition of the act. As it was sometimes impossible to re-establish the situation, the payment of a sum of money as compensation might be in order. If the obligation were in the nature of strict liability, however, the acts of the State leading to the prohibited level of pollution would be lawful acts, the State of origin would be under no obligation to stop the polluting activity and

[6] *Yearbook ... 1984*, vol. II (Part One), p. 120, document A/CN.4/381, para. 86.

would be expressly authorized to continue its pollution on payment of some sort of compensation.

19. The Special Rapporteur was right in maintaining that article 16 established an obligation of due diligence, because paragraph 2 imposed an obligation of result —prevention of a certain event. According to article 21 of part 1 of the draft articles on State responsibility,[7] an obligation of result was violated when the State, through means it had selected, did not obtain the result required by the obligation. Article 23 of the same draft provided that, when the obligation of the State was to prevent the occurrence of a given event, that obligation was violated only if the State, through the means it had selected, did not achieve that result. Those articles seemed to mean that there was no breach of the obligation if the result—to prevent a given event—was achieved. But what if the result was not achieved, or the given event not prevented? It was there that the line separating responsibility for wrongfulness and causal responsibility could be perceived. If the State which did not obtain the required result was automatically responsible for the consequences, what would be the difference between those two types of responsibility? If the result was not obtained, then, under article 23, it was necessary to examine the means employed in order finally to determine the responsibility of the State.

20. Paragraph (6) of the Commission's commentary to article 23 of part 1 of the draft articles on State responsibility[8] illustrated that point. The Special Rapporteur's statement that there was an implicit obligation of due diligence was therefore acceptable. Perhaps there should be a reference in article 16 to the accepted international standards regarding the measures of prevention required of the State of origin, which were mentioned in the *Restatement* of the American Law Institute (see para. (2) of the Special Rapporteur's comments on article 17). That would change the nature of the obligation to one of conduct, thereby satisfying the wish for precision voiced at the previous meeting. Although he had doubts about the practicality of applying that formula in a convention of a general nature, the possibility might be examined by the Special Rapporteur.

21. Mr. Graefrath's remark that the prohibition, in its present terms, was too harsh, had solid grounds in view of the state of inter-pollution prevailing in the world and the repercussions the prohibition would have on industrial activities. Perhaps there should be a transitional provision establishing that States must agree on the means of reducing the present pollution to acceptable levels within a number of years through co-operation or unilaterally, after which the prohibition, in its present or other precise terms, would begin to be enforced.

22. He saw no inconsistency between the "appreciable" harm referred to in paragraph 2 of article 16 and the "effects detrimental to human health or safety" in paragraph 1. Whether the detriment or harm was to human health or to any other of the legally protected interests of man made no difference to the application of the concept of "appreciable". Strictly speaking, no harm was negligible. But the circumstances of interdependence in modern life and the rules of *bon voisinage* had imposed a rule which he believed was already customary international law; harm took on legal significance when it went further than being merely a small disturbance and began to be "appreciated" as such. As the Romans used to say, *de minimis non curat praetor*. Even human health fell within the scope of "appreciation". For example, should an occasional headache be regarded as "appreciable harm"? Or should a factory employing 2,000 workers be closed because some of them were allergic to a substance contained in its residues?

23. The Commission should not attempt to be too precise in handling elements that did not lend themselves to such treatment. In the future, no doubt, experts would determine what amount of mercury or cadmium was tolerable per litre of water, and tables would probably take the place of concepts such as "appreciable harm".

24. Mr. SEPÚLVEDA GUTIÉRREZ said that the previous speakers had made clear the crucial importance of the pollution issue. For pollution, whether gradual or sudden, could affect a whole area, part of a country or, in extreme cases, an entire nation. So serious a problem called for a very precise system of rules and standards, and the three articles under consideration appeared too concise to cover it. The Special Rapporteur himself had acknowledged that the concept, or definition, of pollution could be broadened, and he should perhaps devote a full chapter of the report to the subject.

25. If a definition of pollution was to be included in article 16, it should be more comprehensive and be based on more legal assumptions and other requirements than that which was proposed. As there were differences of opinion on the matter, further debate was needed before a decision could be taken. However, amplification of the definition would not, in itself, be sufficient, since it would be useful only together with a set of rules determining cases of pollution and remedies, as well as the legal effects produced.

26. He also had some reservations about the expression "effects detrimental to", in paragraph 1. The proper relationship should be sought between that concept, which was quite difficult to measure, and articles 8 [9] and 9 [10], which the Commission had already considered. He endorsed Mr. Graefrath's view that there should be a reference to co-operation, on which some rules appeared in previous articles.

27. One difficult choice before the Commission was whether it should take advantage of part XII of the 1982 United Nations Convention on the Law of the Sea, relating to protection and preservation of the marine environment. He had doubts on that point, because taking provisions from other instruments would reduce the possibility of developing international law in such a rapidly changing field as that of pollution. Moreover, the existing rules referred to geographical areas other than rivers, and each watercourse system had its own special characteristics and required rules specific to its particular environment. Furthermore, the uses of water-

[7] *Yearbook . . . 1980*, vol. II (Part Two), p. 32.

[8] *Yearbook . . . 1978*, vol. II (Part Two), pp. 82-83.

courses and the causes of pollution were not the same in third world and in industrialized countries.

28. He would hesitate to say that the draft articles should include all the references to protection of the environment contained in the United Nations Convention on the Law of the Sea. That might discourage States from accepting the draft convention on international watercourses. What was needed was a flexible convention that could be used by countries in different contexts, and it should not, therefore, be overloaded with provisions.

29. Another question to consider was whether the rules on pollution, given their special nature, should be placed in an annex or in a separate document—a possibility raised by the Special Rapporteur in his report. Because of its obvious importance, pollution called for specialized treatment, with particular types of responsibility for violation of the relevant provisions.

30. With regard to paragraph 2 of article 16, the Commission must be more precise on how to determine the concept of appreciable harm, which varied from one legal system to another, and that of due diligence, which was a very elusive idea. He was sure that satisfactory formulas could be found for both.

31. Since the approval of lists of substances, referred to in paragraph 3, would be rather difficult to achieve in practice, he suggested that provision should be made for mechanisms and institutions to carry out the many types of co-operation between States that would be required.

32. Mr. Sreenivasa RAO stressed the practical importance of the exchange of data and information, which was vital to the application of a watercourse régime. That subject was dealt with in draft article 15 [16],[9] which had received broad approval in the Commission.

33. In examining the subject, he had found his experience of the management of the 1960 Indus Waters Treaty between India and Pakistan[10] very helpful. The provisions of article 15 [16] proposed by the Special Rapporteur had the merit of encouraging watercourse States to co-operate in the management of the watercourse so as to derive optimal benefit from it. Water was becoming increasingly scarce, and at the same time the uses of water were becoming more numerous and varied. As explained in paragraph (1) of the Special Rapporteur's comments, article 15 [16] set out the minimum requirements for the exchange of data and information "necessary to assure the equitable and reasonable utilization of an international watercourse [system]". Article VI of the Indus Waters Treaty went into much greater detail: it specified the various types of data and information to be supplied, the intervals at which they were to be collected—daily in some cases—and how they should be processed and presented. His conclusion was that an article such as article 15 [16], establishing the principle of the obligation to exchange data and information, was certainly essential, but was not sufficient in itself. It was also necessary to specify the types of data to be supplied, the intervals at which they should be collected, and how they should be processed. The general provision on exchange of data and information should therefore be followed by more specific provisions on those particulars, perhaps through bilateral or regional agreements.

34. The general terms in which the obligation to exchange data and information was set out in article 15 [16] could place an unduly heavy burden on certain States, particularly developing States. Even India, which was well provided with scientific talent and had a good network of facilities for collecting information, would find it difficult to provide, in timely fashion, all the information which another watercourse State would find helpful. It was significant that the Indus Waters Treaty contained flexible provisions requiring the parties to supply data and information "to the extent that these are available" or "as necessary" or "as practicable".

35. Another point to be borne in mind was that a regular supply of data and information unrelated to any specific need, or particular problem or situation, was of no great value; it would lead only to the accumulation of voluminous data collected in a routine fashion. If the obligation to supply data and information was stretched too far it could result in the building up of a mass of unmanageable material that was of little or no use.

36. If one applied the tests of "pollution" and "appreciable harm" and looked at the restrictions established by treaty or by history on the use of international watercourses, the scope of the data to be exchanged would differ considerably from that suggested by the generalized approach of article 15 [16]. Hence, while he was not opposed in principle to that article, he urged that consideration be given to the points he had raised, so that they could be taken into account when the text was reviewed.

37. Another important point was that the supply of data sometimes created a need for more data, which might well bring the law of diminishing returns into play. There was a real danger that a country, in an effort to fulfil its obligation to supply data and information, might hasten to furnish ill-prepared data that would cause unnecessary fears and arouse avoidable suspicions, possibly leading to an inter-State dispute. The aim should be to ensure that there was an exchange of accurate and well organized data that adequately met the needs of co-operation.

38. There was also the question of the exchange of data and information on new uses of an international watercourse, which should be dealt with in close connection with the articles on new uses in part III of the draft.

39. He supported the inclusion of a general article on the obligation to exchange data and information, but believed that it should be made more specific with respect to the other articles of the draft with which it was connected.

40. Mr. McCAFFREY (Special Rapporteur) assured Mr. Sreenivasa Rao that many of his points would be taken into account in the consideration of article 15 [16] in the Drafting Committee. Moreover, that article

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

[10] United Nations, *Treaty Series*, vol. 419, p. 125.

required the regular exchange only of data and information that were "reasonably available", so that the State called upon to provide them was not required to make a special effort or incur much additional expense.

41. The possibility of an excessive accumulation of data had also been mentioned by Mr. Tomuschat (2051st meeting). In such a case, the State receiving the data could ask for an abatement of the flow. That problem would be dealt with in the commentary, if not in the body of the article.

42. He had prepared some preliminary drafts of commentaries on the articles which were before the Drafting Committee, and would be glad to supply any member with advance copies of the texts being processed by the secretariat.

43. Mr. Graefrath (2063rd meeting) had raised the question of the definition of "pollution" in paragraph 1 of article 16 [17] and its relation to the "appreciable harm" standard in paragraph 2 of that article. The definition in paragraph 1 spoke of "effects detrimental to human health or safety", which could include causing a headache—an effect falling far short of "appreciable harm". The same problem arose in other international instruments. For example, article 1, paragraph 1, of the 1982 United Nations Convention on the Law of the Sea, in its definition of "pollution of the marine environment" referred to the introduction by man of "substances or energy" resulting in "deleterious effects", such as harm to marine life or hazards to human heath. But article 194, paragraph 2, of that Convention required States to take measures to ensure that their activities were so conducted as not to cause "damage by pollution to other States and their environment". The concept of "damage by pollution" was rather similar to that of "harm" in article 16 [17], and the contrast between "damage" and "deleterious effects" was similar to that between "appreciable harm" and "effects detrimental to human health or safety". One way out of the difficulty might be to replace the expression "appreciable harm", in paragraph 2 of article 16 [17], by the word "pollution". He himself would prefer to retain the concept of "appreciable harm".

44. The question of reconciling the rules on the present topic with those on State responsibility had been raised by Mr. Barboza. That point would be dealt with in the commentary he was preparing for draft article 8 [9] (Obligation not to cause appreciable harm). If appreciable harm occurred, and the State of origin had exercised due diligence to avoid it, no responsibility was entailed. International responsibility arose for the State of origin only if it had not exercised due diligence.

45. It had been asked whether the present topic involved issues of responsibility for wrongful acts or of liability for lawful acts. It was perhaps attractive to say that the only duty of the State of origin was to pay compensation to the injured State. That approach, however, raised some serious questions. One could imagine an upper riparian State which, being rich, found it convenient to pay compensation in order to be able to pollute the watercourse, thereby causing harm to a lower riparian State, which received the compensation. The undesirable effect would be to force a pollution servitude upon the lower riparian State.

The meeting rose at 1.05 p.m.

2065th MEETING

Tuesday, 21 June 1988, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

later: Mr. Bernhard GRAEFRATH

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, 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 and Add.1)

[Agenda item 6]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

PART V OF THE DRAFT ARTICLES:

ARTICLE 16 [17] (Pollution of international watercourse[s] [systems])

ARTICLE 17 [18] (Protection of the environment of international watercourse[s] [systems]) *and*

ARTICLE 18 [19] (Pollution or environmental emergencies)[3] (*continued*)

1. Mr. MAHIOU congratulated the Special Rapporteur on having adopted the method, in chapter III of his fourth report (A/CN.4/412 and Add.1 and 2), of presenting the problem and the sources in sections A and B, and the text of the draft articles in section C; that would enable the Commission to make a well-informed decision on the proposed provisions.

2. He wished to respond to certain points raised by the Special Rapporteur. The first, which was referred to in paragraph (12) of the comments on article 16, concerned the relationship between the rule of equitable utilization (art. 6), the prohibition to cause appreciable harm (art. 8 [9]) and the obligation embodied in paragraph 2 of article 16, now under consideration. On that subject, the Special Rapporteur invited the Com-

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

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

[3] For the texts, see 2062nd meeting, para. 2.